

## Section 13A: CONSUMER ISSUES

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# CONSUMER ISSUES

## OVERVIEW

Disasters are breeding grounds for unscrupulous consumer practices. Disaster victims, particularly senior citizens, the disabled and limited English or non-English speaking persons are vulnerable to scams. Even financially sound families may fall behind on credit payments resulting in collection actions. Consumer information is essential to help prevent victimization.

**IMPORTANT NOTE: The information contained in this section is designed to help a volunteer attorney provide preliminary guidance to victims of consumer fraud or those with debtor/creditor problems. Because of the complicated nature of such cases, disaster victims should be advised to seek the advice of an attorney.**

### I. MAJOR CONSUMER ISSUES AFTER A DISASTER

#### A. Caveat Emptor -- Let the Buyer Beware

After any disaster, three factors impact consumers: 1) A desperation to repair any damage and to heal family shock over losses; 2) Excessive demand on firms which provide repair services; and 3) Limitations on the supply of available services because of damage to service providers. In any situation, excess demand and limited supply causes prices for goods and services to increase. A major disaster exacerbates this factor. Consumers should take time to prioritize their needs and develop alternative plans to solve their problems.

Before contracting for any services, the consumer should:

1. **Verify licensing**, if applicable, with appropriate regulatory agencies;
2. **Obtain comparison bids** with lists of services provided and material costs;
3. Obtain all **estimates in writing**;
4. Speak with other customers to **verify satisfaction**;
5. **Read all contracts** or service agreements **before signing**; and
6. File complaints with appropriate regulatory agencies if confronted with potential fraud or abuse.

The telephone number for the Department of Consumer Affairs is 1-800-952-5210. Urge consumers to contact their county District Attorney's Consumer Fraud Division if someone calls with what the consumer feels is a scam. An early alert can prevent others from fraud. Urge them to contact the local newspaper's consumer desk to notify them of scams.

#### B. Price Gouging

California law, Penal Code § 396 makes it a misdemeanor to increase the price of food, repair, reconstruction, emergency medical supplies or gasoline more than 10% after a disaster. The exception is if the seller can prove that the distributor or supplier has increased the price in excess of 10%.

Local governments frequently enact price gouging ordinances after a declared disaster (e.g., Los Angeles Municipal Code § 47.12).

#### C. Home Equity Fraud

Home equity is the market value of the home minus the mortgage and other liens on the home. For example, if a home's market value is \$100,000 and the mortgage and all liens are \$80,000, the equity is \$20,000 ( $\$100,000 - \$80,000 = \$20,000$ ).

Home equity fraud is the taking of a homeowner's equity by fraudulent means. Victims of home equity fraud are most often elderly persons, particularly widows over age 70, minorities with limited English skills or homeowners with fixed incomes below \$24,000.

## **1. Home Repair/Lien Contract Scams**

After a disaster, a homeowner frequently needs major repairs for serious damage. This may include roofing and siding, plumbing, electrical wiring, heating and cooling, replacement of damaged structures, interior living quarters, etc. The cost of these repairs is most likely greater than the insurance coverage and the ability of the homeowner to cover the cost. Frequently, a low-income homeowner has deferred maintenance which may make the damage ineligible for FEMA funding.

The homeowner may feel trapped between the high cost of the repairs and the limited funding for repairs. Unscrupulous contractors or salespeople will take advantage of the fears of the homeowner and agree to make the repairs at unrealistic prices or financing schemes.

The salesperson or contractor then induces the homeowner to sign a lien-contract secured by the home. The loan repayment amounts are higher than what the consumer can afford to pay on a fixed income. Alternatively, the contractor provides inadequate repairs or services and the consumer refuses to pay the note to the finance company. The lien-contract, however, functions like a promissory note. If the homeowner misses only one payment the creditor may foreclose and sell the home without ever going to court. The common result is that the homeowner not only fails to have necessary repair work done, but loses his/her home through foreclosure.

## **2. Refinancing Schemes**

Because of the increased costs of confronting an emergency, consumers frequently fall behind in their credit payments or overextend themselves to the point that they must choose whether to pay creditors or obtain basic necessities such as food. Such consumers are often approached by finance companies promising to consolidate the homeowner's debt for existing mortgage, credit card debt, car loans and repair loans. They then pressure the homeowner to sign multiple agreements without sufficient time to review them or consult with anyone.

The negative outcomes of such refinancing schemes include high processing fees, payments to bogus/phantom creditors and default on the loan. The homeowner often cannot pay both the refinancing costs and basic living expenses, resulting in a situation far worse than before the refinancing.

## **3. Foreclosure Consultants/Equity Purchasers**

Some financial predators prey on persons during the foreclosure process. They claim to be foreclosure experts who offer to assist homeowners after they receive a notice of default. Once the finance company files a notice of default with the County Recorder's Office, the homeowner is deluged by these foreclosure consultants. These financial thieves further encumber the property with liens for fees and extravagant charges. They try to obtain title through a power of attorney or by direct transfer. They take advantage of the homeowner's distress and offer to purchase the home for below market value through misrepresentations on the value of the home and on encumbrances. They represent to the homeowners that they may stay in the property for the rest of their lives. In fact, after they obtain the property, they sell it and the new owner serves the tenants with eviction papers. Clients should be warned of such scams.

## **4. Caretaker/Befriender/Relative Scams**

Isolated homeowners who need assistance to maintain their homes frequently are victimized by friends, relatives or caretakers. They assist the homeowner with household chores, including shopping or taking them on medical visits. Children of elderly parents sometimes seek control of their parents' property for their own uses. All of these persons use scare tactics to convince the elderly, disabled or limited English or non-English speaking person to transfer title of the property to them. Sometimes they obtain a power of attorney when a person is very sick. Unbeknownst to the homeowner, the power of attorney holder may convey or encumber the property and keep the proceeds for him/herself.

## **D. Debtor/Creditor**

Often disasters can trigger financial crises as victims fall behind in their bills. Missed payments or collection actions can damage their credit ratings. Victims should notify creditors of the situation as soon as possible. Some creditors will agree to postpone payments for a period of time.

### **1. Debt Collection**

#### **a. Communicating and Negotiating with Creditors**

If the debtor can afford to make small monthly payments, s/he should contact the collector to ask if the payments are acceptable and reach an agreement on all of the following:

- 1) Total amount owed on the bill, including the interest to be added each year;
- 2) Amount of monthly payments;
- 3) Due dates that payments must reach the collector;
- 4) Address where payments must be mailed; and
- 5) Whether the collector will remove negative information about the bill from the debtor's credit report.

#### **b. Documenting Communication between Debtor and Creditors**

It is important for debtors to keep a record of phone calls from the collector regarding the past due bill, including the full names of the individuals s/he speaks with and date, time and details about the conversations. If the debtor arranges a payment agreement, s/he should send a brief letter confirming the terms of the payment plan. The debtor should always keep copies of any letters and payments sent to the collector. Letters to the collector should be sent certified mail. Consumer Credit Counseling Services may negotiate with collectors on behalf of debtors for little or no fee. See the business listings of the White Pages of the phonebook.

#### **c. Notifying the Collector of Debtor's Inability to Pay**

Some debtors who have no employment income or prospects for such income might be considered "judgment proof." Such people own no real estate, no personal property of significant value, no car worth more than \$1,200 and would probably not have bank accounts or other investments. Such debtors who are unable to arrange a workable payment plan should consider sending the collector a letter informing them of the inability to pay and requesting that the collector stop contacting the debtor about the debt. The debtor should include in the letter any special circumstances which help explain the inability to pay.

Sending such a letter limits the collector's right to contact the debtor. Thereafter, a collector may only contact the debtor to notify him/her of its intention to pursue a lawsuit or to inform him/her that collection efforts will cease.

#### **d. Filing Bankruptcy**

Bankruptcy may become a last resort option for disaster victims who cannot satisfy their creditors. Filing bankruptcy will not necessarily cancel all debts. It is recommended that individuals wishing to pursue bankruptcy proceedings be referred to a State Bar-certified lawyer referral service where an experienced bankruptcy attorney can be identified. For a list of current State Bar-certified LRSs, call 415-561-8250.

Please refer to the State Bar pamphlet, "What Can I Do If I Can't Pay My Debts." To order the pamphlet, call the State Bar at 415-561-8867.

**e. What Happens when Debtors Fail To Pay**

Debtors are not criminally liable for owing debts; however, a collector may file a civil lawsuit against them to collect the debt, and a court judgment will give the collector the right to collect using wage garnishment or seizure of property. Also, the collector has the right to report the unpaid debt to a credit reporting agency such as TRW.

Auto loan contracts usually permit the collector to repossess a car without advance notice after a borrower's failure to make payments. The debtor will have to pay the full balance of the loan plus all costs of repossession in order to regain possession. If the debtor cannot pay, the collector may sell the car and sue the debtor for the amount the debtor owes over the sale price.

If a past due bill is for services a debtor continues to receive (e.g., utilities), the collector may discontinue service or withhold reconnection, even if the debtor moves to another residence. The collector may also sue to try to collect the unpaid balance.

**2. Credit Reporting**

**a. Legal Authority**

This area is governed by the Federal Fair Credit Reporting Act, 15 U.S.C.A. § 1681, which requires that credit reporting agencies furnish a free copy of a consumer's credit report upon request within 30 days after the consumer is notified of an adverse action. Credit reporting agencies also have a statutory obligation to investigate consumers' claims.

**b. Experian**

Experian (formerly TRW Information Systems & Services) is one of a number of credit reporting agencies. To obtain a credit report, call Experian at 1-800-682-7654. Consumers who have a dispute with a creditor over an item on an Experian report should send a letter to: Experian; Attn.: National Consumer Assistance Center; P.O. Box 949; Allen, TX 75013. The letter should include the following:

- 1) Identification number of the credit report;
- 2) Creditor's name and account number;
- 3) Nature of the dispute;
- 4) All identifying information about the debtor including full name, addresses for the previous five years, birthdate including year and social security number; and
- 5) Documentation regarding the change of status of the debt.

The procedure for disputing an item should also be provided on the credit report.

**c. Equifax**

To obtain a credit report from Equifax, call 1-800-685-1111. Consumers who dispute items on an Equifax report should complete a research request form, included with the consumer's copy of the credit report, and send it to Equifax at P.O. Box 740256; Atlanta, GA 30374.

**II.**

**REMEDIES**

**A. California Civil Code Consumer Protection Laws**

**1. Consumers Legal Remedies Act -- Civil Code § 1750 et seq.**

This law protects consumers against unfair and deceptive business practices. It prohibits:

- a. Mislabelling of goods or services as those of another;

- b. Misrepresentations regarding the condition of goods or services, or the geographical origin of goods; and
- c. Certification of goods, quality of goods or services, price of goods or services, etc.

The Act provides that a consumer who is injured by such unlawful practices may bring an action to recover actual damages no less than \$300, an order enjoining such methods or practices, punitive damages and any other relief the court deems proper.

**2. Home Solicitation Contracts -- Civil Code § 1689 et seq.**

This Act regulates the home solicitation industry. It requires specific language to be included in contracts and notices of cancellation. A buyer has the right to cancel a home solicitation contract until midnight of the **third business day** after the day on which the buyer signs the agreement. If a seller fails to give a buyer notice of the right to cancel the contract, until the seller has complied, the buyer may cancel. In addition, the Act provides the guidelines for security interests in real property for goods installed on a home.

**3. Home Equity Sales Contracts -- Civil Code § 1695 et seq.**

This law protects homeowners who are in foreclosure from equity purchasers and their agents. It requires equity purchasers to provide a contract with specific language. It requires agents to be bonded to protect homeowners from fraud or violations of this Act. An equity purchaser who violates certain provisions or engages in fraud or deceit is guilty of a misdemeanor. Within two years of the date of the recording of the sale, the homeowner may rescind any transaction as void or voidable for violations within two years of the date of the recording. The equity purchaser is liable for all damages resulting from any act prohibited by this chapter.

**4. Mortgage Foreclosure Consultants -- Civil Code § 2945 et seq.**

Foreclosure consultant service agreements must be in writing. Homeowners may rescind foreclosure consultation contracts until midnight of the **third business day** after signing. Foreclosure consultants are prohibited from:

- a. Charging or receiving any compensation until after the consultant has fully performed;
- b. Charging or receiving any fee or interest which exceeds 10% per annum of the amount of the loan;
- c. Taking any wage assignment, lien on real or personal property, or other security to secure payment;
- d. Acquiring any interest in a residence in foreclosure from an owner with whom the foreclosure consultant has contracted;
- e. Taking any power of attorney from any owner; and
- f. Inducing or attempting to induce any owner to enter a contract which does not comply with contract requirements contained in this article.

**5. Rescission -- Civil Code § 1689**

A contract may be rescinded if all parties consent. The following are possible bases for rescission:

- a. Mistake;
- b. Duress;
- c. Fraud;
- d. Undue influence;
- e. The consideration for the obligation fails; and
- f. The consideration is void.

Rescission is also allowed if the contract is unlawful or if the public interest will be prejudiced by permitting the contract to stand.

**6. Cancellation -- Civil Code § 3412**

A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

Civil Code § 3412.

**B. California Business and Professions Code ("B & P Code") Remedies**

**1. Unfair Business Acts -- B & P Code § 17200 et seq.**

This chapter prohibits "any unlawful, unfair or fraudulent business acts or practices, and unfair, deceptive, untrue or misleading advertising." B & P Code § 17200.

Courts can enjoin ongoing wrongful and fraudulent business practices and grant specific or preventive relief in whatever context the activity may occur. An individual may bring an action on behalf of the general public. The statute of limitations is four years which means that an individual may be able to incorporate a violation of law that has lapsed and revive it through a cause of action under § 17200.

**2. Acts Against Seniors and the Disabled -- B & P Code § 17206.1**

This chapter provides for an additional civil penalty of \$2,500 for each violation against senior citizens or disabled persons.

**3. Contractors' State Licensing Requirements -- B & P Code § 7031**

Only contractors properly licensed by the Contractors State License Board may sue to recover the following costs:

- a. Contract price;
- b. Reasonable value of labor and materials; or
- c. Security interests.

A homeowner may use this as a defense to any actions brought against him/herself by an unlicensed contractor.

**4. License Revocation -- B & P Code § 7106**

This section allows an action for the suspension or revocation of a contractor's license to be included in an action involving the performance or legal obligation of a contractor.

**5. Home Improvement Contracts -- B & P Code § 7159**

This section lists the many provisions required in home improvement contracts that exceed \$500. Many contractors fail to comply with these mandatory elements. Violations are misdemeanors punishable by a fine of between \$100 and \$500.

**6. Loan Financing Linked to Contract (Spiking) -- B & P Code § 7163**

Many financial scams work by burdening low- or fixed-income persons with loan financing which the contractor arranges. When the homeowner defaults, the finance company forecloses on the home.

This statute provides that:

[A] home improvement contract is unenforceable against the buyer if a loan is a condition precedent to the contract, the contractor provides financing, or the contractor assists or refers the buyer in obtaining the loan **unless all** of the following are satisfied:

- a. A third party agrees to make the loan;
- b. The buyer agrees to accept the loan or financing; and
- c. The buyer does not rescind the transaction within the period prescribed (Truth in Lending Act, 15 U.S.C. § 1601 et. seq. or Reg. Z).

B & P Code § 7163.

If the above conditions are not met, the contractor may not deliver property, perform services other than obtaining building permits, nor represent that the buyer has any obligation under the contract. The buyer should return any property delivered by the contractor if possible.

## **C. Miscellaneous California Statutes**

### **1. Regulation of Notaries -- Government Code § 8214**

Notary publics must be bonded to cover any possible damages that arise as a result of notarizing documents. While some notaries commit intentional fraud, others become unwitting accomplices to predators on persons with property. The con artists may trick an elderly widow into signing and notarizing a document conveying her property to them. In other instances, a person representing himself as the owner has convinced a notary that he is the person who can convey title.

This law provides a bond to protect the consumer.

For the official misconduct or neglect of a notary public, the notary public and the sureties on the notary public's official bond are liable in a civil action to the persons injured thereby for all the damages sustained.

Government Code § 8214.

### **2. Elder Abuse -- Welfare & Institutions Code § 15600**

The Elder Abuse and Dependant Adult Civil Protection Act provides for protection against individuals who try to take financial advantage of elderly or disabled persons. It provides for attorney's fees and punitive damages in addition to other remedies in contract and tort.

It defines fiduciary abuse as:

[A] situation in which any person who has the care or custody of, or who stands in a position of trust to, an elder to a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust...

Welfare & Institutions Code § 15600.

## **D. Federal Remedies**

### **Truth in Lending Act -- 15 U.S.C. §§ 1601-1641 Regulation Z -- 12 CFR § 226.1 et seq.**

This federal act requires loan and credit providers of transactions involving four or more installment payments, to provide specific loan disclosure statements to the borrower. It provides for a three-day rescission period and damages for violations of this Act. In addition, violations of the disclosure requirement may extend the rescission period up to three years from the time of consummation of the loan.

## **E. Common Law Remedies**

Other remedies include the traditional common law remedies of **fraud in fact** and **fraud in the inducement**. The first involves contracts which are signed because of misrepresentation of the contents. A

deed transferred because of fraud is void and the title remains in the grantor. The second involves a document whose contents the signer knows, however, s/he is forced to sign it without proper consent. This type of contract is voidable. **Forgery** is where a person falsely signs a document or tricks someone into signing a document. Such documents are void.

### III.

### MISCELLANEOUS CONSUMER ISSUES

#### A. Home Repair Problems

Abandonment and shoddy work problems with home repair contractors are frequent during a disaster. The free booklet entitled, "What You Should Know Before You Hire a Contractor" available from the Contractors State License Board (CSLB) is a good resource. At a minimum, homeowners should check license status and references prior to signing a contract. CSLB can be contacted at 1-800-321-2752.

Homeowners with complaints about a contractor's performance should file a complaint with the CSLB and with the contractor's bonding company, and consult an attorney for advice regarding the advisability of filing a civil damages action.

#### B. Mechanics' Liens

If a homeowner fails to pay for repair work which the contractor claims to have satisfactorily completed, the contractor may file a mechanics' lien. A contractor must then commence a lien foreclosure action within 90 days after the filing of the lien.

#### C. Moving Company Problems

The California Public Utilities Commission (PUC) regulates moving and storage companies. However, many of the PUC rules and regulations are suspended immediately after a disaster including those regarding rates. Consumers should always ask the salesperson/representative for a license number and call the PUC at 1-800-877-8867 to check license status before signing a contract. Consumers may call 1-800-366-4782 to file a complaint or to report excessive rates.

#### D. Storage Companies

Storage companies must be bonded and a consumer should confirm bond information with the bond company before choosing a storage company.

#### E. Instant Credit/Advance Fee Loans

Call the Department of Real Estate to check licenses and to file complaints. The main office is in Sacramento (916-227-0931). Other offices are located in San Francisco (415-904-5925), Fresno (209-445-5009), Los Angeles (213-897-3399) and San Diego (619-525-4192). Advance fee defrauders convince people with bad credit to pay high fees for loans which do not materialize.

Individuals who need emergency funds may qualify for low-interest disaster loans from the Small Business Administration. See Section 9. They should avoid the use of advance fee lenders. The Department of Real Estate licenses lenders for advance fee loans or instant credit. Corporate lenders must be listed with the Department of Corporations.

#### F. Insurance Problems

For information and complaints, call the Department of Insurance at 1-800-927-4357.

Independent adjusters help a homeowner determine the amount of the loss and obtain the maximum the homeowner is entitled to under the policy. Unscrupulous adjusters improperly recommend contractors to make repairs. Homeowners should always hire contractors independently of the adjuster. Contracts must include a 72-hour right to cancel.

If the insurance company refuses to pay or the adjuster minimizes the damage to the homeowner's property, the homeowner should contact an attorney who is an insurance specialist immediately.

### **G. Phoney Charities**

Door-to-door and telephone solicitations from charities without identification are frequent after a disaster. Avoid "(900)" phone number donations and contact the county Department of Social Services to check if a charity is registered. The county District Attorney's Consumer Fraud Division may be aware of fraudulent schemes.

### **H. Attorney Solicitations**

The State Bar of California strictly prohibits attorneys from:

1. Soliciting clients at an accident scene, at a hospital or on the way to a hospital;
2. Seeking clients who, because of their physical, emotional or mental state, are unable to exercise reasonable judgment;
3. Guaranteeing the outcome of a case; and
4. Seeking employment by mail.

Complaints against attorneys may be filed by calling the State Bar at 1-800-843-9053. See Section 4. Before hiring an attorney, individuals can call the State Bar Membership Records Department at 415-561-8877 to obtain public information about the attorney, including any discipline history. Look in the Yellow Pages for phone numbers of certified lawyer referral services. The State Bar can also provide phone numbers of current State Bar-certified lawyer referral services; call 415-561-8250.

### **I. Powers of Attorney**

Consumers should avoid individuals who promise to obtain disaster relief if they sign a Power of Attorney form. In past disasters, these persons typically obtained benefits and then kept all or a large portion for themselves. FEMA does not authorize or license persons as intermediaries.

## Section 13B: DOCUMENT REPLACEMENT

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# DOCUMENT REPLACEMENT

## OVERVIEW

During a disaster, people often must abandon their homes on short notice. Lost documents are a serious consequence of almost every disaster. Many persons cannot qualify for insurance, disaster assistance or public benefits without documentation. Individuals must replace lost documents as soon as possible to avoid interrupting essential services or benefits.

### I. GENERAL INFORMATION

First, check safe deposit boxes and other safekeeping places. They many contain an original or copy of important documents.

Second, check with the appropriate agency to get the most current information regarding replacement of documents.

Third, remember that there may be a fee to process requests or to obtain certified copies.

Fourth, find out whether it is faster to go to the office that has the document or whether you must request the information by mail or FAX. In many cases, agencies take several weeks to process requests by mail.

### II. VITAL RECORDS

#### A. In General

Vital records are official certificates of every birth, death, marriage and divorce. They are on file in the locality where the event occurred. In California, this is the county where a person was born, died, married or divorced.

#### B. Births, Marriages and Deaths

##### 1. County Recorder's Office -- County Seat

The County Recorder's office in the county where the event occurred is the office to contact for copies of these records. The County Recorder's office is a county office usually located in the county seat where the local Board of Supervisors and other county offices are located. Call to find out the hours of operation and procedures. If documents are needed quickly, bring a check to cover the fees and go directly to the office.

##### 2. Information Needed for Birth or Death Records

If requesting the information by mail or in-person, have the following information ready:

- a. Full name of the person whose record you need;
- b. Sex;
- c. Parent's names, including maiden name of mother;
- d. Month, day and year of birth or death;
- e. Place of birth or death (city or town, county and state -- also name of hospital, if known);
- f. Purpose for which copy is needed; and
- g. Relationship to person whose record is being requested.

##### 3. Information Needed for Marriage Records

Give the following information for marriage records:

- a. Full names of the bride and groom;
- b. Month, day and year of marriage;
- c. Place of marriage (city or town, county and state);

- d. Purpose for which the copy is needed; and
- e. Relationship to persons whose record is being requested.

### **C. Divorces and Dissolutions**

In California, the Clerk of the Superior Court or the Family Law Court Clerk has the records of all divorces, also known as dissolutions.

To get divorce or dissolution records, you must provide the following information:

1. Full names of husband and wife;
2. Date of dissolution;
3. Place of dissolution;
4. Type of Final Judgment;
5. Purpose for which copy is needed; and
6. Relationship to persons.

In general, if you do not have exact dates, the office will charge a fee to locate the documents. If you go to the Superior Court Clerk's office, you may search for the documents yourself. Many offices have computer lists or microfiche lists that are alphabetical.

### **D. Basic Facts To Get a Record by Mail or FAX**

If you know where the records are kept, but cannot go in person to replace them, follow the steps outlined:

1. Telephone first to get information;
2. Write to the correct office:  
County Recorder's Office  
Birth, Death and Marriage Records  
Correct Address  
County Seat, California, Zip Code;
3. Include the information listed above and check or money order made out to the correct county official for the fees; and
4. For certified copies, ask for certification and pay the correct fee for the number of copies that you want.

Do not send cash.

### **E. For General Information in California**

For information on how to replace vital records of events that occurred in California call the Office of Vital Records at 916-445-2684. This is an automated line with information in Spanish and English.

### **F. For Information about Other States**

For information on how to replace vital records of events that occurred outside California obtain the publication "Where to Write for Vital Records."

Any individual can obtain a copy as follows:

1. Call the Superintendent of Documents at 202-512-1800;
2. FAX the Superintendent of Documents at 202-512-2250;
3. Write to: Superintendent of Documents  
P.O. Box 371-954  
Pittsburgh, PA 15250-7954; or
4. Visit the nearest Government Printing Office bookstore which is usually located in the Federal Building of most large cities.

### III.

### FEDERAL DOCUMENTS

#### A. Federal Information Center

For general information about how to get information or documents from any agency call 1-800-688-9889 or TDD 1-800-326-2996. Check the Government Listings of the White Pages of the phonebook to get addresses and local phone numbers. Many agencies have toll-free (800) lines which provide information on various services available including how to replace lost documents.

#### B. Social Security Cards

The Social Security Administration will replace a lost Social Security card. Individuals can go to their local district office or call 1-800-772-1213 for forms and information. Social Security requires individuals to fill out a lost card form and provide one type of identification. The identification must be an original or certified copy.

#### C. Medicare Cards

The Social Security Administration will also replace lost Medicare cards. Call 1-800-772-1213 or go to the local district office for information regarding a free replacement.

#### D. Veterans Administration

Each county in California has an office of Veteran's Assistance. Call 1-800-827-1000 to get information on document replacement and veteran's benefits during a disaster. The TDD number is 1-800-829-4833. Look in the Federal listings of the Government Pages of the White Pages.

#### E. Immigration and Naturalization Service (INS)

Immigrants and naturalized citizens face great difficulties if they do not have documentation of their status. They cannot work and they may be subject to deportation. The INS has different forms to replace different documents. There are frequently significant time delays in obtaining replacement documents. To order forms, call 1-800-870-3676. Local offices also have forms; to call the nearest INS office look in the Government Listings of the White Pages under Federal Government, Department of Justice.

To replace a work registration or "green" card, an individual must fill out a Form I-90 (Application by Lawful Permanent Resident for new Alien Registration Receipt Card). Individuals must submit a completed I-90 in person at the nearest office of the Immigration & Naturalization Service. Applicants for replacement cards must also submit two color photographs taken within the last 30 days. They must bring a check or money order to cover the processing fee. INS will fingerprint each individual.

#### F. Passports and Department of State Documents

Individuals with lost visas or passports may get replacement documents from the Department of State. Some local post offices and federal courthouses have the forms for passports. Check the Federal Government Listings of the White Pages of the phonebook for the number of the Passport Agency.

### IV.

### PERSONAL DOCUMENTS

#### A. Driver's License/Vehicle Registration/Certificate of Title

To replace a driver's license, vehicle registration or certificate of title, go to the nearest office of the Department of Motor Vehicles (DMV). Also, verify with DMV about waiver of penalties and extensions for overdue registration. If known, it is helpful to have the vehicle identification number.

## **B. Insurance Documents**

To obtain insurance policies, information about coverage and to make a claim, contact the insurance agent or insurance company directly. Most insurers and insurance industry groups set up special numbers for policy holders after a disaster. Call Directory Assistance at 1-800-555-1212 for the number of a particular insurance company.

## **C. Bank Accounts/ATM Cards**

Contact appropriate financial institutions to replace bank passbooks, checkbooks, ATM and/or credit cards and safe deposit box keys. Most banks have (800) numbers to report lost or stolen cards. Call this number immediately to report a lost or stolen card. Individuals must go to the branch where they opened their account, which has their original signature to obtain immediate replacement cards, check books and other bank books, if they have no identification.

## **D. Wills**

To obtain a copy of a will, trust or other testamentary instrument, contact the attorney who prepared the document. If the attorney does not have a copy, individuals should prepare a new will or other document.

## **E. Deeds**

Certified copies of deeds to real property are available at the County Recorder's office in the county where the property is located. The following information is needed:

1. Current owner's name(s);
2. Property address;
3. Seller's name;
4. Date of the recording; and
5. Document number.

If a person does not have detailed information, the Recorder's office may charge a fee to search the records for the correct document.

## **F. Court Records**

First, determine in which court the action took place: **Superior Court, Probate** (wills, adoptions, guardianships), **Family Law** (dissolutions of marriage, custody decrees, parentage decrees, child support orders, restraining orders), **Juvenile Court** (documents may be sealed) or **Criminal Courts, Municipal Court** (landlord-tenant disputes, debtor-creditor) or **Small Claims Court**.

Contact the clerk's office of the appropriate court where the documents are on file. Call the clerk of the court or the executive office of the courts to find the correct courthouse. Many counties have different physical locations for different court files. In some instances, an individual must locate the record on microfiche and must return to check the file and obtain a copy. In California, you must have the year, the names of plaintiff and defendant and, if possible, the case number.

## **G. Food Stamp Identification, MediCal Cards/Stickers**

The local Department of Social Services office will replace documents, checks and stickers for recipients of public benefits. There is an expedited emergency procedure for all individuals irrespective of the crisis. Individuals must ask for the expedited procedure.

## **H. Unemployment Insurance or State Disability**

Check with the local office of the Employment Development Department for replacement information or documents.

## **I. Credit Cards**

Banks and other institutions have toll-free (800) numbers to report lost or stolen credit cards. Individuals should call immediately to report the loss and obtain replacement cards. The cards will usually only be sent to the original address. This may pose a problem if the home is destroyed and the family is living in temporary shelter. Some credit card programs have local offices or banking institutions where replacement cards can be obtained.

## Section 13C: EMPLOYMENT ISSUES

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# EMPLOYMENT ISSUES

During a disaster traditional statutory rights do not end. Attorneys who advise clients should be sure to look to remedies that involve existing law.

**IMPORTANT NOTE: The information contained in this section is designed to allow a volunteer attorney to provide preliminary guidance to a disaster victim with employment-related problems. Because of the complicated nature of such cases, clients should be advised to seek the advice of an experienced employment attorney.**

## I. WAGE AND HOUR ISSUES

### A. General Information

Employers have a responsibility to pay workers the statutory minimum wage or contracted wages. Workers are entitled to overtime pay for hours worked in excess of 8 hours per day. Employers cannot use a disaster as an excuse to violate hours and wages laws. The current Federal minimum wage is \$4.75 per hour as of October 1, 1996. The current State minimum wage is also \$4.75 per hour as of October 1, 1996. The State minimum wage will increase to \$5.00 per hour on March 1, 1997, \$5.15/hour on September 1, 1997 and \$5.75 per hour on March 1, 1998.

Workers are also entitled to premium pay for overtime, as in nondisaster times. Most workers in California are entitled to overtime after 8 or 10 hours per day, as provided for in the Industrial Wage Commission wage order which applies to their occupation or industry. Workers who are covered by federal law are also entitled to overtime after 40 hours per week.

### B. Post-Disaster Live-in Employment

During a disaster, individuals may lose their homes. If they accept live-in employment, the employer must still pay them minimum wage and can make reasonable deductions for room and board only if there is a **written, voluntary agreement**. The maximum an employer can deduct for a room occupied alone is \$20 per week and for a shared room, \$16.50 per week.

### C. Termination of Employment

Since many businesses may suffer damage or economic losses during a disaster, employees may lose their jobs. Employers must still pay employees at the time of termination and provide them with an itemized statement of wages, hours and deductions. Employers who fail to do this must pay up to 30 days waiting-time penalties to the employees, calculated from the date the wages were due until finally paid.

### D. Remedies for Injured Workers

Remedies for injured workers include:

1. Demand letter to the employer to pay wages;
2. State Labor Commissioner;
3. Small Claims Court (\$5,000 maximum);
4. Municipal or Superior Court; and
5. U.S. Department of Labor, Wage and Hour Division.

The statute of limitations is four years on written employment contracts, three years if the right to wages is provided by state statute (such as minimum wage and overtime laws) and two years on oral contracts. The statute of limitations for violation of federal law is two or three years. The employer has a duty to maintain records of the hours worked by its employees and make the records available for inspection by the employees upon reasonable request.

## II.

### EMPLOYMENT DISCRIMINATION

Disasters are not defenses to actions for employment discrimination, e.g., an employer lays off only women employees during a disaster. Individuals who believe they have suffered discriminatory treatment can file claims with federal Equal Employment Opportunity Commission (EEOC) or with the California Department of Fair Employment and Housing (DFEH). To contact the EEOC, look in the government pages of the White Pages of the phonebook. The DFEH can be reached at 1-800-884-1684 or TDD 916-324-1678. (TDD is for hearing-impaired people.)

Employers may not use a disaster as an excuse to terminate unwanted employees. These employees may have a cause of action under such laws as the Americans with Disabilities Act or state and local disability statutes and ordinances.

Federal law generally covers employers with 15 or more employees and forbids discrimination on the basis of race, religion, sex, national origin, age (40+ years old) and/or disability. Complaints should be filed with the EEOC within 180 days of the discriminatory act. State law, applicable to employers with five or more employees, precludes discrimination on the basis of race, religion, sex, national origin, color, ancestry, physical handicap, medical condition or marital status. Complaints must be filed with the DFEH within one year of the discriminatory act.

State law also forbids employers to discriminate on the basis of sexual orientation. Complaints must be filed with the Labor Commissioner within **30 days** of the discriminatory act.

## III.

### WRONGFUL TERMINATION

An employer can discharge an employee for any reason or no reason, with a few exceptions based on public policy or contractual agreements. In the aftermath of disasters which force businesses to close or limit their work, many terminations may occur. However, employers may not use the disaster as a pretext for an illegal purpose:

- A. Violation of anti-discrimination laws;
- B. Violation of federal or state labor laws (e.g., union organizing);
- C. Retaliation for exercising the legal right to file claims (e.g., Labor Commissioner, DFEH, Occupational Safety and Health Administration (OSHA), Workers' Compensation Board);
- D. Violation of an employment contract providing for termination with "good cause"; or
- E. Violation of public policy (e.g., refusal to engage in illegal activities).

## IV.

### FAMILY AND MEDICAL LEAVE

State and federal law entitle many employees to a 12-week unpaid leave because of the serious illness of an employee or that of his/her immediate family member or because of the birth or adoption of a child. Generally, employees who have been employed for at least a year and for 1,250 hours in the year preceding the leave and who work for an employer who employs at least 50 workers within 75 miles are covered. This federal law is enforced by the U.S. Department of Labor, Wage and Hour Division. State law is enforced by DFEH.

## V.

### WORKERS' COMPENSATION

#### A. In General

Workers who are injured in the course of their employment and because of their employment and who become physically or mentally ill because of their jobs may apply for Workers' Compensation benefits. During a disaster, individuals who are injured "due to the disaster" only should apply for Disaster Unemployment Assistance (DUA) (See Section 10). However, if the employee is injured during a disaster but the injury would not have happened if it were not for the work s/he was doing, Workers' Compensation rules apply. One should note that stress-related claims in Workers' Compensation and under Disaster Unemployment Assistance may be more difficult to prove than they previously were due to changes in the law. A competent Workers' Compensation attorney should advise on this matter.

## **B. Claims Process**

An injured worker should see a doctor immediately to document claims for Workers' Compensation. The employer must provide medical treatment for a work injury and must refer the worker to their doctor, or the worker has a free choice of physicians. The employer must provide claim forms for the employee to file a Workers' Compensation claim. A claim must be filed within one year from the date of the injury in most circumstances, unless the employer provides benefits which extend the filing time to five years. For uninsured employers, workers can bring claims to the California Uninsured Employers Fund and also have a right to sue the employer for negligence in civil court.

The State Bar of California has a program to certify specialists in Workers' Compensation law. To obtain a list of current certified specialists, contact the Legal Specialization Unit of the State Bar's Office of Certification by calling 415-241-2100.

## **VI. STATE UNEMPLOYMENT INSURANCE**

Employees whose jobs end for traditional employment reasons -- end of the agricultural season, manufacturing plant closings, school year ends, quitting for good cause or employment termination not related to misconduct -- remain eligible for regular Unemployment Insurance (UI) benefits. In addition, workers who are unemployed due to the disaster but are entitled to regular UI must exhaust their regular UI benefits before they can receive DUA. The governor may waive the one-week waiting period for regular UI during disasters. See Government Code ' 8571. All of the nondisaster rules apply. These include sufficient earnings during the base period, meeting the separation requirements and other UI rules. They are entitled to the same processing and appeals as workers during nondisaster times. However, if they are found ineligible for regular UI, they should explore the possibility of obtaining DUA. UI disqualifications may also prevent a worker from obtaining DUA (See Section 10).

## **VII. STATE DISABILITY INSURANCE**

Individuals who are ill or are injured in a nonwork-related accident may be eligible for State Disability Insurance (SDI). The illness or injury may be physical or mental. This disability program is a short-term disability program for workers who suffer an injury or illness which prevents them from doing their present job.

First, the employer must contribute to the program for the employee. Paystubs will note an SDI deduction for an individual if s/he is covered. Second, the employee must have medical documentation that they are unable to work. Examples of injuries that qualify an employee for state disability include broken limbs and surgery that requires time in bed.

SDI is different from Workers' Compensation, which is for on-the-job injuries. **Individuals may not collect duplicate benefits for Workers' Compensation and State Disability Insurance.** However, Workers' Compensation benefits may be delayed while an employer challenges the claim. An employee may apply for SDI and the State will be reimbursed when the employee prevails on the Workers' Compensation claim. SDI is also different from Social Security Disability Insurance (SSDI), which is for permanent disability.

Applicants apply for SDI at the local Employment Development Department (EDD) office. The same rights and appeals applicable to UI apply to SDI. SDI is available for up to six months. However, the maximum weekly SDI benefit is greater than the maximum weekly UI benefit.

## **VIII. SOCIAL SECURITY DISABILITY INSURANCE**

Individuals who are disabled and unable to work for a period of more than one year or who have a terminal condition and whose employers have contributed funds to Social Security Disability Insurance (SSDI) may be eligible for this federal insurance program. The amount of funds a person receives through this program depends on the contributions made. A person does not have to meet federal poverty guidelines to qualify for SSDI.

"Disability" is defined as:

... the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you

are able to do any other work, we consider your residual functional capacity and your age, education, and work experience.

20 CFR § 404.1505.

The Social Security Administration runs this program. Individuals must provide medical documentation that they are unable to work at any job. Their doctors must show that they suffer from a serious impairment that prevents them from working for more than 12 months or is terminal. The doctors' reports must show, if possible, that the individual suffers from a physical or mental impairment that is included among categories of "Listed Impairments".

If a person's disability is serious, but not as serious as those in the listings, a finding of disabled can still be possible in view of the person's residual functional capacity, age, education and work history. Advancing age, lack of transferable skills, the absence of any recent work experience and/or recently completed job training or education can all work in favor of a finding of disabled for people who are in their 50's or above. Generally, it is more difficult for younger individuals, i.e., those under 50, to prove disability, regardless of their particular vocational profile.

Individuals apply at their local Social Security District Office. The process for applications generally takes at least six months.

If a claimant loses at the Initial Determination Stage, s/he can request a reconsideration. A request for reconsideration must be made within 60 days of the initial denial. If s/he loses at reconsideration, the appeals process moves to a hearing before an Administrative Law Judge. A claimant must request a hearing within 60 days of the denial or reconsideration. A hearing procedure can take up to one year. Additional medical evidence can and should be submitted at any stage of the application or appeals process.

## **IX.**

## **IMMIGRATION**

Check the immigration section for the types of documentation that workers need to qualify for different immigration categories. See Section 13E. Undocumented workers are not eligible for unemployment insurance or any disability programs, state or federal.

## Section 13D: HOUSING

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Note: See Miscellaneous Section for discussion of commercial landlord/ tenant issues

# HOUSING

## OVERVIEW

This Section of the Handbook addresses tenants' rights under California law when a residential rental unit is damaged or destroyed by a disaster. Refer to Section 7 for a description of FEMA Housing Assistance Programs. For more information about landlord/tenant law, refer to the resources listed in Paragraph VII. of this Section. Refer to Section 13G for information about commercial tenancies.

**IMPORTANT NOTE: The information contained in this Section is designed to help a volunteer attorney to provide general information about residential housing issues. Disaster victims should be advised to seek the advice of an attorney experienced in housing law.**

### I. PRELIMINARY CONSIDERATIONS

When a tenant's unit is damaged or destroyed by a disaster, it is important for advocates to think carefully about remedies under California landlord/tenant law as well as relief that is available through federal housing assistance programs (See Section 7) and other assistance programs.

There are four questions for advocates to ask and analyze to determine how to advise a client about a landlord/tenant claim:

- A. How badly is the unit damaged?
- B. Does the tenant have a written lease? (Usually, if there is no written lease, then the tenancy is considered as if there were a month-to-month lease.)
- C. Does the tenant receive any federal or state housing subsidies, or is the unit a subsidized or public housing unit?
- D. Does the tenant want to keep possession of the apartment, leave permanently or move temporarily while the landlord makes repairs?

### II. ASSESSING DAMAGE

California law requires landlords to maintain rental units in "habitable condition." Civil Code § 1941.1 requires that dwelling places substantially meet each of the following characteristics in order to be considered habitable:

- A. Roof and exterior walls must be waterproof;
- B. Windows and doors must be unbroken;
- C. Plumbing and gas facilities must be maintained in good working order;
- D. Hot and cold running water must be provided;
- E. Sewage disposal system must be connected and operational;
- F. Heating facilities must be maintained in good working order;
- G. Electrical lighting and wiring must be maintained in good working order; and
- H. Floors, stairways and railings must be kept in good repair.

For the purposes of this Section, disaster damaged dwelling places can be classified as one of the following:

- A. Destroyed: More than one of the above listed facilities no longer exists.
- B. Substantially damaged: Any one of the facilities no longer exists or more than one facility does not operate most of the time.
- C. Materially damaged: Any one of the facilities is inoperable most of the time or more than one operates sporadically but may be able to be repaired.
- D. Minor damage: Any one facility operates sporadically, but may be able to be repaired.

These categories are useful guidelines to help tenants assess their situations, discussed in the Disaster Legal Assistance Manual, Los Angeles County Bar Association, Barristers Disaster Relief Assistance Committee, January 1994. 185 pp. However, the guidelines are by no means definitive rules. Case law merely distinguishes between

uninhabitable dwellings where there is "substantial interference" with the tenant's use of the dwelling and where there are "material" problems.

### III.

#### UNIT IS DESTROYED

If the unit is so destroyed that it is obviously not suitable for living, there are not a lot of options to consider. The tenant needs to move out. The questions are primarily financial ones, regarding return of rent, return of security deposit and long-term financial adjustments. The tenant should be eligible for FEMA Temporary Housing Assistance (See Section 7) and may also be eligible for emergency welfare benefits (See Section 12). If the tenant's personal property was destroyed, depending on income, s/he may be eligible for either a Small Business Administration (SBA) personal property loan (See Section 9) or an Individual and Family Program (IFGP) grant (See Section 8).

Unless there is a written lease to the contrary, Civil Code § 1933(4) indicates that the tenancy is terminated when the unit is totally destroyed. This means that the tenant:

- A. Should give notice to the landlord;
- B. Is free to move;
- C. Should be entitled to the return of their security deposit (Civil Code ' 1950.5);  
and
- D. Should be released from all ongoing obligations.

Tenants in this situation are entitled to obtain access and recovery of any remaining personal property in the unit. If there is a written lease, it may contain other provisions.

### IV.

#### UNIT IS SUBSTANTIALLY OR MATERIALLY DAMAGED

This is a more difficult situation to analyze than the prior one. The relevant questions are:

- A. Can the unit be repaired?
- B. How quickly can it be repaired?
- C. Can the repairs be made while the tenant is living in the unit, or will the tenant have to relocate temporarily while the repairs are being made?
- D. Does the tenant want to move, or retain possession of the unit and have the landlord make repairs?

#### A. Tenant Wishes To Permanently Move

If the tenant wants to move, it is important to **thoroughly document** the extent of the damage before moving. Advise the tenant to:

1. Obtain inspection reports from FEMA inspectors;
2. Obtain certified copies of inspection reports from local city building inspectors (tenant will have to call to request an inspection);
3. Take photographs and record the date the picture was taken, who took the photograph and the subject of photograph;
4. Have reliable witnesses view the premises and keep notes of the date they viewed the premises and what they saw; and
5. List the conditions in the unit.

Tenants who have month-to-month leases (or no lease) can always give 30 days' notice to the landlord and then move. However, a 30-day notice may not be required if the unit is substantially damaged. Written provisions in leases will control other types of tenancies (besides month-to-month tenancies).

If the unit is **substantially damaged**, advise the tenant to write a letter to the landlord, recording the above findings, stating that the premises are essentially not habitable and that the tenant is considering the lease terminated. California law allows a tenant to terminate his/her tenancy if the "greater part" of the premises "perishes". Civil Code § 1932(2). The tenant should sign and date the letter, then proceed the same as if the unit were destroyed (See Paragraph III.).

If the unit is **materially damaged**, the tenant cannot terminate the lease without informing the landlord about the repair problem and giving the landlord a reasonable time to fix the problem.

## **B. Tenant Wishes To Retain Possession of the Unit**

### **1. Referrals for Further Assistance**

Low-income tenants or tenants in rural areas may not be able to obtain another apartment. Advocates should first advise tenants who want to keep their units about finding emergency housing, using FEMA and emergency assistance programs. See cross-references in Paragraph III.

### **2. Asserting Tenant's Right To Have Unit Repaired**

The advocate should work with the tenant to obtain their rights under the landlord/tenant law to have the landlord make the repairs as fully and quickly as possible. Under California law, the landlord has the responsibility to return the unit to habitable standards. Green v. Superior Court (1974) 10 Cal.3d 616; Hinson v. Delis (1972) 26 Cal. App.3d 62.

#### **a. Tenant may Vacate Apartment While Repairs Are Being Made**

If the tenant chooses to leave temporarily, it's important for the tenant to state his/her intentions to the landlord in writing (and keep a copy of the letter). The tenant must explain that s/he is not vacating or abandoning the unit, but is moving temporarily because of the uninhabitable condition. The tenant should clearly explain the intent to return and continue the tenancy and the fact that s/he may be withholding some rent until the unit is returned to habitable standards. However, if the tenant really wants to retain possession of the disaster-damaged apartment, s/he should strongly consider the small claims court option described below (Paragraph B.2.c) rather than withholding rent and temporarily vacating the apartment. If the tenant withholds rent, the landlord can initiate eviction proceedings (See Paragraph VIII). The landlord is under no obligation to pay for temporary housing. It may be impossible for the tenant to pay for the rental of two apartments at the same time. Perhaps the tenant could go to small claims court first, before moving, to ask the court to order a rent reduction.

#### **b. Repair and Deduct Statute**

If the repair requires less than one month's rent, the tenant may make the repair himself/herself and deduct the cost of repair from rent. Civil Code § 1942. Refer to Paragraph V.A. below before advising tenants about the statute.

#### **c. Small Claims Court**

Tenants can go to Small Claims Court and ask the court for a rent return or an order for the landlord to make the repairs. If the repairs have been cited by an inspector and not corrected for 60 days, Civil Code §1942.4 gives the court authority to not only award damages, but also to compel the landlord to repair the premises.

### **3. Written Leases and Month-to-Month Tenancies**

Advocates should look at any **written lease** the tenant may have. Keep in mind that a residential tenant cannot be forced to waive his/her right to habitable premises. Civil Code § 1942.1; Knigh v. Hallshammer (1981) 29 Cal.3d 46, 171 Cal. Rptr. 707. Unless the tenant is in an unusual, negotiated situation, the above information about enforcement of habitability rights would apply. A tenant with a year lease would probably have stronger rights to move back into the unit after its repair than a tenant with a month-to-month tenancy. With a **month-to-month tenancy**, the landlord could conceivably decide to go out of business and just give a 30-day notice.

## V.

### UNIT HAS MINOR DAMAGE

For tenants with units that have sustained minor damage, most of the advice given in Paragraph IV, above, applies. The tenant should consider emergency housing options and available FEMA benefits (See cross-references in Paragraph III.), document the condition of the unit and write a letter to the landlord. The repair and deduct statute (Civil Code ' 1942), mentioned in Paragraph IV.B.2.b. could be very useful for tenants who have enough money to use it.

#### A. The California Repair and Deduct Statute (Civil Code § 1942)

The repair and deduct statute enables tenants to repair the premises themselves and deduct the cost of the repair from the rent, after giving the landlord **reasonable notice** of the repair problem. Tenants may use this remedy only for repairs that cost **less than one month's rent**. Eligible repairs under the statute are listed in Civil Code ' 1941.1. See Paragraph II. Tenants may use the remedy **only twice a year**. Due to these monetary limitations, the statute is not useful for many tenants whose dwelling units have substantial damage. Advocates must advise tenants to **document** the problem before the repair is made, (See Paragraph IV.A.), **save receipts** regarding the repair and give the landlord **reasonable written notice**. The landlord may initiate the eviction proceedings if less than the full amount of rent is paid, so it is essential for tenants who use the repair and deduct remedy to have proper documentation. It is good practice to advise tenants to set aside the rent money, if they can, so they can negotiate with the landlord if problems arise.

Unfortunately, many tenants are unable to use the repair and deduct statute because they do not have enough money to pay for the repair. If a tenant has already paid the monthly rent, s/he may not have enough money to pay for the repair. For example, if the disaster occurs at the beginning of the month, it may be 20 or 30 days before the tenant can use the statute and have the problem fixed. In this scenario, the advocate can encourage or assist the tenant to request that the landlord make the appropriate repairs. Eliciting the support of FEMA or city inspectors could be helpful.

#### B. Small Claims Court

As mentioned above, the tenant may go to Small Claims Court and ask the court to order the landlord to make repairs and/or give a rent reduction until repairs are made. This is safer but may take longer than repair and deduct.

## VI.

### SUBSIDIZED AND RENT CONTROLLED HOUSING

Tenants in subsidized or public housing have a greater stake in retaining possession of their housing. Loss of a unit is much more traumatic to these tenants because it is much harder to find a comparable rent. Tenants with Section 8 vouchers or certificates may find it difficult to locate another landlord who will accept the subsidy, particularly when there are many displaced tenants seeking housing.

There are considerable additional remedies for tenants who live in subsidized or public housing. These landlords cannot unilaterally terminate a tenancy with a 30-day notice or at the expiration of the lease period because "just cause" is required for eviction. This means tenants can be evicted only if there is a cause. Furthermore, under some of these programs, tenants may have relocation rights that are specifically stated in their leases or in the regulations governing the programs. In other words, even if a tenant's unit is destroyed (which will normally terminate the tenancy), if there are other units available to the housing authority or landlord, the tenant may have a right to be transferred to one of those units. It is important to evaluate the nature of the subsidized program and the additional remedies available to tenants.

## VII.

### RETURN OF SECURITY DEPOSIT

Tenants must request return of the security deposit in writing, after moving. Landlords have a period of three weeks, pursuant to California Civil Code §1950.5, in which to return the security deposit or submit an itemized list of the things for which they are withholding money. This is the statutory requirement, but advocates may certainly argue that the landlord should return the deposit sooner if it is necessary to help a tenant relocate after a disaster. Landlords who fail to return a security deposit with bad faith may be subject to statutory damages of up to \$600, in addition to actual damages. Civil Code § 1950.5(k). Advocates may refer tenants to Small Claims Court if the landlord wrongfully fails to return the deposit.

## VIII.

## EVICTION

In addition to keeping a copy of all correspondence with the landlord, it is important for tenants to thoroughly document the condition of their units and their use of the repair and deduct statute because non-payment of rent subjects tenants to the potential for eviction (unlawful detainer). Advise tenants that if they are personally served with a summons and complaint, they will have only **five days** to file an answer with the court. With court order, landlords may serve a tenant by posting the summons and complaint on the premises and mailing a copy to the tenant. Advise the tenant to inform the landlord in writing about any temporary address and to periodically check the damaged unit to see if court papers have been posted. Low-income tenants should call their local legal services office for assistance if they receive legal papers regarding an eviction. Other tenants should call the local State Bar-certified lawyer referral service to receive a referral to an attorney. Call the State Bar Office of Legal Services for a listing of legal services offices (415-561-8800 or 1-800-628-4858) or the State Bar Office of Bar Relations for a list of certified lawyer referral services (415-561-8250).

A tenant can raise repair problems or repair and deduct as defenses in an unlawful detainer action. The court can order reduced rent and can require that landlord to make repairs. Code of Civil Procedure § 1174.2.

After a tenant requests that the landlord make repairs or complains about the habitability conditions of a dwelling unit to the local authorities, the landlord cannot retaliate against the tenant. Civil Code § 1942.5. For a period of 180 days following the repair complaint, efforts by the landlord to increase the rent, decrease services or evict the tenant may be considered retaliatory. Civil Code § 1942.5(a). The aforementioned documentation is critical in order for a tenant to prove that an eviction may be retaliatory.

## IX.

## LANDLORD/TENANT LAW RESOURCES

The following books have extensive information about representing tenants in unlawful detainer proceedings.

California Eviction Defense Manual, second edition, Myron Moskowitz and the San Francisco Neighborhood Legal Assistance Foundation, Cal CEB, 1993 (with 1996 update).

California Practice Guide: Landlord-Tenant, Friedman, Garcia & Hagarty, The Rutter Group, 1996.

California Residential Landlord-Tenant Practice, Cal CEB, 1986 (with 1995 update).

Tenants= Rights, 12th edition, Moskowitz and Warner, Nolo Press, Berkeley (1-800-992-6656) (pro per guide).

For subsidized and public housing:

HUD Housing Programs: Tenants' Rights, second edition, The National Housing Law Project, 1994, (with 1996 supplement) (510-251-9400).

RHCDS (FmHA) Housing Programs: Tenants' and Purchasers' Rights, second edition, The National Housing Law Project, 1995 (510-251-9400).

The following material was prepared specifically with post-disaster landlord-tenant issues in mind:

Disaster Legal Assistance Manual, Los Angeles County Bar Association, Barristers Disaster Relief Assistance Committee, January 1994, 185 pp.

"Damaged or Destroyed Residential Rental Units: A Fact Sheet for Landlords and Tenants", State of California Department of Consumer Affairs, Legal Guide LT-6, 400R. Street, Suite 3090, Sacramento, CA 95814-6200, (October 1996).

## Section 13E: IMMIGRATION

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# IMMIGRATION

## OVERVIEW

California has a substantial immigrant population. The diversity of ethnic groups and languages presents a challenge for delivering effective disaster legal assistance. This section is a brief overview of disaster legal issues affecting immigrants. Individuals who need more than brief information and advice should be referred to lawyer referral services or legal services providers specializing in immigration law. For example, questions regarding adjustment of status, naturalization, public charge, detention by the police or the Immigration and Naturalization (INS) and deportation may arise. In addition, eligibility for many public assistance and disaster relief programs is directly related to immigration status. See Section 11 and Section 12 regarding immigrant eligibility for public assistance. See also Section 5 and Section 7 regarding immigrant eligibility for disaster housing assistance and III. below regarding immigrant restrictions on other types of disaster assistance.

### I. CONSIDERATIONS WHEN WORKING WITH IMMIGRANT POPULATIONS

#### A. Demographics

It is important to consider the demographics of the population affected by a disaster. Before a disaster, staff should collect census data on their geographic area. This data will provide information on the ethnicity of residents, the language groupings, number of single parent households, number of children and elderly in a community, as well as income levels. The census data will indicate the number of persons who are refugees and from what country they have come. Knowledge of the demographics will assist in recruiting the appropriate volunteers.

Compare the legal needs of the survivors of the Oakland Hills Fire with the needs of the survivors of the Northridge Earthquake. In the fire disaster, legal volunteers needed to know about land use and real property issues. Many residents were middle income and some were elderly. The majority were English-speaking. In the earthquake, there was a large number of undocumented non-English speaking survivors. A large number of persons were tenants, not homeowners, and many were low-income persons who lost their jobs as a result of earthquake damage.

#### B. Ethnicity and Language

Survivors will react to and recover from disasters within the context of their ethnic background and cultural viewpoint. Survivors with limited English-speaking skills may have difficulty communicating needs except in their native language. Volunteers should include bilingual and bicultural persons. If such persons are not available, efforts should be made to recruit volunteers with the appropriate ethnic backgrounds and language skills from community-based organizations.

In working with limited English-speaking persons, it is important to speak clearly and simply. Try to avoid legal jargon. Check frequently to make sure that the person has understood what you have said and ask him/her to repeat your instructions. Written information and instructions in the person's primary language would be ideal.

In some cultures people will always agree with what the authority figure says, even if they do not understand. If a child or friend comes to act as an interpreter, inform the person that he/she has a right to an adult volunteer who speaks his/her language. **Make sure that the child or friend does in fact understand what you are saying and is not merely nodding politely.**

#### C. Cultural Issues

Even if immigrants understand English, there are frequently cultural barriers to utilizing government programs or accepting assistance from private agencies. Many immigrants have informal leadership structures within their community which parallel the structures and customs in their home countries. They may be reluctant to provide basic information to strangers because of fears of retribution. If the pattern in their home country was for families to tolerate substandard and dangerous conditions, they may be fearful to seek help. Some immigrants may consider

assistance from outside the family a "handout" and would be inhibited from obtaining essential services.

Recordkeeping in different cultures varies. Individuals from cultures where oral contracts and a handshake are the basis for economic activity may have difficulty understanding the need for written documentation. Even the most knowledgeable person may find it difficult to locate records during a disaster. Providing information on how to obtain duplicate records would be helpful.

## **II. IMMIGRATION CATEGORIES**

The Immigration and Naturalization Service (INS) has promulgated regulations to define categories of noncitizens who are considered "lawfully present" in the United States. 8 CFR § 103.12.

Persons who are lawfully present in the U.S. include the following categories. For each of these categories we have listed examples of documents that individuals may have to show that they have this status. However, these examples are not exhaustive. Also, individuals who have lost INS documents commonly experience long delays in obtaining replacement documents.

### **A. Citizens or Nationals of the United States**

All persons born in the United States, or U.S. territories such as Puerto Rico and the U.S. Virgin Islands, are U.S. citizens and nationals. Persons born outside the U.S. who have one parent who is a United States citizen may also be U.S. citizens. This category includes persons who are naturalized citizens. Persons who were born in certain U.S. outlying possessions -- American Samoa and Swains Island -- are nationals of the U.S. but not U.S. citizens.

Documentation includes birth certificates, baptismal certificates, visas, passports and naturalization certificates.

### **B. Permanent Residents**

This category includes all persons who have been granted the right to permanently reside in the United States. Many of these persons may have lived in the United States for decades. These persons have most of the rights of citizens, including the right to work. However, they cannot vote in national elections.

Most permanent residents have "alien registration receipt cards" (Form I-551 or I-151), which are commonly known as "green cards" even though they have been issued in different colors over the past several decades. Other evidence of permanent residence includes form I-181 (Memorandum of Creation of Lawful Permanent Residence), form I-327 (Reentry Permit), and passports or I-94 forms stamped "admitted for I-551."

### **C. Refugees and Asylees**

These are persons who cannot return to their home countries because of fear of persecution or displacement as a result of war or natural disaster. The reasons for their fear of persecution may include race, religion, nationality, political affiliation, etc. A refugee is someone who has been granted refugee status outside the United States or at a border. An asylee is a person who has applied for and been granted asylum within the United States.

Documentation of this status may include I-94 forms stamped "refugee," "asylee," "207" or "208;" form I-571 (Refugee travel document); form I-688B or I-766 (employment authorization document) coded 8 CFR § 274a.12(a)(3) (Refugee) or (a)(5) (Asylee); or an order granting asylum from INS, the immigration court, the Board of Immigration Appeals, or a federal court.

**D. Persons Granted Withholding of Deportation or Withholding of Removal**

Another group of immigrants who cannot return to their home countries because of fear of persecution are individuals who have been granted withholding of deportation. Because of a change in the law that applies to individuals whose removal proceedings begin on or after April 1, 1997, this relief will be called "withholding of removal" (INA § 241(b)(3)).

Documentation of this status may include I-94 forms stamped "§ 243(h)" or "§ 241(b)(3);" form I-571 (Refugee travel document); form I-688B or I-766 (employment authorization document) coded 8 CFR § 274a.12(a)(10) (withholding of deportation); or an order granting withholding of deportation or withholding of removal from INS, the immigration court, the Board of Immigration Appeals, or a federal court.

**E. Conditional Entrants**

Persons who were admitted to the U.S. as "conditional entrants" prior to April 1, 1980 are also considered to be lawfully present. Conditional entrants under former § 203(a)(7) of the INA were the functional equivalent of refugees prior to the enactment of the 1980 Refugee Act. These individuals may have a passport or form I-94 stamped "conditional entrant" or "§ 203(a)(7)."

**F. Parolees**

Persons who have been granted parole under INA § 212(d)(5) by the INS to come into the United States for a period of at least one year are considered to be lawfully present in the U.S. All other persons who have been granted parole are also considered to be lawfully present, unless they were paroled under INA § 212(d)(5) for exclusion proceedings, or under 8 CFR § 212.5(a)(3) for prosecution. These individuals may have a passport or form I-94 evidencing the grant of parole.

**G. Persons Inspected and Admitted**

Persons who have been inspected and admitted to the United States and who have not violated their status are considered lawfully present. This group includes all of the many visa categories of nonimmigrants. These individuals are admitted under a particular visa category that is based on the purpose for which the individual is admitted. The visa categories of nonimmigrants are known by the letter of the subparagraph of INA § 101(a)(15) that pertains to the category, and these categories range from A through S. Some common examples are visitors for pleasure or business (B-1 or B-2 visas), students (F visas), temporary workers (H visas), exchange visitors (J visas), and religious workers (R visas). The spouse and minor children of the principal alien may also be admitted in the same status. Nonimmigrants may have a passport, form I-94 evidencing nonimmigrant status, or Border Crossing Card.

This group also includes miscellaneous other categories of noncitizens not specified in the INA's nonimmigrant categories. Some examples include aliens admitted to the U.S. as citizens of the Federated States of Micronesia or of the Marshall Islands pursuant to agreements between the U.S. and these former trust territories (authorized by treaty to reside and work in the U.S.), and American Indians born in Canada who possess at least 50% blood of the American Indian race (INA § 289).

**H. Temporary Residents**

Persons who have temporary resident status under the legalization or Special Agricultural Worker (SAW) provisions of the INA (INA §§ 210 or 245A). Documents include forms I-688, 688A, 688B or 766 indicating issuance under INA § 210 or § 245A or 8 CFR § 274a.12(a)(2).

**I. Persons Granted Temporary Protected Status**

Temporary Protected Status (TPS) is granted to individuals where the attorney general has determined that because of civil war, natural disasters, or other appropriate circumstances, the U.S. should not normally deport individuals to a country. Persons granted TPS are authorized to work, may not be deported, and are considered lawfully present. Documents include forms I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(a)(12).

**J. Cuban-Haitian Entrants**

Nationals of Cuba or Haiti who were paroled into the U.S. prior to 1982 are also considered lawfully present. These individuals may have passports or form I-94 indicating parole status.

**K. Persons Granted Family Unity Status**

Persons whose parent or spouse obtained permanent residence through amnesty and petitioned for them to be granted permanent residence may be granted family unity status if they were in the United States on May 5, 1988. Persons with family unity status are authorized to work and may not be deported. They may have to wait several years to be granted permanent residence because of backlogs in the availability of immigrant visas. Documents include forms I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(a)(13), form I-817 (application for family unity), I-797 (notice of action indicating grant of family unity) or other notice granting family unity.

**L. Persons Granted Deferred Enforced Departure Status**

Deferred Enforced Departure (DED) status is granted to members of particular nationality groups who are permitted to remain in the United States and to work. Documents include forms I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(a)(11).

**M. Persons Granted Deferred Action Status**

Deferred action is a status that INS grants to individuals where the agency decides as a matter of discretion not to proceed with deportation or removal. Documents include forms I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(c)(14), or a letter from INS granting deferred action.

**N. Applicants for Adjustment of Status**

This category consists of persons who may remain in the United States because they are applying for permanent resident status. These persons may be granted work authorization. The INS considers that individuals who are the spouse or child of a U.S. citizen whose visa petitions have been approved and who have pending applications for adjustment of status are lawfully present in the U.S.

Documentation may include form I-485 (application for adjustment of status); I-360 (application to qualify as abused spouse or child under Violence Against Women Act); EOIR-42 (application for cancellation of removal and adjustment of status); I-797 (notice of action) reflecting approval of visa petition or receipt of I-485; I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(c)(9) (adjustment of status) or (c)(16) (registry); I-512 (advance parole) or I-94 indicating entry to pursue § 245 application.

**O. Applicants for Asylum, Withholding of Deportation, or Withholding of Removal**

This category includes persons applying for asylum, withholding of deportation, or withholding of removal, because they fear persecution in their home country. The INS considers these applicants to be lawfully present in the U.S. if they have been granted employment authorization. Applicants under 14 years of age (who may not apply for employment authorization) are considered lawfully present if their asylum or withholding application has been pending for at least 180 days.

Documentation includes forms I-688B or 766 (employment authorization) indicating issuance under 8 CFR § 274a.12(c)(8) (asylum) or (a)(10) (withholding of deportation), or form I-589 (application for asylum).

### III.

## RESTRICTIONS ON DISASTER ASSISTANCE

### A. **Proposition 187 Does Not Restrict Disaster Assistance**

In November 1994, California voters approved Proposition 187. It seeks to deny "social, educational and medical" benefits to undocumented persons.

Many lawsuits have challenged the constitutionality of the proposition. Both state and federal courts have enjoined the implementation of the proposition. As of the printing date of this publication, Proposition 187 was not a factor should a disaster strike California.

### B. **Emergency Supplemental Appropriations for Additional Disaster Assistance Act of 1995**

#### 1. **Limits on FEMA Disaster Housing Assistance**

On July 27, 1995, Congress passed the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act (Act), Public Law No. 104-19. Section 2006 of the Act prohibits FEMA as a federal entity from providing non-emergency disaster assistance from the Act to individuals "not lawfully within the United States." Non-emergency disaster assistance includes all FEMA Disaster Housing Programs in Section 408 of the Stafford Act: Rental Assistance, Mortgage and Rental Assistance, Home Repair Assistance and Transient Accommodations. Prior Law in 1994 had prohibited FEMA from providing RA and MRA for more than 90 days to persons not lawfully present in the U.S.

In order to be eligible to apply for FEMA Disaster Housing Assistance and prior to the receipt of such assistance, applicants must sign a self-certifying declaration attesting that they are lawfully within the United States (beginning with FEMA-DR-1067, United States Virgin Islands, declared September 16, 1995). They are also asked to provide a form of identification which does not have to be official documentation and which is solely for the purpose of confirming their identity; that is they are who they say they are. It is not to establish citizenship or immigration status.

After closure of the application period, FEMA will conduct a random audit of the self-certifying declarations, requiring applicants to provide documentary evidence of the lawful status they declared.

#### 2. **Definition of "Lawfully Within the United States"**

- a. As discussed above, INS promulgated regulations to define "lawfully present in the United States" for purposes of benefits under title II of the Social Security Act (8 CFR § 103.12). The categories of those considered to be "lawfully present" are also listed above.
- b. FEMA's self-certifying declaration form provides three categories of persons who are lawfully in the United States: 1) citizen or national of the United States; 2) lawful permanent resident; and 3) person otherwise lawfully present in the United States. Those persons who would be considered lawfully within the United States for purposes of FEMA's self-certifying declaration include, but are not limited to:
  - United States citizens or permanent residents;
  - Immigrant visa holders;
  - Non-immigrant visa holders;
  - Refugees;
  - Asylees.

As of the printing date of this publication, FEMA anticipates amending its definition of "lawful presence" in light of welfare reform legislation.

### **3. Other Forms of Disaster Assistance**

- a. American Red Cross assistance, which can include emergency housing assistance, and the following emergency disaster assistance are **not** included in the 1995 Act's restrictions requiring lawful presence: search and rescue; emergency medical care, mass care and shelter; clearance of roads and construction of temporary bridges and essential community services; risk warnings; dissemination of public information and assistance regarding health and safety measures; provision of food, water, medicine and other essential needs.
- b. Individual public benefits programs including Food Stamps, Aid to Families with Dependent Children and Medi-Cal also have restrictions on immigrant eligibility that need to be checked individually. See Section 11 and Section 12.
- c. Although FEMA will not process applications for FEMA Disaster Housing Assistance unless a self-certifying declaration has been signed, this does not effect FEMA's processing of inspections for transmission to the State for Individual and Family Grant Program (IFGP) assistance. The State has the option to decide if it wants IFGP cases transmitted without a signed self-certifying declaration.
- d. Persons who are undocumented and without proper INS work authorization are not eligible for Disaster Unemployment Assistance (DUA) or Unemployment Insurance (UI). See Section 10.
- e. The Small Business Administration (SBA) does not require proof of immigration status as of the printing date of this publication. However, Social Security numbers are required for SBA disaster loans.

Please note that the Attorney General<sup>1</sup> has the authority to designate certain programs, services or assistance, after consultation with appropriate Federal agencies and departments, which: 1) deliver in-kind services at the community level; 2) do not condition the provision of assistance on the recipient's income or resource; and 3) are necessary for the protections of life or safety, for all persons, regardless of immigration status. This authority is granted in The Personal Responsibility and Work Reconciliation Act of 1996<sup>2</sup>. As of the printing date of this publication, FEMA continues to follow the 1995 legislation referenced above for its disaster housing assistance programs.

### **C. Common Problems**

#### **1. Citizen Children and Undocumented Parents or Siblings**

If the minor children of undocumented parents were born in the United States, these children are potentially eligible for services and public benefit programs.

Minor children cannot apply for Disaster Unemployment Assistance for their parents. They can obtain public benefits for themselves but not for their undocumented parents or siblings.

For purposes of eligibility for FEMA Disaster Housing Assistance, the self-certifying declaration should be signed at the time of the FEMA inspection by the applicant or by another adult household member lawfully present in the United States who can represent the household and who either resides in the same damaged structure and who lived in the structure at the time of the disaster or whose loss of income forms the basis for a MRA application.

#### **2. Documented Persons whose Status Changes**

If an applicant is "lawfully within the United States" at the time of the disaster and application for Disaster Housing Assistance, but subsequently falls out of lawful status, that person is eligible for disaster housing assistance covering the time for which he/she was lawfully within the United States.

#### **IV. FEMA AUDIT PROCEDURES**

##### **A. Verification Procedures**

FEMA has a computer program that randomly select applicants who received Disaster Housing Assistance for audit. Audited applicants will receive a return receipt requested letter requesting that they provide documentary evidence of legal presence in the United States by mail to FEMA at the address indicated in the letter. The letter will list various forms of acceptable documentation and will provide the toll free helpline number for applicant questions.

##### **B. Role of the Immigration and Naturalization Service**

The INS may verify the documents and information provided by the applicant to FEMA for purposes of the audit. The INS does not receive any other information FEMA may have in its records about the applicant relating to the applicant's application for disaster assistance such as the applicant's address and phone number.

FEMA makes the final determination, not the INS, as to whether an applicant is lawfully within the United States for purposes of eligibility for its Disaster Housing Assistance Program. The role of the INS is to provide FEMA with technical support and access to its information resources to help FEMA verify the information provided by the applicant. However, the INS has reserved the right to pursue criminal prosecution for violation of federal law.

##### **C. Recoupment of Assistance from Ineligible Applicants**

FEMA may initiate recoupment proceedings against any audited applicant who fails to provide suitable documentation to verify that he/she is lawfully within the United States. The applicant will be required to return any Disaster Housing Assistance provided and will not be eligible to receive any further assistance from FEMA's Disaster Housing Programs for that disaster, or any subsequent disasters unless the applicant subsequently provides suitable documentation of lawful presence. The applicant will be advised in writing of the decision and appeal rights and he/she or his/her authorized representative may request in writing copies of the documents upon which FEMA based its decision.

#### **Endnotes**

1. 61 Fed. Reg. 45985 (8/30/96) (AG Order No. 2049-96, Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation)
2. Public Law No. 104-193

# Section 13F: INSURANCE

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# INSURANCE

## OVERVIEW

Insurance benefits may provide disaster victims with the fastest source of assistance following a major disaster. Due to the time-sensitive nature of most insurance coverage, it is important to encourage victims with insurance to:

1. **File a claim** with their carrier immediately if they haven't done so already and despite what their insurers may have told them about coverage; and
2. **Take photos** of, videotape and inventory their damage.

It is likely that several weeks following the disaster, people who have already filed claims for damage to a home, small business, vehicle or person but have not obtained satisfactory responses from their insurance companies will also seek legal advice on how to proceed. Careful review of insurance policies is in order in these cases. It is also important to consider that those without personal insurance (e.g., renters) may be able to recover their losses in part from other sources (e.g., landlords).

**IMPORTANT NOTE: The information contained in this section is designed to help a volunteer attorney provide general information about insurance issues. Disaster victims should be advised to seek the advice of an attorney experienced in insurance law.**

## I. BASIC INSURANCE ISSUES

### A. Preliminary Steps in a Disaster

Immediately following a major disaster few victims think about taking pictures of their damage for the insurance agent or filling out claims forms. They are usually concerned about obtaining the necessities of life for their families and dealing with their losses. Because of this natural reaction, it is very important to urge all disaster victims to immediately begin taking the steps necessary to ensure the greatest insurance protection.

Because of the very complicated contract nature of most policies, any guidance provided to victims by a volunteer attorney will be of only a general nature. All clients should be advised to:

1. Read their policy;
2. Contact their agent; and
3. Preserve evidence of their damage with pictures, videotapes and written inventories.

Disaster victims also need to be advised to apply for disaster relief from FEMA or the Individual and Family Grant Program (IFGP) within the filing deadline, and also to file their proofs of claim under any applicable insurance policies. FEMA and IFGP will not pay for insurance losses that are actually covered/paid, but applications will be processed and provided under FEMA programs whether or not insurance proceeds have actually been paid. To assist volunteer attorneys in giving common sense guidance to victims, several areas of concern are discussed below.

### B. Locate the Insurance "Policy" or "Contract"

#### 1. Loss during Disaster

The loss or destruction of personal papers creates many problems for disaster victims. Since it is too late to advise clients to keep copies of their papers in a safe deposit box, review with them the document replacement tips offered in this manual. See Section 13B. Insurance policies should be easy to obtain.

## 2. Obtain a Copy of Lost/Destroyed Policy

The first step in gaining a copy of a lost or destroyed policy is to contact the insurance company. Following major disasters, many insurance companies establish special hotlines for just this purpose. Remember to advise the client to ask for the entire policy, not just the cover page or recitals. Under California law, **insurance companies must provide a copy of the entire insurance contract.**

### C. Types of Policies and Basic Features

#### 1. Homeowners Insurance

Many homeowners maintain insurance to cover physical damage to their home and to cover liability for third party injuries which occur on their property. Unfortunately, most homeowners policies do not provide coverage for floods and earthquakes, unless specific riders are purchased for this coverage.

The State of California recently implemented the California Earthquake Authority (CEA) Insurance Program. The CEA program is a publicly managed state agency that will provide insurance coverage for earthquake damage to residential property owners, mobile homeowners and renters. The CEA was conceived as a plan to make earthquake insurance available to consumers, and at the same time, reinvigorate the homeowners insurance market. For more information please call the California Earthquake Authority in Sacramento at 916-492-4300.

##### a. Coverage for Wind-Driven Rain Damage

Damage caused by rain entering through wind-damaged windows, doors, or a hole in a wall or the roof, resulting in standing water or puddles, is considered windstorm damage. Windstorm damage is generally covered by homeowners insurance not flood insurance.

##### b. Coverage for Flood Damage

Nationally, over 90% of all disasters are flood-related. Federal flood insurance for building and contents coverage is available in communities participating in the National Flood Insurance Program (NFIP) which is managed by FEMA and can be purchased through licensed property/casualty insurance agents or through most companies selling homeowners insurance. **Please note that contents coverage is also available to renters.** Flood insurance may also be available from some private carriers. Actual cost varies according to the property, liability limits and deductible selected by the insured. The NFIP's Preferred Risk Policy which has a low annual premium is designed for residential properties located in low to moderate flood risk zones. Flood insurance claims are paid whether or not a disaster is declared. One-third of NFIP claims come from outside high risk flood areas. Generally, proofs of loss must be filed within 60 days; check the policy for deadlines.

The NFIP defines flooding as a general and temporary condition during which the surface of a normally dry land is partially or completely inundated. Two adjacent properties or two or more acres must be affected. Flooding can be caused by rising bodies of waters including the overflow of inland or tidal waters; runoff of surface waters from any source such as heavy rainfall; mudslides or mudflows caused by flooding; and the collapse or destabilization of land along bodies of water from erosion by waves or water currents exceeding normal, cyclical levels. Flood damage coverage is generally not provided in homeowners insurance policies.

Different rules apply to FEMA and other federal disaster assistance in floods, depending on whether the community is "participating" in the NFIP. If the community is not participating, then individuals cannot purchase NFIP and no federal monies can be provided for permanent repair or reconstruction in Special Flood Hazard Areas (SFHA). Flood insurance must be purchased for properties located in a SFHA as a condition of federally-backed mortgage loans. If a property in an SFHA in a "participating community" is not insured, the disaster victim can still get federal help (a "first bite at the

apple"), but it may not be enough to rebuild since special rules require properties that are more than "50% damaged" to be rebuilt to certain local flood plain requirements and elevated.<sup>1</sup>

Moreover, anyone who is uninsured and receives federal disaster assistance after a flood will be required to maintain flood insurance to remain eligible for future federal disaster assistance from IFGP and SBA (see Sections 8 and 9). The IFGP program pays for flood insurance premiums. (In the recent North Dakota floods, IFGP grants were reduced by \$200 off the top, and paid directly for group flood insurance premiums for 3 years.)

## **2. Business Insurance**

Many victims of disasters are business owners who may also seek federal disaster assistance. Like most homeowner policies, business policies are unlikely to provide standard coverage for earthquakes and floods without additional riders. However, most policies will contain **business interruption coverage** and **inventory protection coverage** which may allow a business to recover some of its losses. Federal flood insurance is available to businesses for building and contents coverage.

## **3. Vehicle Insurance**

Most vehicle insurance contains two major types of coverage, "**liability**" (for damages caused to third parties) and "**comprehensive**" (for property damage to the insured's vehicle) coverage. While some policies restrict or eliminate coverage for earthquake damage, individuals who have purchased "comprehensive" insurance coverage should be covered for physical damage to their vehicle caused by the disaster.

## **4. Condominium and Renter Insurance**

Owners of condominiums and renters often have the most complicated problems with insurance claims following a disaster. This is because there are often two different sources of coverage for disaster losses. Condominium owners should carefully review, and maintain a copy of, their condominium association's insurance policy to ensure that when combined with their personal insurance policy there are no gaps in coverage. Again, earthquake and flood coverage usually requires the purchase of additional coverage not included in standard policies. Federal flood insurance is available to condominium owners for building and contents coverage.

Renters should maintain personal possessions coverage, but most do not do so. If the renter does maintain such coverage, the situation is almost identical in nature to that described above for condominium owners. However, if no coverage was in place it is unlikely that the renter will be able to recover through the landlord's policy. Personal property damage of lessees is specifically excluded from most earthquake policies. Renters can purchase federal flood insurance contents coverage.

**Despite this fact, all victims should be urged to file a claim with all possible sources of benefits.**

## **D. Parts of a Standard Policy**

As mentioned above, the rights and responsibilities of the insurer and insured are described in the insurance contract or "policy". It is very important that the victim have a copy of the full policy. Most policies contain a declaration page, a detailed policy description and endorsements.

### **1. Declaration Page**

Usually the first page of a policy, this page will briefly summarize the coverage contained in the policy. Many victims may only have this section of their insurance contract and should be directed to obtain the additional sections.

## **2. Policy Description**

This is typically referred to as the body of the insurance policy and contains all of the contractual language which regulates the relationship between the insurer and insured. **It is in this section that conditions, limitations and exclusions regarding coverage will be described.** As is the case with many complicated contracts, these descriptions may be confusing and may contain a large number of "defined" terms.

## **3. Endorsement**

Usually located at the end of a policy, endorsements may add, modify or delete coverage noted in the standard policy. It is very important to review the endorsements since earthquake or flood coverage is usually contained here and not in the policy description.

## **E. Making a Coverage Claim**

### **1. Claims Procedures Following Disaster**

All insurance companies have different claims procedures to obtain benefits. These procedures will often be contained in the policy description section of the insurance contract, but almost always begin with contacting the insurance carrier. After major disasters, many carriers will establish special phone hotlines for their policy holders. In addition, the Department of Insurance (1-800-927-4357) may be able to help you locate a particular insurer.

**Regardless of what a victim has been told by his/her insurance agent, urge him/her to make a claim. It is impossible to dispute a denial of benefits unless a claim is made.**

### **2. First Party Claims**

Also, note that there may be different procedures for filing a **first party claim**, in which the insured seeks benefits for damage suffered by the insured, and a **third party claim**, in which a third party seeks to gain benefits through another party's coverage.

### **3. Third Party Claims**

Third party claims are often very complicated and result in disputes and litigation far more often than first party claims. Victims should be advised to consult with an experienced insurance attorney.

### **4. Inspection**

After a claim is filed, the first step toward payment of proceeds is usually a visit from a claims adjuster to the location of the damage. This adjuster then makes an initial determination regarding the amount of benefits the insurance company will pay on the claim.

## **II. INSURANCE PROBLEM AREAS**

### **A. Bad Faith, Misrepresentation and Denial of Claims**

The State of California has many laws regulating insurance contracts and the behavior of members of the insurance industry. If there are any questions regarding whether or not misrepresentations were made in the sale of an insurance contract, whether a denial of coverage was made using the proper procedures, or whether treatment from the insurance carrier was proper, both judicial and administrative remedies are available. Victims with these types of questions should consult with an experienced insurance attorney.

## **B. Offshore Insurance Carriers**

Due to the high cost and difficulty of obtaining quality insurance in California, many people purchase their insurance from "offshore" insurance carriers. These companies sell insurance to California citizens through area brokers, but are not headquartered or located in California. They are often headquartered in foreign countries or the Caribbean, and they are not regulated by the California Department of Insurance. While some offshore carriers are reputable companies and pay their claims, many are little more than shams designed to victimize poor and hard-to-insure residents. If a disaster victim appears to be covered by such a carrier, urge them to contact the Department of Insurance to check on the status of the company.

## **C. Seek Additional Legal Advice if Necessary**

The amount a person is able to recover from their insurance, as well as the amount available from FEMA programs, may depend upon the proper execution of the requirements contained in his/her insurance contract. Accurate interpretation of coverage and claims responsibilities will often be beyond the scope of services that a volunteer attorney can provide. Often, victims seeking legal assistance will not even have a full copy of their insurance contract for review. Therefore, it is exceptionally important to urge victims to seek detailed legal assistance from a qualified insurance attorney or legal services agency if they have not received a satisfactory settlement of their insurance claim. If the victim does not have a personal attorney, suggest the use of a State Bar-certified lawyer referral service. Call the State Bar Office of Bar Relations for a list of certified lawyer referral services (415-561-8250). Many such services waive processing fees for disaster victims following federal disaster declarations. If the victim is indigent, provide suggestions on local legal service agencies who might be able to help. Call the State Bar Office of Legal Services for information about local legal services programs (415-561-8800).

## **D. Refer to Insurance Specialist**

Although true in all areas of inquiry, great care should be taken to properly advise each victim of the scope of assistance that you are providing. Since insurance claims may involve tens, if not hundreds of thousands of dollars, victims should be given possible sources of additional assistance and provided common sense guidelines to increase the likelihood of submitting a successful claim.

# **III. INSURANCE CLAIMS CHECKLIST**

## **A. Contact the Agent, Broker or Insurance Company**

Start the claims process. Do this even if there is uncertainty as to the extent of coverage or level of deductible. Also, insist on filing a claim regardless of whether or not the agent believes coverage is available.

## **B. Provide a Means to Contact the Agent**

Make sure the agent knows where to reach you, especially if your home or apartment has been destroyed. If you are staying in a shelter, offer to contact the agent regularly until you have a contact number.

## **C. Document All Damage/Confirm All Conversations with a Letter**

As soon as possible, take pictures or videotape all of your damage. Keep a detailed written inventory of all losses. Do not clean up or dispose of items until they have been photographed and inventoried.

If your initial claim is made by phone, confirm the conversation in writing and provide a list of your losses. **Always note on your correspondence with the agent that the losses you list are only a partial list of your losses and that you will forward additional claims of losses when discovered.**

**D. Protect Property from Additional Loss**

**E. Obtain Estimates for Repairs/Keep All Receipts**

Get estimates for the repairs you will need to make. Retain receipts for all repairs and additional costs incurred because of the disaster damage. These receipts should include those for costs incurred for additional living expenses.

**F. Conduct Adjuster Inspection Before Repairs are Made**

**G. Get an Advance**

If you are unable to maintain housing, consider asking your insurance carrier for an advance on your insurance proceeds.

**H. Do Not Sign a Release**

**Do not sign** a release, waiver, or cash a proceeds check without consulting with a lawyer.

**I. Contact Insurance Company if Claim is Denied**

If your claim is denied in part or in full **request that the insurance company provide the reasons for their actions in writing.**

If their reasoning does not seem consistent with the language of the insurance contract, or if you are unable to understand their reasoning, **contact an attorney specializing in insurance cases for assistance.**

For information and assistance regarding insurance carriers, contact the California Department of Insurance at 1-800-927-4357.

**Endnotes**

1. FEMA can also authorize additional NFIP coverage to help with the extra cost of rebuilding such damaged structures. For example, in North Dakota, FEMA authorized an additional \$15,000 in coverage for policies purchased or renewed after June 1, 1997 to help pay for elevating, flood proofing, demolishing or relocating a substantially damaged structure (if required by local flood-plain management).

## Section 13G: MISCELLANEOUS

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# MISCELLANEOUS

## OVERVIEW

The following topics may arise during the course of assisting disaster victims; however, a more in-depth discussion of each is beyond the scope of this manual. A brief summary is provided for each topic. For legal assistance beyond brief advice, disaster victims should be referred to a State Bar-certified lawyer referral service.

### I. ALTERNATIVE DISPUTE RESOLUTION

There are many types of disputes that may be settled without going to court, such as consumer, employment, housing, neighborhood conflicts and small claims matters. If a disaster victim is settling problems out of court, a referral to an alternative dispute resolution (ADR) program may be appropriate. Using ADR instead of litigation may result in a more expedient, cost-effective and satisfactory outcome. Mediation is one specific ADR process where a neutral facilitator assists the parties in resolving their dispute. Please note that ADR programs may be nonprofit or for-profit entities. Also, some programs may use attorney mediators, non-attorney mediators or both. For more information about alternative dispute resolution, refer to the State Bar pamphlet, "Should I Try To Settle My Problem Out Of Court." To order the State Bar pamphlet, call 415-561-8867. For a list of ADR programs in your community, refer to the Yellow Pages of the phonebook under "mediation" or "arbitration", or contact the local county bar association or the State Bar of California Office of Legal Services at 415-561-8800.

### II. COMMERCIAL LANDLORD/TENANT

It is crucial that a copy of the lease be reviewed carefully for terms and conditions dealing with issues including loss of property use due to damage or destruction, rent abatement, limitation of liability, repairs, insurance and evictions. Parties to commercial leases, unlike residential leases, can waive or modify statutory rights and obligations.

#### A. Lease Provisions

##### 1. The Duty To Repair

Commercial and office leases typically require the landlord to make structural repairs (such as repairs to foundations, roofs, exterior walls, interior load-bearing walls, parking lots, walkways, etc.). In turn, the tenant is usually required to make interior repairs (e.g., plumbing, electricity, heating, ventilation, air conditioning systems, etc.). In some cases, however, the tenant may be required to make all repairs.

##### 2. Lease Provisions Limiting Landlord's Duty To Repair

The lease may include limitations on the landlord's duty to repair, such as conditioning the landlord's duty to repair on whether or not there is insurance. For instance, if the landlord is responsible for repairing the damage and the premises are only partially destroyed, the landlord may be required to repair the premises only if the damage is insured. If partial damage is uninsured, or if the premises are entirely destroyed, the landlord may have the option to either repair the damage or terminate the lease. Additionally, the lease may give the landlord the option to terminate it, regardless of insurance coverage, if the tenant is near the end of the lease term (within approximately six months).

##### 3. Tenants' Rights

The lease may contain a provision for abatement of rent. In other words, if the landlord is required to repair damage, the tenant's rent may be reduced in proportion to the extent of damage while the landlord makes repairs. Additionally, many leases give the tenant the right to terminate the lease if the landlord fails to undertake repairs within a specified time limit. In the event that the lease requires the tenant to repair the damage, the tenant may be required to repair only insured, partial damage.

**B. Notes Regarding Emergency Legislation and Self-Employed Workers**

It is important to obtain any local emergency orders or State legislation affecting residential and commercial landlord/tenant relationships. Self-employed commercial tenants should also be advised about Disaster Unemployment Assistance (See Section 10), Mortgage and Rental Assistance (See Section 7) and SBA disaster loans (See Section 9).

**III. DEATH AND PROBATE**

In the unfortunate event of death, family members may not know that there is assistance available to the survivors:

- A. Funeral expenses for deaths directly caused by the disaster (See Section 8);
- B. Disaster Unemployment Assistance (See Section 10); and
- C. Death and survivor benefits from the Social Security Administration.

Additionally, insurance policies need to be reviewed for coverage. Family members may have questions about probating the decedent's estate as well as their own estate planning needs (e.g., living trusts, wills, durable powers of attorney for property and health care, conservatorships and guardianships). Please refer to the State Bar pamphlets "Do I Need a Will" and "Do I Need Estate Planning" for general information. To order pamphlets, call the State Bar at 415-561-8867.

**IV. NONPROFIT ORGANIZATIONS**

A careful review of the organization's insurance policy and lease is in order. Eligible nonprofits may qualify for disaster housing assistance from FEMA, for disaster loans from SBA and federal tax deductions for disaster losses. An attorney experienced in nonprofit corporation law may be consulted. See Sections 5, 13F and Commercial Landlord/Tenant above (in this Miscellaneous Section, Paragraph II).

**V. REAL PROPERTY (MORTGAGE PAYMENTS)**

The damage or destruction of residential or business real property raises a number of issues such as tax consequences, insurance, repair and reconstruction, mortgage payments and foreclosure. See Sections 5, 9, 13A and 13F.

Mortgage payments are still due even if a home is destroyed. The lender should be notified immediately of the situation. The lender will have information on insurance coverage which may apply. If the policy does include coverage for the damage caused by the disaster, the homeowner must decide if the insurance money should be used to pay off the mortgage or to repair or rebuild the home.

Depending on the extent of property damage, the homeowner's ability to make mortgage payments and the lender's position, consider the following:

- A. Delay mortgage payments for a specific or indefinite time (with or without interest);
- B. Reduce monthly mortgage payments for a specific or indefinite time (with or without interest);
- C. Refinance the loan;
- D. Sell the property;
- E. Abandon the property to the lender (possibility of deficiency claim and negative credit report);
- F. Foreclose judicially or non-judicially (possibility of deficiency claim and negative credit report); or
- G. Other options offered by the lender.

For more information, please refer to Disaster Legal Assistance Manual, Los Angeles County Bar Association, Barristers Disaster Relief Assistance Committee, January 1994, 185 pp.

## VI.

### SMALL CLAIMS COURT

A disaster victim may want to take a dispute to small claims court if the dispute involves \$5,000 or less, such as recovering a security deposit from the landlord. See Section 13D. Please refer to the State Bar pamphlet "How Do I Use the Small Claims Court" and instruct the client to go to Small Claims Court to obtain written information on how to handle a small claims case. To order the State Bar pamphlet, call 415-561-8867. For more information about Small Claims Court, contact the court or the small claims advisor in your county (See County government listings in the White Pages of the phonebook).

## VII.

### TAXES

#### A. Property Taxes

California law provides for a reassessment of property taxes when damage to the victim's property caused by a natural disaster reaches a certain statutorily determined dollar amount. A request for reassessment must usually be filed within **six months** of a disaster and the application for reassessment must be completed and returned within **30 days**. Contact the county assessor for instructions about filing such a request. (See County government listings in the White Pages of the phonebook.)

#### B. State Taxes

For general information about filing state tax returns for the year in which the disaster occurred, including extensions for filing and deductions for loss of real/personal property, call the Franchise Tax Board at 1-800-852-5711.

#### C. Federal Taxes

Federal tax laws provide that a victim may be able to declare a casualty loss on his/her federal income tax return for damage to real or personal property. For general information about filing federal tax returns for the year in which the disaster occurred, including extensions for filing and deductions for loss of real or personal property, contact the Internal Revenue Service at 1-800-829-1040. IRS Publication 547, "Nonbusiness Disasters, Casualties and Thefts," and Publication 584, a workbook showing ways to calculate amounts of loss, may be helpful. Order them free from the IRS by calling 1-800-829-3676. Questions regarding income and property tax consequences should be referred to a tax specialist.

