



March 3, 2021

Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, California 94102
Via E-Mail to eric.long@jud.ca.gov

Re: Proposed Revisions to Judicial Council of California Civil Jury Instructions (CACI)

Dear Members of the Judicial Council Advisory Committee on Civil Jury Instructions:

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 single family and apartment owners and operators who are responsible for nearly two million affordable and market rate rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local forums.

As a preliminary matter, CAA thanks the Judicial Council and staff for their work on these instructions to implement SB 91, particularly given the short timeframes for doing so.

CAA offers the following comments on the proposed revisions to instructions 4302, 4303, 4304, 4308 and 4329.

CACI No. 4302. Termination for Failure to Pay Rent – Essential Factual Elements

CAA agrees that revisions are necessary to CACI No. 4302, but the proposed revisions are insufficient for two reasons. First, the Directions for Use refer to “rent due on a residential tenancy between March 1, 2020 and January 31, 2021” as the unpaid rent to which the necessary modification would apply. SB 91 extended this “covered time period” to June 30, 2021. Code of Civil Procedure §1179.02(a).

Second, the proposed instruction does not state how it is necessary to modify the instruction when the unlawful detainer action is based on non-payment of COVID-19 rental debt. The COVID-19 Tenant Relief Act (CTRA) requires that the landlord serve a 15-day notice for rent due during the covered period. Unlike the standard three-day notice to pay rent or quit, the CTRA 15-Day Notice offers the tenant three alternatives. The tenant can pay or quit – as with the three-day notice – or the tenant may preserve, at least temporarily, the tenancy by returning the Declaration of COVID-19 Related Financial Distress (and documentation if required) with 15 days. Code Civ. Proc., §1179.03.

CAA recommends that the Judicial Council provide an alternate instruction for use when the unlawful detainer action is based on the tenant's failure to pay the rent between

March 1, 2020, and June 30, 2021. CAA recommends two variations of this instruction – one for use prior to July 1, 2021, and one for use on or after July 1, 2021. CTRA requires a tenant who has qualified for eviction protections by providing the declaration of COVID-19-related financial distress (and documentation if required) to pay by June 30, 2021, 25% of the rental payments due between September 1, 2020, and June 30, 2021, to be permanently protected against eviction for non-payment of any remaining balance due for the covered period. Code Civ. Proc., §1179.03(g).

Proposed Language for Alternate Instruction:

Termination for Failure to Pay Rent – Essential Factual Elements – COVID-19 Tenant Relief Act – Rent Due Between March 1, 2020, and June 30, 2021

[*Name of plaintiff*] claims that [*name of defendant*] [and [*name of subtenant*], a subtenant of [*name of defendant*],] no longer [*has/have*] the right to occupy the property because [*name of defendant*] has failed to pay the rent. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] [*owns/leases*] the property;
2. That [*name of plaintiff*] [*rented/subleased*] the property to [*name of defendant*];
3. That under the [*lease/rental agreement/sublease*], [*name of defendant*] was required to pay rent in the amount of \$[*specify amount*] per [*specify period, e.g., month*];
4. That [*name of plaintiff*] properly gave [*name of defendant*] fifteen-days' written notice to pay the rent, return the declaration of COVID-19-related financial distress [and documentation supporting the claim that the tenant has suffered COVID-19-related financial distress] [*use if the landlord properly alleged the tenant is a high-income tenant in the notice*], or vacate the property;
5. That as of [*date of fifteen-day notice*], at least the amount stated in the fifteen-day notice was due;
6. That [*name of defendant*] did not pay the amount stated in the notice within fifteen days after [*service/receipt*] of the notice;
7. That [*name of defendant*] did not deliver a signed declaration of COVID-19-related financial distress to the landlord within fifteen days after [*service/receipt*] of the notice;
8. That [*name of defendant*] did not deliver documentation supporting the claim that the tenant has suffered COVID-19-related financial distress to the landlord within fifteen days after [*service/receipt*] of the notice.

[*Use if the landlord properly alleged the tenant is a high-income tenant in the notice*];

8. That [*name of defendant*] [*or subtenant [name of subtenant]*] is still occupying the property.

[Alternative to 6 and 7 for actions filed on or after July 1, 2021]

That [*name of defendant*] delivered a signed declaration of COVID-19-related financial distress (and documentation if required for high-income tenant) to the landlord within fifteen days after [*service/receipt*] of the notice but did not pay by June 30, 2021, 25 percent of each rental payment due between September 1, 2020, and June 30, 2021, demanded in the notice[s].

CACI No. 4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

CAA agrees that revisions are necessary to CACI No. 4303, but the proposed revisions are insufficient for the same reasons as CACI No. 4302. First, the Directions for Use refer to “rent due on a residential tenancy between March 1, 2020 and January 31, 2021” as the unpaid rent to which the necessary modification would apply. SB 91 extended this “covered time period” to June 30, 2021. Code Civ. Proc., §1179.02(a).

Second, the proposed instruction does not state how it is necessary to modify the instruction when the notice of termination at issue is based on non-payment of COVID-19 rental debt. CTRA requires 15-Day Notice to include specific statutory text in 12-point type. The required text depends on when the rent was due and when the notice was served. The notice text in subdivision (b) of Section 1170.03 of the Code of Civil Procedure is required to be served for rent that came due between March 1, 2020, to August 31, 2020. However, for rent that came due between September 1, 2020, subdivision (c) of Section 1170.03 of the Code of Civil Procedure requires two distinct notices depending on when the notice was served. One version of the text is required for notices served prior to February 1, 2021, and different text is required for notices served on or after February 1, 2021. Code Civ. Proc., §1179.03(c)(4)&(5). CTRA also requires this statutory notice text to be provided in Spanish, Tagalog, Chinese, Korean, or Vietnamese if the rental agreement was required by law to be provided in that language. Code Civ. Proc., §1179.03(d).

CTRA also allows a landlord to require “high income” tenants to provide documentation to support the Declaration of COVID-19 Related Financial Distress. Specific allegations and disclosures must be made for the documentation requirement in the notice to be effective. Code Civ. Proc., §1179.02.5(c).

CAA recommends that the Judicial Council provide an alternate instruction for use when the notice of termination is based on the tenant’s failure to pay rent between March 1, 2020, and June 30, 2021. The proposed instruction omits the provisions applicable to commercial tenancies, since CTRA’s protections only apply to residential tenants.

Proposed Language for Alternate Instruction:

**Sufficiency and Service of Notice of Termination for Failure to Pay Rent – COVID-19
Tenant Relief Act – Rent Due Between March 1, 2020, and June 30, 2021**

[*Name of plaintiff*] contends that [*he/she/nonbinary pronoun/it*] properly gave [*name of defendant*] 15-days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, [*name of plaintiff*] must prove all of the following:

1. That the notice informed [*name of defendant*] in writing that [*he/she/nonbinary pronoun/it*] must pay the amount due within fifteen days, return the included Declaration of COVID-19 Related Financial Distress (and documentation if required), or vacate the property;
2. That the notice stated no more than the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and

[*Use if payment was to be made personally:*

the usual days and hours that the person would be available to receive the payment; and]

[*or: Use if payment was to be made into a bank account:*

the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank; and]

[*or: Use if an electronic funds transfer procedure had been previously established:*

that payment could be made by electronic funds transfer; and]

3. That the notice included a Declaration of COVID-19 Related Financial Distress in 12-point font in English or in Spanish, Tagalog, Chinese, Korean, or Vietnamese if the contract or agreement was negotiated in that language.
4. That the notice included the statutory text required by Code of Civil Procedure Section 1179.03.
5. The notice included the notice required by Code of Civil Procedure Section 1179.02.5(d)
[*Use if plaintiff has evidence defendant was a high-income tenant, and plaintiff required defendant to provide documentation to support the claim that the tenant has suffered*

COVID-19-related financial distress by landlord properly alleging the tenant is a high-income tenant in the notice.]

6. That the notice was given to [name of defendant] at least 15 days before [insert date on which action was filed].

[The fifteen-day notice period excludes Saturdays, Sundays, and judicial holidays, but otherwise begins the day after the notice to pay the rent or vacate the property was given to [name of defendant].]

Notice was properly given if [select one or more of the following manners of service:]

[the notice was delivered to [name of defendant] personally[./; or]]

[[name of defendant] was not at [home or work], and the notice was left with a responsible person at [[name of defendant]’s residence or place of work], and a copy was also mailed in an envelope addressed to [name of defendant] at [[his/her/nonbinary pronoun] residence]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail][./; or]]

[name of defendant]’s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

CACI No. 4308. Termination for Nuisance

The proposed revisions to the directions for use of CACI No. 4308, provide the following:

“If the grounds for termination involved assigning, subletting, or committing waste in violation of a condition or covenant of the lease, give CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement – Essential Factual Elements*. (Code Civ. Proc., §1161(4).)

CACI No. 4304 fails to address AB 1482’s dual notice requirement outlined in subdivision (c) of Section 1946.2 of the Civil Code (the “Dual Notice Requirement”) for just cause evictions, as defined by subdivision (b) of Section 1946.2 of the Civil Code, relating to a material breach of a lease. The Dual Notice Requirement requires an owner of residential real property subject to AB 1482 to serve a second three-day notice to quit with no opportunity to cure for material lease violations that were not cured within the initial three-notice notice.

CACI No. 4329. Affirmative Defense- Failure to Provide Reasonable Accommodation

California's fair housing regulations provide that an "individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action." Cal. Code Regs., tit 2 § 12176(c)(8).

The proposed instructions require the defendant to prove:

4. that such [an] accommodation[s][was/were] necessary to afford [[*name of defendant*]/a member of [*name of defendant*]'s household] an equal opportunity to use and enjoy the [*specify nature of dwelling at issue, e.g., apartment building*];"

"Necessary" as used in this context does not have its ordinary meaning. California's fair housing regulations require a direct and logical connection ("nexus") between the accommodation requested and the disability, for an accommodation to be "necessary". Specifically, the regulations provide that "a requested accommodation may be denied if "there is no disability-related need for the requested accommodation (in other words, there is no nexus between the disability and the requested accommodation)." Cal. Code Regs., tit. 2, § 12179. Similarly, if the need for the disability is not obvious or known to the housing provider, the disabled person must establish it is necessary by demonstrating, the "relationship between the individuals' disability and how the requested accommodation is necessary to afford the individual with a disability equal opportunity to enjoy a dwelling or housing opportunity." Cal. Code Regs., tit. 2 (§12178(c)(2)).

The instructions should guide the jury through making the determination whether the defendant has established that the accommodation is necessary. As with the disability of the defendant, the need for the accommodation may be apparent, or known by the plaintiff. If the need for the accommodation is unknown, it must be established by the defendant upon request by the plaintiff.

CAA recommends the following addition to subpart 4 of proposed Instruction 4329:

4. "The relationship between [[*name of defendant*]/a member of [*name of defendant*]'s household]'s disability and the requested accommodation and how the requested accommodation[s][was/were] necessary to afford [[*name of defendant*]/a member of [*name of defendant*]'s household] an equal opportunity to enjoy the [*specify nature of dwelling or housing opportunity at issue, e.g., apartment building*];"

CAA also respectfully requests that the following cases be added to the Sources and Authority section of the instructions:

Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995) (holding that accommodation is necessary if it affirmatively enhances a disabled tenant's quality of life by ameliorating the effects of the disability);

Giebel v. M&B Assocs., 343 F.3d 1143, 1155 (9th Cir. 2003) (but for the accommodation the disabled person will likely be denied equal opportunity to enjoy the housing of their choice);

Auburn Woods I Homeowner's Ass'n. v. Fair Employment and Housing Commission, 121 Cal. App. 4th 1578, 1596 (2004) (without the accommodation, a landlord's rules, policies or practices interfere with a disabled person's right to use and enjoy their dwelling.)

Finally, CAA recommends that the Judicial Council add an instruction that covers the elements a plaintiff must prove to overcome this affirmative defense. The regulations spell out the circumstances where an accommodation can lawfully be denied. These should also be the subject of a jury instruction applicable to unlawful detainer actions. Section 12179 lists five circumstances in which an accommodation can be denied. Each of these can provide a basis for overcoming the affirmative defense. The examples raised in Section 12176(B) envision how these may apply in the unlawful detainer context – specifically the “undue financial and administrative burden” reason for denying an accommodation. Incorporation of the factors listed in Section 12179(b) would assist a jury in determining whether a landlord has or has not proven that the accommodation poses an undue financial and administrative burden.

Thank you for your consideration of our comments and suggestions. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,

California Apartment Association



By

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