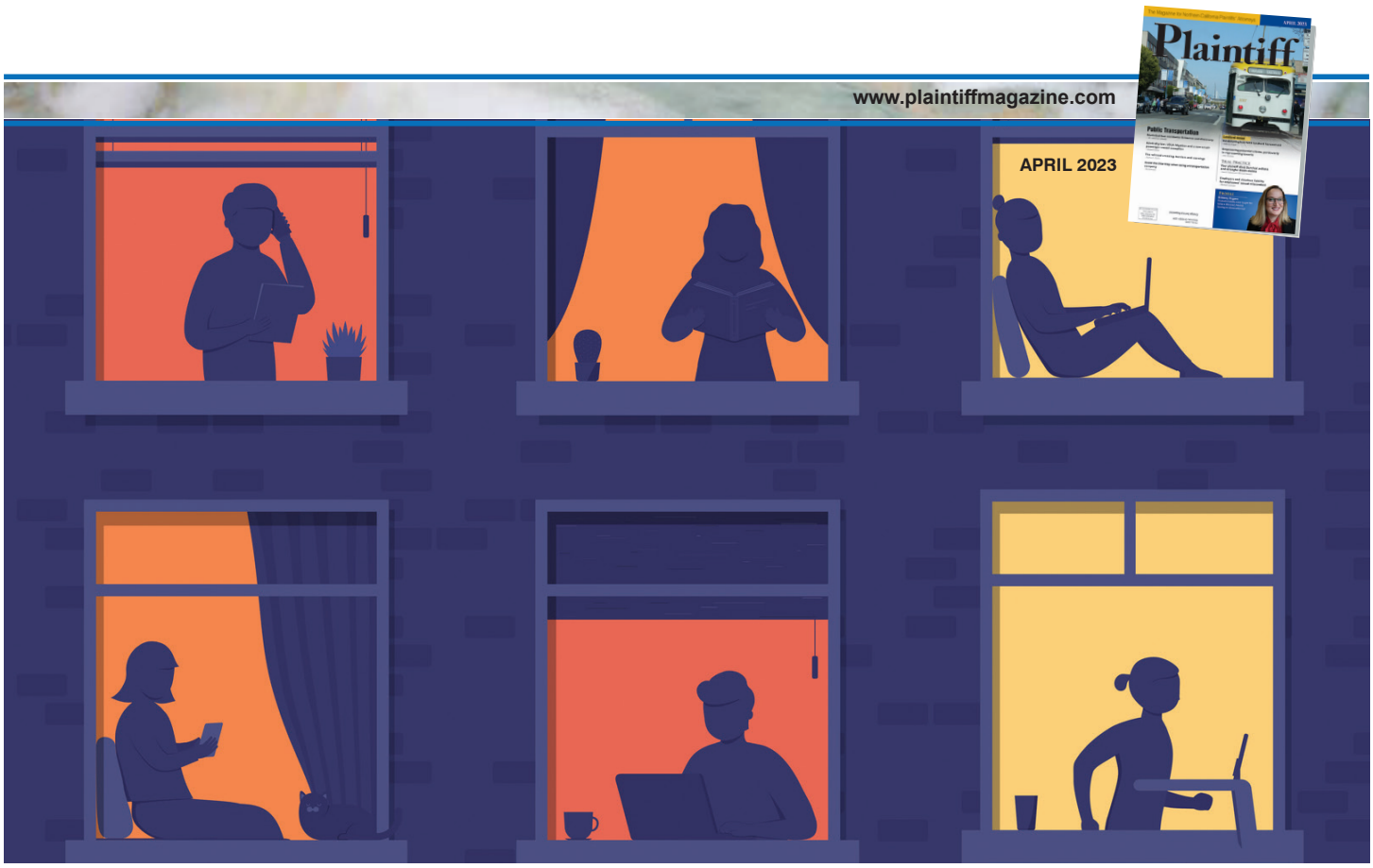


Establishing bad-faith landlord harassment

The bad-faith standard allows us to dig deeper and demonstrate an all-encompassing and damning indictment of landlord greed

By Rahman Popal

Most ordinances enacted to curb landlord harassment require the tenant to prove the landlord's actions are done in bad faith. For example, establishing bad faith is a requirement to prevail on a landlord harassment claim in the following jurisdictions: San Francisco, Los Angeles, Oakland, Berkeley, Santa Monica, and Hayward, among others. Thus, under these various statutes, to prevail, a tenant must prove that a standalone act of, for example, refusing to undertake repairs, delaying required repairs, refusing to accept rent, or severing housing services, among other prohibited conduct, is done in bad faith.

Unfortunately, to date, there is no controlling definition of bad faith nor a uniform way to prove it. However, emerging litigation on the topic provides more clarity. Recently, in an unpublished decision, the Court of Appeals for the First District rejected and overturned an excessively narrow and entirely specious reading of the bad faith requirement under the San Francisco Anti-Harassment of Tenants Act (Measure M). (*Pennypacker v. Yuen*, A157680/A157985 (1st Dist., Div. 2 June 15, 2022) (unpublished).) In addition, in a recently published decision, *Duncan v. Kihagi*, the Court of Appeals ruled that evidence of a landlord's past rent ordinance violations at other properties is admissible to establish "intent and bad faith or recklessness." (68 Cal.App.5th 519 (2021).) These cases and other trends in bad-faith harassment litigation help us better understand how to establish bad-faith harassment.

Defining bad faith

Bad faith is rarely defined within the various rent ordinances, and there is no controlling definition in caselaw. Many tenant rights attorneys use the Black Law Dictionary definition of bad faith: "[n]eglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties." By its plain understanding, bad faith necessitates showing a state of mind. Some practitioners further define this state of mind as a wrong committed by an interested or sinister motive or

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dishonest purpose. (*Pugh v. See's Candies* (1988) 203 Cal.App.3d 743, 764.)

Unlike other jurisdictions, Santa Monica defines bad faith in their ordinance. Bad faith is "[a]n intent to vex, annoy, harass, provoke or injure another person. This includes, but is not limited to, the intent of a property owner or manager to induce a tenant to vacate a rental housing unit through unlawful conduct." (Santa Monica Muni. Code § 4.56.010.) Importantly, Santa Monica's definition indicates that an intent to displace is not a per se requirement for a showing of bad faith, an argument advanced by the landlord's counsel in a dispute arising out of San Francisco's anti-harassment provisions to limit its otherwise broad applicability. In *Pennypacker v. Yuen*, the trial court judge wrongly upheld the defense counsel's utterly erroneous reading of the San Francisco anti-harassment protections that a jury must find each act of harassment was done with the intent to force the tenant to vacate. On appeal, the landlord's counsel argued that this is a correct reading of the law because the singular purpose of the rent ordinance is to keep tenants housed, which is patently false and flies in the face of the intent behind landlord anti-harassment legislation generally. This conflates the purpose behind the wrongful eviction protections under San Francisco's Rent Ordinance with the anti-harassment provisions added much later. As exhibited by the intent behind Measure M in San Francisco and the legislative history of the various anti-harassment statutes, these protections were added because many rent-controlled and vulnerable tenants cannot simply afford to move out of their homes.

There are multiple stated policy reasons undergirding landlord anti-harassment measures, including but not limited to "deter harassing behavior by landlords, to encourage landlords to follow the law and uphold their responsibility to provide habitable rental properties, and to give tenants and the City of Oakland legal recourse where tenants are subjected to harassing behavior by landlords." (Oak. Muni. Code § 8.22.610(M).) These laws are meant to create a more equal playing field for tenants because "[h]abitability and other tenant complaints are often not raised with landlords nor with City inspectors for fear of retaliation." (Los Angeles Muni. Code § 45.30.) Ultimately, the goal is not to preserve *any* rent-controlled housing but safe, stable, and secure housing. (*Ibid.*)

As long as there is no controlling definition from the courts, and the various ordinances remain silent on the issue, insurance companies and their attorneys may continue to push similar arguments, ironically made in bad faith. The purpose of anti-harassment laws is myriad, not limited to just keeping tenants housed, and includes providing a safe, habitable, secure, and harassment-free living environment to individuals who are often the most vulnerable in society and cannot simply afford to move. As such, a jury should be explicitly informed that the application of any definition of the bad-faith standard need not require a finding that the landlord's conduct was done with the intent to recover possession.

Proving landlord bad faith

In applying the above definitions, to prove a claim of bad faith, a tenant must show that the landlord's breaches were not just done out of an honest mistake, but with an interested or sinister motive or dishonest purpose. In doing so, without explicit or affirmative statements by the landlord or their agents regarding their intent or reckless disregard of the tenant's rights, or a clear record of the landlord or landlord's agent knowledge of a tenant's protections related to their tenancy, a tenant may get into an evidentiary battle regarding the admissibility of relevant information to prove their bad faith claim. To avoid this, under harassment ordinances requiring a showing of bad faith, a tenant may want to push back and write a brief note regarding their landlord's harassing behavior and generally cite their protections under their local rent ordinance. In doing so, at a minimum, the tenant would be better able to prove that all harassing conduct following this letter was reckless, thus likely meeting the bad-faith standard.

As is often the case, if the tenant has no record of informing their landlord of their protections under the law, there may be a dispute regarding what evidence may be used to show the landlord's bad-faith conduct. Generally, these disputes turn on whether the evidence proffered is inadmissible character evidence. Although character evidence is generally inadmissible to prove that a person's character or trait is evidence of their conduct on a specific occasion, evidence of past or related conduct may be admissible to prove the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Code Civ. Proc., § 1101.)

Rent-control harassment

A tenant may be able to establish that their landlord had an intent, plan, or motive to harass them by introducing evidence of the landlord's ownership of other rent-controlled properties. (*Duncan*, 68 Cal.App.5th at 532.) The landlord's ownership of rent-controlled properties is evidence of the landlord's knowledge of rent control, eviction, and harassment regulations. It may also be evidence of their pattern of harassment. (*Ibid.*) A tenant may be able to introduce evidence of past harassment by a landlord at their other properties to show that the landlord had "a pattern or practice of mistreating their tenants," which is admissible to show that the landlord exhibited bad faith and had an intent, plan, or motive to harass, whether knowingly or recklessly. (*Id.* at 535-536.)

In a recent harassment case related to the landlord's bad faith refusal to undertake repairs for several years, we argued that the landlord's conduct toward our long-term rent-controlled client was in bad faith by showing different treatment between recent

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market-rate tenants and longer-term below-market-rate rent-controlled tenants. In that case, the landlord responded to market-rate tenants faster, making repairs in response to market-rate tenant complaints, but refused to undertake those same repairs for below-market-rate tenants who paid lower rents. Under this theory, the entire history of complaints at the building and the landlord's responses to those complaints is relevant and discoverable.

Personal animus

Sometimes, the harassment is borne out of personal animus toward a particular tenant. Landlord-tenant relationships, especially in rent-controlled jurisdictions, may be lengthy and storied. Even if these relationships start strong, they may sour once the tenant complains about unsafe or substandard conditions. In multi-unit properties, landlords and their agents often gossip about residents they deem 'problem tenants' who complain too much to others in the building.

In these cases, especially, it is essential to make particular discovery regarding the landlord and the landlord's agent's statements about your client to other agents, tenants, and potential witnesses. Assuming the landlord or management testify that they did not discuss your client's tenancy or the particular facts related to your client's case to anyone else, witness testimony about their past discussions with the landlord/management about your client is likely to be admissible, especially if those statements exhibit animus or bad faith. The statements would likely fall within the hearsay exception as both prior inconsistent statements and potentially under the state-of-mind exemption.

Tedious, but necessary

Establishing bad faith may feel tedious in many landlord-tenant cases where the intent seems so clear, especially given the increasingly profit-driven financialization of housing. However, this requirement opens the landlord up for more potential discovery and questions, requiring them to turn over more evidence likely to expose them to more significant penalties and punitive damages. In the best cases, the bad-faith standard allows us to dig deeper and demonstrate an all-encompassing and damning indictment of landlord greed.


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