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CALIFORNIA PRETRIAL RENT DEPOSIT PILOT PROJECT: A LEGAL AND EMPIRICAL ANALYSIS OF THE SYSTEM IN ACTION IN THE LOS ANGELES MUNICIPAL COURT (CENTRAL DIVISION)

BRUCE ZUCKER*

I. INTRODUCTION

In order to evict a tenant from his or her rental unit in California, a landlord must file a lawsuit, called an unlawful detainer action,[1] seeking court sanctioned possession and restitution of the subject premises. Landlords may not use force, intimidation, reduction of services,[2] or any other

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1. *See* CAL. CIV. PROC. CODE §§ 1161, 1161a. (West 1982 & Supp. 1998).
2. California Civil Code section 789.3 states, in pertinent part:

> (a) A landlord shall not with intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant as his residence willfully cause, directly or indirectly, the interruption or termination of any utility service furnished the tenant, including, but not limited to, water, heat, light, electricity, gas, telephone, elevator, or refrigeration, whether or not the utility service is under the control of the landlord.
> (b) In addition, a landlord shall not, with intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant as his or her residence, willfully:
> (1) Prevent the tenant from gaining reasonable access to the property by changing the locks or using a bootlock or by any other similar method or device; (2) Remove outside doors or windows; or (3) Remove from the premises the tenant's personal property, the furnishings, or any other items without the prior written consent of the tenant . . . .

"self-help" tactics[3] to influence a tenant into vacating his or her rental unit in lieu of following the court process.[4] However, landlords usually wish to get a tenant out of the rental unit as quickly as possible because tenants are often "indigent, judgment-proof" and render "an award of damages of rent [to] be meaningless."[5]

The unlawful detainer system was designed to be an expedited action, permitting a landlord to legally regain possession in a matter of a few weeks,[6] thereby reducing the amount of lost rents and lost profits. Unlawful detainer actions have priority over virtually all other pending actions (except criminal cases) and usually are set for trial within twenty days of the filing of the Memorandum to Set Case For Trial.[7]

In consideration of the short time frame involved, the proceedings are restricted as to the questions that may be addressed and the subject matter that may be litigated.[8] The landlord must categorically comply with the statutory notice terms[9] because the defendant's procedural rights are very re-

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Any violation of this section may result in an award to the aggrieved tenant of actual damages, $100 per day for each day of violation ($250 minimum per cause of action), attorneys fees, and/or injunctive relief during the pendency of the action. CAL. CIV. CODE § 789.3(c) (West 1982 & Supp. 1998).

Although this statute only applies to residential tenancies, nothing limits its application to temporary or occasional residences. *See* Otanez v. Blue Skies Mobile Home Park, 1 Cal. App. 4th 1521, 1525, 3 Cal. Rptr. 2d 210, 212 (1991).

3. At common law, landlords were permitted to resort to "self-help" in order to regain possession of the rental unit, e.g., lockout. *See* Daluiso v. Boone, 71 Cal. 2d 484, 495, 78 Cal. Rptr. 707, 714 (1969); Jordan v. Talbot, 55 Cal. 2d 597, 605, 12 Cal. Rptr. 488, 492 (1961).

4. A tenant (including month-to-month) has a property interest in his or her rental unit. At common law, a lease was considered to be a "transfer of possession of specific property for a temporal period or at will." ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 1 (1980). However, modern application has also considered a lease as a bilateral contract. *Id.*

5. MYRON MOSKOVITZ, CALIFORNIA EVICTION DEFENSE MANUAL § 1.2 (1998).

6. *See id.* at 411.

7. *See* CAL. CIV. PROC. CODE § 1179a (West 1982 & Supp. 1998). "In all proceedings brought to recover the possession of real property pursuant to [the forcible entry and detainer chapter], all courts . . . shall give such actions precedence over all other civil actions . . . to the end that all such actions shall be quickly heard and determined." *Id.*

All of the pre-trial processes have shorter time periods, including a motion to quash service of summons, motion for summary judgment, time to respond to service of the summons and complaint, and the setting of depositions. Even those processes that do not expressly have shorter time frames are subject to the issuance of an order shortening time, such as a motion to compel responses to interrogatories, production of documents, continuances, and service of subpoenas.

8. For example, the court may not ordinarily hear title disputes as part of the unlawful detainer trial. *See* Yuba River Sand Co. v. Marysville, 78 Cal. App. 2d 421, 425, 177 P.2d 642, 645 (1947). The court may not entertain a cross-complaint or counterclaim, at least while possession is still at issue. *See* Vasey v. California Dance Co., 70 Cal. App. 3d 742, 139 Cal. Rptr. 72 (1977). Collateral estoppel is limited in its application stemming from issues in unlawful detainer actions. *See generally* Landeros v. Pankey, 39 Cal. App. 4th 1167 (1995).

9. *See generally* De La Vara v. Municipal Court, 98 Cal. App. 3d 638, 159 Cal. Rptr. 648 (1997); Childs v. Eltinge, 29 Cal. App. 2d 843, 105 Cal. Rptr. 864 (1973).

stricted.[10] Failure to do so will result in a judgment in favor of the tenant.[11]

Even though the defendant is limited as to the defenses that he may raise to the unlawful detainer, courts have nonetheless increasingly allowed tenants to employ them. For example, the California Supreme Court recognized the implied warranty of habitability as a defense to the tenant's failure to pay rent.[12] Should the tenant prove that the landlord breached the implied warranty during the unlawful detainer action, the court must award judgment in favor of the tenant and deny possession to the landlord.[13] In addition, tenants may raise various other defenses to the landlord's unlawful detainer complaint, including retaliation,[14] inadequate or improper service of notice,[15] rent control issues,[16] landlord's bad faith,[17] waiver,[18] estoppel,[19] as well as other equitable defenses.[20]

Even though tenants' rights in unlawful detainer actions are limited, some have notoriously managed to abuse the unlawful detainer system in their favor by frivolously invoking the habitability defense or other proce-

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10. *See generally* S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 131 Cal. Rptr. 761 (1976). "The starting point in evaluating the proposed defense is the general rule that because unlawful detainer action is a summary designed to facilitate owners in obtaining possession of their real property, counterclaims, cross-complaints, and affirmative defenses are [generally] inadmissible." *Id.* at 723.

11. *See id.*

12. *See* Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704 (1974).

13. *See id.* at 631-37. *See also* CAL. CIV. PROC. CODE § 1174.2 (West 1982 & Supp. 1998).

14. *See* CAL. CIV. CODE § 1942.5 (West 1982 & Supp. 1998). "If a lessor retaliates against the lessee because of the exercise by the lessee of his rights under [California Civil Code section 1940 *et seq.*] or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days." *Id.*

15. *See* CAL. CIV. PROC. CODE § 1161 (West 1982 & Supp. 1998). In most instances, an unlawful detainer action is predicated upon an adequately constructed and served notice to quit. For a discussion of notices in unlawful detainer actions, see Bruce Zucker, *Action Depends on Adequacy of the Notice to Quit*, L.A. DAILY J., Mar. 19, 1998, at 8.

16. Many rent-control laws and regulations of the various California municipalities require "just cause" to evict tenants, and impose unique eviction requirements. *See* TERRY B. FRIEDMAN, CALIFORNIA PRACTICE GUIDE—LANDLORD-TENANT § 5:1 (1997).

17. *See* Strom v. Union Oil Company, 88 Cal. App. 2d 78, 198 P.2d 347 (1948) (holding where landlord was intentionally elusive and sought to induce tenant into forfeiture of lease by unfairly refusing rent, landlord failed to sustain cause of action in unlawful detainer).

18. *See* EDC Associates v. Gutierrez, 153 Cal. App. 3d 167, 200 Cal. Rptr. 333 (1984) (holding where landlord knowingly accepts payment of rent from tenant after tenant's alleged breach of lease occurs, landlord waives right to seek forfeiture of the tenancy).

19. *See* Salton Community Services v. Southard, 256 Cal. App. 2d 526, 531, 64 Cal. Rptr. 246 (1967) ("[W]here a lessor, by conduct subsequent to execution of the lease, leads a lessee to believe strict compliance with a covenant will not be required and the latter acts accordingly to his detriment, the lessor will be estopped to assert a failure to comply as a ground for forfeiture.").

20. *See Green*, 10 Cal. 3d at 620 (stating tenant may plead as defense to an action in unlawful detainer that the landlord breached the implied warranty of habitability).

dural devices as delay tactics.[21] One tenant actually managed to stay in possession of his rental unit for a ten-month period by filing a series of pre- and post-trial motions at a cost of over $20,000 to the landlord.[22]

Following the advent of these defenses, tenants increasingly raised them in their answers to the eviction suit. Not only did tenants increase the procedural defenses to the actions, but they also availed themselves of the bankruptcy process, causing further delays to eviction.[23]

As a result of this increase in procedural defenses, the unlawful detainer system, which was originally designed to be a speedy mechanism for landlords to recover possession of their rental units, became very cumbersome and time-consuming. California landlords have complained that the law "has gone too far" with safeguarding a tenant's right to remain in possession of his rental unit, resulting in a severe slow-down of the summary eviction system.[24] What used to take less than a month started to take several months, or sometimes even longer. Landlords increasingly lost millions of dollars each year as a result.[25]

Landlords and their interest groups have lobbied for a faster eviction system that reduces the amount of lost rents and other related legal costs.[26] Although the problem is perceived to be particularly troublesome in California, other states and their landlord lobbies have voiced similar concerns with delays in the eviction process.[27]

The California Legislature responded to this perceived slow-down of the unlawful detainer system with the creation of a new and different eviction system. This new system became known as a "Test" or "Pilot Project," implemented in select California courts, including Los Angeles. On March 3, 1994, Senator Kopp introduced Senate Bill 690.[28] This Bill passed through the Assembly and Senate, was signed by Governor Wilson on September 26, 1994, and was codified into law effective July 1, 1996, as California Code of

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21. For a discussion and illustration of this problem, see Stephanie O'Neill, *Tenants from Hell: Professional Deadbeats, "Petition Mill" Scam Artists Imperil Small Rental Property Owners Unfortunate Enough to Select Them as Renters*, L.A. TIMES, Aug. 8, 1993, at K1.

> Each year, landlords statewide lost at least $338 million to renters who refuse to pay, according to the 1991 Unlawful Detainer Study, sponsored by the California Apartment Law Information Foundation. While some of the losses stem from valid tenant gripes, most are believed to be the result of unwarranted claims of renters who choose, for whatever reason, not to pay.

Id.

22. *See id.*

23. *See id.*

24. Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 766 (1994).

25. *See* Cal. S.B. 690 § 1(b), 1995-1996 Leg., Reg. Sess. (Kopp 1994).

26. *See* Gerchick, *supra* note 24, at 765.

27. *See id.* at 765 n.19.

28. Cal. S.B. 690, 1995-1996 Leg., Reg. Sess. (Kopp 1994).

Civil Procedure section 1167.2, entitled the "Pretrial Rent Deposit Pilot Project."[29]

The Pilot Project seeks to reduce the time in which a residential landlord may regain possession of his or her rental unit by requiring tenants to comply with certain pre-trial procedures, including the presentation of an offer of proof at a pre-trial hearing, as well as posting up to two-weeks' rent with the court, in order that the tenant may receive a trial on the merits.[30] Established for a limited time, the California Legislature seeks responses from the local municipal courts testing the Pilot Project cases no later than September 30, 1998, and will re-examine the success of the program by December 31, 1998.[31]

This Article discusses the Pilot Project and compares it with the traditional unlawful detainer system currently in place in all of California's municipal courts. Part II discusses the origin and history of the unlawful detainer system and the way the traditional system operates, including its structure and design. Part III discusses the Pilot Project, including its background, statutory scheme, and procedural mechanism. Part IV turns to an empirical study and analysis of the Pilot Project as it compares with the traditional unlawful detainer system in the Los Angeles Municipal Court, Central Civil Division. Part V offers an analysis by this author as to the effectiveness of the Pilot Project in terms of the statutorily stated goals for success, a determination as to whether it is an improvement over the traditional system, a legal analysis of its impact upon landlord and tenant rights in California, and suggestions for alternative methods the Legislature may consider in order to assist California landlords to expeditiously evict abusive tenants. Part VI concludes that the Pilot Project achieved a statistically significant reduction in time from the filing of the complaint to restoration of possession of the rental unit (measured to the time the clerk issues a writ of possession), but fails to satisfy the Legislature's goal of a fifty percent reduction in time.

II. UNLAWFUL DETAINER PROCEDURE: ORIGIN AND HISTORY OF THE SYSTEM IN CALIFORNIA

At common law, property owners did not need the assistance of the court in order to evict tenants from their rental units. If a landlord desired to terminate a tenancy, he was perfectly within his rights to simply forcefully eject the tenant from the premises.[32] However, as time passed, courts became

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29. *Id.*

30. CAL. CIV. PROC. CODE § 1167.2(c)(1) (West 1982 & Supp. 1998).

31. *Id.* § 1167.2(a)(2)(F).

32. Under early English common law, a landlord was privileged to force his tenant to vacate the leased premises, provided the amount of force did not cause death or serious bodily harm. *See* SCHOSHINSKI, *supra* note 4, at 399. Provided the landlord stayed within these limits, a tenant could not prevail in a civil action for restitution or damages. *See id.*

increasingly concerned with the use of "self-help" by landlords in favor of maintaining the peace and orderly use of court processes.[33] By 1381, the English Parliamentary process eliminated the "self-help" rule and barred the use of force by the landlord in effectuating evictions.[34]

United States jurisdictions have departed from the early English common law rule and have expressly barred the use of self-help by landlords.[35] Virtually every state currently has an unlawful detainer or forcible detainer system for expeditiously evicting tenants through a court-sanctioned process.[36]

The California Supreme Court examined the limits of self-help in California in *Jordan v. Talbot*.[37] In *Jordan*, the plaintiff leased a rental unit from the defendant.[38] The lease agreement, signed by both parties, provided for a "right of re-entry" by the landlord and a lien against personal property in the event the tenant breached any material covenant or condition in the lease.[39] After the tenant failed to timely pay her rent, the landlord entered her rental unit, removed her belongings, and refused to permit her to re-enter.[40] The landlord did not file any court action for possession.[41]

Following a forcible entry and detainer action by the tenant, the court awarded damages for her dispossession.[42] On appeal, the landlord argued that he was not liable for forcible entry and detainer because the lease agreement contained a right of re-entry, he did not use "force" to enter the premises, and he was privileged to enter the rental unit in order to effect his "lien" on the tenant's personal possessions inside.[43]

The court rejected the landlord's arguments, holding that any provision in a lease that allows a landlord to enter a rental unit in order to dispossess a tenant without the resort to court processes is contrary to established public policy.[44] "Regardless of who has the right to possession, orderly procedure and preservation of the peace require that the actual possession shall not be disturbed except by legal process."[45] The landlord unlawfully resorted to

33. *See id.*

34. *See id.* at 399-400. Although the use of "self-help" became a violation of criminal law, the English system did not extend a private cause of action to illegally dispossessed tenants. *See id.*

35. *See id.*

36. *See id.* However, a minority of jurisdictions will permit self-help evictions, provided the lease agreement expressly permits it and the landlord uses only reasonable force. But, the prevailing view declares such provisions void as contrary to modern public policy. *See id.* at 403.

37. 55 Cal. 2d 597, 361 P.2d 20, 12 Cal. Rptr. 488 (1961).

38. *See id.*

39. *See id.* at 601.

40. *See id.*

41. *See id.*

42. *See id.* at 602.

43. *See id.* at 602-03.

44. *See id.* at 604-05.

45. *Id.* at 605.

self-help when he unlocked the tenant's rental unit without permission and removed her personal belongings, "even though there was not physical damage to the premises or actual violence."[46]

The common law doctrine of "self-help" is no longer a tolerable remedy for a landlord's need for restitution of the rental unit.[47] Forcible and unlawful detainer statutes in virtually every jurisdiction in the United States, including California, provide a summary proceeding for landlords to recover possession of their properties and restrict them to such legal processes.[48]

California enacted the unlawful detainer system in order to provide a landlord with a summary remedy for evicting a tenant from the rental premises for a violation of a covenant, condition, or restriction in the lease, including non-payment of rent.[49] The Legislature has attempted to completely establish the parameters governing the unlawful detainer action in these California statutes.[50] The following is a brief description of the process for this system.

A. Service of Notice

On initiating an unlawful detainer action, the landlord must serve upon the tenant the requisite notice pursuant to statute.[51] If the action is based upon a breach of a curable covenant, the landlord must serve a three-day notice to cure, perform, pay rent, or quit and deliver up possession of the premises.[52] If the tenant fails to cure the breach within the three-day period, or, alternatively, if he refuses to vacate the unit by the expiration of that time, a cause of action in unlawful detainer ripens.[53]

Alternatively, the landlord may serve either a three-day or thirty-day notice to quit. Such a notice is not based upon a curable breach of covenant, and simply demands restitution of the premises. A landlord may serve a three-day notice to quit where a tenant commits serious waste, causes a sub-

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46. *Id.*

47. *See* Daluiso v. Boone, 71 Cal. 2d 484, 78 Cal. Rptr. 707 (1969). California courts favor a "judicial adjustment of differences" with respect to resolving issues surrounding rightful possession of land and thus discourage the parties from "redressing or attempting to redress their own wrongs" at the expense of a possible breach of the peace. *Id.* at 495.

48. *See* SCHOSCHINSKI, *supra* note 4, at 408.

49. *See* CAL. CIV. PROC. CODE § 1161 (West 1982 & Supp. 1998).

50. *See* Cambridge v. Webb, 109 Cal. App. 2d Supp. 936, 937, 244 P.2d 505, 506 (Cal. App. Dep't Super. Ct. 1952).

51. There are limited exceptions to this rule. If the tenant is an employee of the landlord, no notice to terminate the leasehold is typically required, provided the employment contract clearly indicates the number of days that the tenant/employee has to vacate the unit. *See* CAL. CIV. PROC. CODE § 1161(1). Moreover, if the premises are substantially or completely destroyed, no notice to terminate is required. *See* CAL. CIV. CODE § 1933(4) (West 1982 & Supp. 1998).

52. *See* CAL. CIV. PROC. CODE § 1161 (West 1982 & Supp. 1998).

53. *See id.*

stantial nuisance, or employs the rental unit for illegal uses.[54] He may serve a thirty-day notice to quit at the expiration of a lease term or where the tenancy is based upon a month-to-month term and where he does not wish to renew or continue the tenancy.[55]

California law requires landlords to serve a three-day or thirty-day notice by one of three ways. First, he should serve the notice by personally delivering it to the tenant.[56] If the tenant is not in the rental unit, then the landlord may substitute serve the tenant by leaving the notice with "a person of suitable age and discretion" and by sending a copy via first-class mail to the tenant.[57] If either personal or substitute service cannot be achieved, the landlord may post the notice on the door of the rental unit and send the tenant a copy by first-class mail.[58] In addition to these three methods of service, a fourth method, certified or registered mail, is a proper alternative way to serve a thirty-day notice to quit.[59] Once the notice period expires and the defendant does not cure the breach of covenant and/or vacate the rental unit, a cause of action in unlawful detainer ripens.[60]

B. Overview of the Traditional System

Once a cause of action accrues in unlawful detainer, California law gives the plaintiff standing to proceed with the lawsuit. A landlord must file a complaint, demanding possession of the subject premises.[61] The basis for the action is usually premised upon the failure to surrender possession following one of the four notices to quit discussed above.[62]

The landlord must serve a copy of the complaint, along with a five-day summons, on the tenant.[63] After receipt of service of the summons and complaint, the tenant may file a demurrer,[64] a motion to strike,[65] a motion to quash,[66] a general denial, or an answer.[67] It is possible for a defendant to file a motion to quash, followed by a demurrer, and then followed by a general

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54. *See id.* § 1161(4).
55. *See id.* § 1161(1).
56. *See id.* § 1162.
57. *Id.* Although the statute seems to suggest that this second form of service may only be used if the tenant cannot be found at either his residence or "usual place of business," courts rarely require landlords to first attempt personal service upon the tenant at his workplace.
58. *See id.*
59. *See* CAL. CIV. PROC. CODE § 1946 (West 1982 & Supp. 1998).
60. *See id.* § 1161.
61. *See id.* § 1166.
62. *See supra* notes 51-60 and accompanying text.
63. *See* CAL. CIV. PROC. CODE § 1167 (West 1982 & Supp. 1998).
64. *See id.* § 430.10.
65. *See id.* §§ 435-437.
66. *See id.* §§ 418.10, 1167.4.
67. *See id.* § 1170.

denial or answer in order to delay the process and achieve additional time, even if the ultimate defense is meritless.

Once the tenant ultimately files his answer or general denial, the landlord may then seek a trial setting by filing a Memorandum to Set Case for Trial.[68] Pretrial procedures are limited,[69] and California courts normally do not set unlawful detainer actions for settlement or trial setting conferences. The clerk of the court must set the case for trial within twenty days[70] of filing the Memorandum to Set Case for Trial.[71] Parties are required to receive at least ten days advance notice of trial.[72]

Once the case is set for trial, the discovery process may continue.[73] However, even if the discovery process is incomplete, courts will not ordinarily grant a continuance of the trial.[74] Trial dates are otherwise rarely continued.[75]

Assuming the court enters judgment in favor of the plaintiff landlord, he or she may then seek enforcement of the judgment by applying for issuance of a writ of possession from the court clerk.[76] Once receiving the application, the clerk will verify the entry of judgment for possession and restitution of the premises and issue the writ.[77] The writ is then presented to the levying officer for the county (usually the sheriff or marshal), who serves it on the subject premises.[78] The occupants then have a minimum of five days to vacate the premises before the levying officer may return to force them out.[79] Of course, any occupant may then seek an ex parte order from the court that issued the judgment and writ of possession for a stay of execution on a vari-

68. *See id.* § 1170.5(a); *see also* CAL. CT. R. §§ 209ff, 507ff (West 1982 & Supp. 1998).

69. Discovery is available, but does not alone delay the setting of the trial date. *See* CAL. CIV. PROC. CODE § 2024(a) (West 1982 & Supp. 1998).

70. This assumes possession of the premises is at issue. *See id.* § 1179a. Otherwise, the action is not entitled to priority setting and will not necessarily be set within twenty days of filing the Memorandum to Set Case for Trial. *See id.*

71. *See id.* § 1170.5. The defendant may file a counter-memorandum within five days of the filing of the Memorandum to Set Case for Trial in order to request a different date for trial, to challenge the time estimate, or to request a jury trial. CAL. CT. R. § 507(c). The clerk must consider the defendant's counter-memorandum. *See id.*

72. *See* CAL. CIV. PROC. CODE § 594(b) (West 1982 & Supp. 1998).

73. Full discovery is available to litigants in unlawful detainer actions, though the time parameters are shorter in recognition of the expedited process. *See* FRIEDMAN, *supra* note 16, § 8:426; CAL. CIV. PROC. CODE § 2019 (West 1982 & Supp. 1998). The litigants to an unlawful detainer action may take depositions, propound interrogatories, demand inspection of documents, and request for admissions. *See id.*

74. *See* FRIEDMAN, *supra* note 16, § 8:454. However, a party may be able to receive *ex parte* orders to shorten time for processing discovery, especially if the opposing party caused a delay in the normal discovery process or if the sought after information is shown to be critical to the seeking party's case. *See id.* §§ 8:459, 9:38.

75. *See* CAL. CT. R. § 375(a) (West 1982 & Supp. 1998).

76. *See* CAL. CIV. PROC. CODE §§1170.5(a), 1174(c) (West 1982 & Supp. 1998).

77. *See id.* § 712.010.

78. *See id.* § 715.020(a).

79. *See id.* § 715.020(c).

ety of legal and/or equitable grounds.[80] Such stays, however, are rarely granted.

III. PRETRIAL RENT DEPOSIT PILOT PROJECT

A landlord may have the option of electing to proceed through the Pilot Project Test program in select California courts. The Pilot Project seeks to provide landlords with a faster system for evicting tenants, provided certain pre-conditions are met and provided the landlord gives up certain rights.

All of the pre-court processes are exactly the same as those under the traditional system. The landlord must serve the requisite notice upon the tenant (for Pilot Project cases, a three-day notice to pay rent or quit is the only applicable one). If the tenant refuses to cure the breach or, alternatively, vacate the premises by the expiration of the notice, then a cause of action in unlawful detainer ripens.

A. Background of the Pilot Project

Hearing many anecdotal stories of how the habitability defense caused "abuses and delays" in the unlawful detainer process, the California Legislature (primarily through Senator Quentin Kopp) considered and ultimately enacted legislation aimed at restricting California tenants from frivolously employing this defense.[81] Senate Bill 690, later codified as California Code

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80. The court may stay the execution of the writ of possession while considering the validity of post-trial motions, including one for a new trial, entry of new judgment, or application for relief from forfeiture. *See id.* § 918.

For discussion on application for relief from forfeiture, see Bruce Zucker, *Extreme Hardship May Undo Court-Ordered Eviction*, L.A. DAILY J., Nov. 6, 1997, at 8.

The court also has the inherent power to temporarily delay execution of the writ of possession due to hardship. *See id.*

81. Cal. S.B. 690, 1995-1996 Leg., Reg. Sess. (Kopp 1994).

> The Legislature finds and declares as follows:
>
> (a) The landlord-tenant relationship is unique. Rent may not be accepted by the owner during the pendency of an unlawful detainer action without a potential waiver of all of the owner's rights under an eviction notice. Moreover, during the pendency of unlawful detainer proceedings (1) owners are not allowed to eliminate any services provided to the tenant with the intent to cause the tenant to vacate the premises, (2) owners are not excused from making continuing real property tax, mortgage, mortgage interest, utility, insurance or maintenance payments for the premises, and (3) owners are not allowed to retake possession by self-help.
>
> (b) Millions of dollars are lost by owners of residential rental property on a recurring annual basis and added to the rent of rent-paying tenants as the result of uncollectible unlawful detainer judgments and the delays inherent in the state's unlawful detainer system.
>
> (c) Approximately 220,000 unlawful detainer cases are filed annually in the state, involving less than 5 percent of the state's rental units, costing millions of dollars in attorneys' fees and court costs, and unnecessarily burdening the court admini-

of Civil Procedure section 1167.2, created an alternate eviction system in certain California municipal courts[82] that became known as the Pretrial Rent Deposit Pilot Project.[83] This statute does not appear to be thoroughly thought through by its authors; as discussed and illustrated below, its wording has ambiguities and it contains provisions that appear internally inconsistent.[84]

The implementing statute[85] for the Pilot Project enumerates the objectives that the Legislature seeks to achieve.[86] First and foremost, the Legislature anticipates that cases proceeding through this system will effect a fifty percent time reduction as measured from the point the landlord files the unlawful detainer complaint to the moment the court issues the writ of possession.[87] Additionally, no more than five percent of tenants who lose their cases should be filing notices of appeals,[88] and no more than one percent of the rental units should have outstanding health department, building and safety, or other such regulatory agency citations.[89] Second, the Legislature does not wish to burden the courts with the processing and administration of this new eviction system.[90] As a measurement, it declared that the cost of its operation should not exceed that of the conventional system and that the "total administrative and judicial time" for processing these new cases should be reduced by 40%.[91] Finally, the Legislature wishes to ensure that "due process protections are maintained for all parties,"[92] although it did not explicitly define what it meant by this statement.

The Legislature does not appear to expect that each and every one of the above listed criteria will be achieved. "Failure to meet one or more of the numerical measurements of success shall not be interpreted as a lack of success of the project, if, in the Judicial Councils' view, the totality of circum-

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> stration and taxpayers.
>
> (d) It is the intent of the Legislature in establishing a statewide rent deposit project to mitigate the delays and revenue losses in the current unlawful detainer process by requiring deposit with the court of unpaid prospective rent for the period from the date of the commencement of the unlawful detainer action to the date of the anticipated trial.

Id.

82. CAL. CIV. PROC. CODE § 1167.2 (West 1982 & Supp. 1998).

83. Melissa Cordish, Preliminary Report on the Pretrial Rent Deposit Pilot Program in the Los Angeles Municipal Court Central Civil Division 4 (May 1997) (unpublished manuscript, on file with author).

84. *See, e.g., infra* note 130.

85. CAL. CIV. PROC. CODE § 1167.2 (West 1982 & Supp. 1998).

86. *Id.* § 1167.2(a)(1).

87. *Id.*

88. *Id.* § 1167.2(a)(1)(A).

89. *Id.* § 1167.2(a)(1)(B).

90. *Id.* § 1167.2(a)(1)(E).

91. *Id.* § 1167.2(a)(1).

92. *Id.* § 1167.2(a)(1)(D).

stances reflect success of the project."[93]

B. The Statutory Scheme

At the time of this writing, various California municipal courts were testing the Pilot Project.[94] In such areas, landlords may choose to prosecute an unlawful detainer action through either the Pilot Project or through the traditional unlawful detainer method.[95]

There are several differences between the Pilot Project and the traditional unlawful detainer systems. The requirement that a pre-trial hearing be held prior to the tenant receiving a trial on the merits is the primary difference between them.[96]

Should the landlord elect to proceed through the Pilot Project system, he must first satisfy several procedural prerequisites. First, the landlord must affirm under penalty of perjury that the rental unit at issue does not have any health, safety, fire, rent control, or other local agency citations outstanding.[97] If so, the landlord may not proceed through the Pilot Project system.[98] If discovered during the pendency of the action, the unlawful detainer is subject to dismissal.[99]

Besides ensuring the court that the unit has no outstanding health or safety citations, the landlord may only proceed through the Pilot Project system if the cause of action is based upon a holdover following service and expiration of a three-day notice to pay rent or quit.[100] The landlord may not use this system to prosecute actions based upon other causes of actions, such as breaches of covenants other than to pay rent or for holdover tenants following the service and expiration of a thirty-day notice to quit.[101]

Once the complaint is filed, a "reply form" is attached to the tenant's copy of the filed complaint.[102] After service of the complaint and reply form, the tenant may use it as one method to respond to the unlawful detainer.[103] The reason for the creation of the reply form is to allow a tenant who wishes

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93. *Id.* § 1167.2(a)(1).

94. As of January 1, 1997, the Pilot Project included courts located in Los Angeles, San Bernardino, Riverside, Santa Maria, El Cajon, and Downey. However, "nothing shall preclude other municipal courts [in California] from opting to implement the pilot project." *Id.*

95. *See id.* § 1167.2(b)(1). "The plaintiff *may* make a demand for a pretrial prospective rent deposit . . . ." *Id.* (emphasis added) (implying that the plaintiff is not required to do so).

96. *See id.* § 1167.2(b)(3).

97. *See id.* § 1167.2(b)(1). Apparently, the Legislature wants to ensure that so-called "slumlords" do not avail themselves of this expeditious system. Moreover, by definition, a unit with any outstanding health and safety citation has likely breached the implied warranty of habitability, thus raising the likelihood of a defense judgment.

98. *See id.*

99. *See id.* § 1167.2(c)(1).

100. *See id.*

101. *See id.*

102. *Id.* § 1167.2(b)(2).

103. *See id.*

to defend the action to notify both the landlord and the court that he or she "denies the allegations" in the complaint and wishes to be present at the mandatory pretrial hearing.[104]

There are two ways the tenant may file the reply form. First, he may go to the courthouse and personally file it with the court clerk.[105] In the alternative, within five days of service of the complaint, he may send it to the clerk by certified mail.[106] Regardless of whether the clerk has received the reply form from the tenant, the court will set the case for a pretrial hearing to occur within eight to thirteen days after the landlord has filed the proof of service for the complaint.[107]

Besides returning the reply form to the court, the tenant may alternatively choose to file an answer or a general denial.[108] As a practical matter, this will be sufficient to ensure the tenant has entered an appearance in the action. However, if the tenant does not return the reply form to the court within the five-day period or otherwise formally respond to the complaint, he or she may have to post a prospective rent deposit[109] with the court clerk[110] prior to (or on the day of) the hearing.[111] Otherwise, the tenant risks losing his right to receiving a trial on the merits.[112] If the tenant does not timely file the reply form or other responsive pleading within the five-day statutory period, or post the rent prior to (or on the day of) the hearing, the court will have the authority to summarily grant judgment in favor of the landlord at the pretrial hearing without giving the tenant any additional opportunity to defend the action.[113]

Following a pretrial hearing, the court may elect to set the case for trial on the same day.[114] However, the court may only do so if the notice of the pretrial hearing sent to the parties reflects the fact that the court may set the case for trial on the same day,[115] and the tenant must be provided the opportunity to have an attorney present for the trial.[116] The tenant may not waive the requirement of notice and opportunity to procure counsel for a trial oc-

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104. *Id.*

105. *See id.* § 1167.2(b)(2)(A).

106. *See id.*

107. *See id.* § 1167.2(b)(3).

108. *See id.* § 1167.2(c)(3).

109. "Prospective rent" is defined as receipt of up to 15 days rent, but not exceeding $500. "Prospective rent" is calculated pro rata and is based upon the lowest amount of rent charged during the prior six-month period. *See id.* § 1167.2(e).

110. The rent deposit must be made in the form of cash, cashier's check, or money order. *See id.*

111. *See id.* § 1167.2(b)(2)(B).

112. *See id.*

113. *See id.* § 1167.2(b)(2)(C).

114. *See id.* § 1167.2(b)(3).

115. *See id.*

116. *See id.* § 1167.2(c)(4).

curring on the same day as a pretrial hearing.[117] The tenant may be present and advance his legal position in opposition to the landlord's presentation at the pretrial hearing, provided he either returned the "reply form" within the statutorily mandated time parameters or posted the rent deposit prior to, or on the day of, the pretrial hearing.[118]

The pretrial hearing is supposed to be "informal," such that the goal of it is to "dispense justice promptly, fairly, and inexpensively."[119] As a practical matter, the rules governing the presentation and admissibility of evidence are often relaxed, much like those that govern during a small claims court trial.[120] As a general rule, attorneys are not permitted to represent their clients at this pretrial hearing.[121]

The primary function of the pretrial hearing is for the court to make a determination as to whether the landlord has pled a prima facie case evidencing a cause of action in unlawful detainer and whether the tenant has any basis, along with supporting evidence, for defending the action.[122] As part of this determination, the court will hear testimony as to whether the plaintiff is the landlord of the rental unit, whether the defendant failed to tender the rent described in the three-day notice, whether the defendant was served with the notice according to methods of service set forth in California Code of Civil Procedure section 1162,[123] whether the defendant held-over following expiration of that notice, and whether a "substantial conflict" exists between the parties.[124] After evaluating all of the testimony and other information submitted by the landlord and tenant, the court will rule as to

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117. *See id.*

118. In practice, some courts permit tenants to participate in the pretrial hearing even if they have failed to file a formal response prior to the hearing or posting of rent. *See generally* Cordish, Preliminary Report on the Pretrial Rent Deposit Pilot Program in Los Angeles Municipal Court Central Civil Division, *supra* note 83.

119. CAL. CIV. PROC. CODE § 1167.2(c)(1) (West 1982 & Supp. 1998).

120. *See id.* § 116.510 ("The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively."). *See also* Houghtaling v. Superior Court, 17 Cal. App. 4th 1128, 21 Cal. Rptr. 2d 855 (1993) (stating the rules of evidence and the presentation of cases are relaxed in California small claims courts).

121.

> [N]o attorney may take part in the conduct of the pretrial hearing unless the attorney is appearing to maintain an action by or against himself or herself, by or against a partnership in which he or she is a general partner and in which all partners are attorneys, or by a corporation. If any attorney appears at the pretrial hearing to maintain an action [in one of these three circumstances], an attorney may appear for the opposing party . . . .

CAL. CIV. PROC. CODE § 1167.2(c)(2) (West 1982 & Supp. 1998). However, an attorney may appear to represent either a landlord or a tenant at the pretrial hearing if a motion or demurrer is presented. *Id.* § 1167.2(c)(3).

122. *See id.* § 1167.2(c)(2).

123. *See supra* notes 51-60 and accompanying text.

124. A "substantial conflict" exists when material issues of fact need to be determined at trial. CAL. CIV. PROC. CODE § 1167.2(c)(1) (West 1982 & Supp. 1998).

whether the tenant will be ordered to deposit prospective rent with the court in order to receive a trial on the merits.[125]

If the court determines that the landlord has met his burden and that the tenant is not likely to prevail at trial, the court must order that the tenant deposit rent with the court if he wishes to receive a trial.[126] The court must give the tenant two court days following the pretrial hearing to post the deposit, provided an answer or reply form was timely filed with the court.[127] If the tenant failed to file a response to the action, the court should order him to post the rent deposit on the same day as the pretrial hearing.[128] If the tenant does not post that day, the court has the authority to enter judgment in favor of the landlord without further notice or proceedings.[129]

Regardless of whether the tenant timely filed a response to the action, he may still file one at the pretrial hearing.[130] Just like the traditional system, the tenant may file any of the statutorily authorized responsive pleadings, including a motion to strike, a demurrer, a general denial, or an answer.[131] However, unlike the traditional system, the responsive pleading may be oral or written.[132] If the tenant files an oral response, the court clerk must somehow reduce it to writing.[133] Any motion or demurrer that the tenant elects to file must be heard and ruled upon at the pretrial hearing.[134]

Although the general statutory scheme of the Pilot Project discourages the use of lawyers (and specifically prohibits their presence during most pretrial hearings), attorneys may appear at the hearing in order to present a motion or demurrer on behalf of a tenant, or to respond to a motion or demurrer on behalf of a landlord.[135] Otherwise, attorneys may not participate during the pretrial hearing phase.[136]

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125. *See id.*

126. *Id.* § 1167.2(c). The court must determine "whether a substantial conflict exists as to a material fact or facts relevant to the unlawful detainer" in order to require the defendant to post prospective rent to obtain a trial. *Id.*

127. *See id.* § 1167.2(c)(1).

128. *See id.*

129. *See id.* As a practical matter, courts participating in the Pilot Project permit tenants up to two days to post the pretrial rent deposit if they attend the hearing, regardless of whether they timely filed a reply or answer to the complaint.

130. *See id.* § 1167.2(c)(3). This subsection seems incongruous with subsection (b)(2)(B), which requires the defendant to file the reply form with the court, and at the same time, tender a rent deposit no later than the date for the pretrial hearing. Failure to comply with the latter subsection appears to require the court to then render judgment in the plaintiff's favor. *See id.* § 1167.2(b)(2)(B). It appears that these two subsections may be reconciled by interpreting them as mandating the defendant to tender a rent deposit prior to the time of the hearing if the defendant wishes to formally respond to the complaint, unless the tenant has already filed a reply form.

131. *See id.* § 1167.2(c)(1).

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

During the pretrial hearing, the court must make a determination as to whether there is a "substantial conflict" between the landlord and tenant.[137] If one does not exist, the tenant must post a rent deposit in order to receive a trial.[138] If there is a substantial conflict, or if the tenant posts rent, the court will set the case for trial.[139]

The main determination at trial will most likely focus on whether the landlord breached the implied warranty of habitability, thus mandating that the rent deposit (if previously posted) be returned to the tenant.[140] Of course, any other defenses that the tenant may prove to undermine the cause of action in unlawful detainer, such as the landlord's lack of standing, premature filing of the complaint, overstatement of the amount due in the three-day notice, improper service of the notice, or any other similar such defenses, should also result in a defense judgment and require a return of the rent deposit.[141]

Following trial on the merits, if the trial court determines that the landlord breached the implied warranty of habitability,[142] it will require that the rent deposit be returned to the tenant, provided that certain other conditions are satisfied.[143] The tenant need not pay any past rent due under the three-day notice. The tenant must only pay the reduced amount of rent from the trial date until the corrections of the deficiencies are made.[144]

On the other hand, should the tenant fail to prevail at trial, the court will release the rent deposit to the landlord. Any subsequent action for unpaid rent by the landlord must account for the rent deposit released to the landlord, and the court hearing the damages action must do a set-off as part of the judgment.[145]

The statutory scheme of Code of Civil Procedure section 1167.2 is not a model of clarity. There are several ambiguities and self-contradictions contained within the statute. However, to date, no appellate case law has emerged in order to interpret and clarify some of the provisions contained within the statute.

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137. *Id.* § 1167.2(c)(2).
138. *See id.* § 1167.2(c)(1).
139. *See id.*
140. *See id.* § 1167.2(f).
141. *See generally id.* § 1167.2(g).
142. *See id.* § 1167.2(f).
143. *See id.*
144. *See id.*
145. *See id.* § 1167.2(g). If the landlord prevails at the pretrial hearing, he may only receive a judgment for possession. The court may not award damages. *See id.* § 1167.2(c)(4). However, if the case proceeds to trial, the court may award damages as well as restitution of the subject premises. *See id.*

IV. THE EMPIRICAL STUDY: COMPARISON OF THE TWO SYSTEMS

A. *Study Methodology*

To compare the Pilot Project with the traditional unlawful detainer system, we examined data from the Los Angeles Municipal Court, Central Civil Division (LAMC). Of all of the California courts where the Pilot Project is currently tested, LAMC draws the largest number of unlawful detainer filings within its venue.

The LAMC clerk's office is responsible for accepting filings of the unlawful detainer complaints for both traditional and Pilot Project unlawful detainer actions. The clerk separates the two types of cases in its case numbering system by assigning the letter designation "P" to the Pilot Project cases and the letter designation "U" to the traditional cases. The remainder of the case number is determined by the year of the filing (i.e., "97") and the sequential number of the filing (i.e., "00123"). Therefore, the 123rd traditional unlawful detainer case filed in this court in 1997 receives the case number "97U00123," while the 123rd Pilot Project case receives the case number "97P00123."

We limited our inquiry to the populations of "P" and "U" cases filed in the 1997 calendar year. During 1997, the LAMC clerk accepted 347 P-cases and approximately 30,850 U-cases for filing. Because the population size of the Pilot Project cases was relatively small, we decided to code and collect data on each of the 347 P-cases for this study. To compare them with the U-cases, we took approximately one percent of the approximately 30,850 total U-cases as our sample size. This amounted to examining 400 U-cases at random.

As discussed above, the Legislature set forth three primary criteria for measuring the success of the Pilot Project. For the first criterion, the Legislature seeks a fifty percent decrease in time from the filing of the complaint to regaining of possession; less than five percent of the cases should be appealed by a losing tenant; and less than one percent of the rental units at issue in the court action should have outstanding habitability violations at the time the complaint was filed.[146] The second criterion calls for "significant administrative burdens . . . not [to be] imposed upon the courts."[147] The total cost of processing Pilot Project cases must be equal to or less than the total cost for processing traditional unlawful detainer cases.[148] For the third criterion, the Legislature wants to ensure that "due process protections" are maintained for both the landlord and the tenant. Specifically, this new system should not adversely effect the parties' abilities to "prepare and present a case" at the hearing.[149] Notwithstanding these goals, if the Pilot Project

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146. *See id.* § 1167.2(a)(1).
147. *Id.*
148. *See id.* § 1167.2(a)(1)(D).
149. *Id.*

fails to meet all of the criteria discussed above, the Legislature may nevertheless deem it "successful" if the "totality of the circumstances" indicate the Pilot Project is a good system.[150]

B. Specifics of the Study and Summary of Findings

For purposes of our study, we focused on the first criterion set forth by the Legislature; that is, an examination of the speed, the number of appeals, and the number of outstanding health violations compared between the two systems. In addition, we also measured other factors, including a comparison of the number of attorneys representing each party, the average rent amounts and number of pure non-payment cases proceeding through each system, the number of tenants who default, and the number of tenants qualifying for waivers of court fees.

1. Summary of Pilot Project Findings

With respect to the Pilot Project cases, tenants filed some form of a formal response in 142 cases (40.9%). Tenants filed reply cards in eighty seven cases (25.4%); they filed some other form of responsive pleading (either a general denial or answer) in sixty eight cases (19.6%); and they filed both a reply and either an answer or general denial in thirteen cases (3.8%).

Of the 347 active P-cases, 308 cases (88.8%) were set for pretrial hearings. Defendants failed to appear for pretrial hearings in 179 cases (51.6%). Of the remaining cases where the tenant appeared for the pretrial hearing, fifty-one cases (14.7%) were set for trial. Of that number, twenty-five cases (49.0% of pre-trial hearings) required the tenant to post a rent deposit as a prerequisite to receiving a trial on the merits. Three trials (5.9% of total trials) were held the same day as the pretrial hearing.

Out of the 347 P-cases, 33 cases (9.5%) were abandoned by the landlord at some point during the court process and prior to the rendering of a judgment; 57 cases (16.4%) were dismissed either voluntarily by the landlord or involuntarily by the court (due to lack of prosecution); and the remaining 257 cases (74.1%) went to final judgment.[151] In terms of attorney representation, sixty-eight cases (19.6%) had an attorney represent the landlord at some point during the process, while only four cases (1.2%) had an attorney represent the tenant.

We identified only one case with outstanding health citations. This resulted in a judgment in favor of the defendant. Only seven total cases resulted in judgments for defendants, which represents 2.0% of the 347 cases and 2.7% of the 257 judgments entered. The remaining 250 judgments

150. *Id.* § 1167.2(a)(1).

151. At the time of this writing, four cases were still pending. Each appears to have been abandoned by the landlord.

(97.3%) were entered in favor of the landlord. We found only one Pilot Project case that was appealed (.3%). See Table 1.

Table 1

Pilot Project – Summary of Findings

P-Cases (n=347)

Variable	Cases	%
Responses		
Reply	87	25.4
Answers/General Denials	68	19.6
Any Response	174	50.1
Defaults	179	51.6
IFPs (Fee Waivers)	83	23.9
Trials	51	14.7
Judgments Entered	257	74.1
For Plaintiff	250	97.3*
For Defendant	7	2.7*
Writs Issued	188	54.2
Appeals	1	0.3
Abandonments	33	9.5
Dismissals	57	16.4
Pretrial Hearings Scheduled	308	88.8
Rent Deposits		
Ordered	25	49.0**
Health Citations	1	0.3
Attorney Representation		
Plaintiff	68	19.6
Defendant	4	1.2

* Represents percentage of judgments entered.

** Represents percentage of cases set for trial on condition of posting rent deposit out of total number of trials.

2. *Summary of Traditional System Findings*

With respect to the traditional system, we sampled 400 U-cases at random out of a total of approximately 30,850 cases filed in the 1997 calendar

year, which represented 1.3% of the total population of cases. Of the 400 cases sampled, tenants filed a formal response in 165 cases (41.3%). Tenants defaulted in another 165 cases (41.3%). Landlords abandoned 26 cases (6.5%) and filed voluntary dismissals in 69 cases (17.3%). Attorneys represented landlords in 290 cases (72.5%). On the other hand, attorneys represented tenants in only eleven cases (2.8%).

Of the 400 U-cases sampled, 147 went to trial (36.8%). However, the court issued judgments in 305 cases (76.3%).[152] The court entered judgment in the landlord's favor in 300 cases (98.4% of total judgments), while it entered judgment in the tenant's favor in only 5 cases (1.6% of total judgments).

Of the 300 cases that went to judgment in favor of the landlord, the court issued 254 writs of possession, representing 84.7% of total landlord judgments. We found only two cases that were appealed by losing tenants (.5%). *See* Table 2.

Table 2

Traditional System – Summary of Findings

U-Cases (n=400)

Variable	Cases	%
Responses (Answers)	165	41.3
Defaults	165	41.3
IFP's (Fee Waivers)	140	35.0
Trials	147	36.8
Judgments Entered	305	76.3
For Plaintiff	300	98.4*
For Defendant	5	1.6*
Writs Issued	254	63.5
Appeals	2	0.5
Abandonments	26	6.5
Dismissals	69	17.3
Attorney Representation		
Plaintiff	290	72.5
Defendant	11	2.8

* Represents percentage of total judgments entered.

152. This figure includes default judgments.

3. Comparison Between Pilot Project and Traditional System

Following a summarization of the data, we compared several different variables between the two systems. The most crucial variable comparison involves the relative time from filing of the complaint to the issuance of the writ of possession. However, we also examined and reported the results of the comparisons between the number of outstanding health violations, the number of appeals, defaults, attorney involvement, fee waivers (IFP's), rental amounts, and the number of judgments entered and writs issued. The following tables summarize the results and the results are further discussed in the brief narrative that follows.

Table 3
Summary of Comparisons
(Traditional System vs. Pilot Project)

Variable	**U-Cases & P-Cases (n=747)**		
Decreases	**U-Cases**	**P-Cases**	**% Change**
Complaint to Judgment	34.2 days	27 days	-21.1
Complaint to Writ Issuance	38.7 days	33 days	-14.8
Trials	36.8 %	14.7%	-22.1
Attorney Representation (Plaintiff)	72.5%	19.6%	-52.9
Writ Issuances	63.5%	54.2%	-9.3
IFPs (Fee Waivers)	35.0%	23.9%	-11.1
Increases	**U-Cases**	**P-Cases**	**% Change**
Defaults	41.3%	51.6%	10.3
No Meaningful Difference	**U-Cases**	**P-Cases**	**% Change**
Appeals	0.3%	0.5%	0.2
Attorney Representation (Defendant)	2.8%	1.2%	-1.6
Judgments Entered (Plaintiff)	98.4%	97.3%	-1.1
Judgments Entered (Defendant)	1.6%	2.0%	0.4
Judgments Entered (Plaintiff or Defendant)	76.3%	74.1%	-2.2
Abandonments	6.5%	9.5%	3.0
Dismissals	17.3%	16.4%	0.9

Table 4
Rental Values – Summary of Comparisons
(Traditional System vs. Pilot Project)

Variable	U-Cases	P-Cases	% Change
Monthly Rental Amounts (mean)	$509.34	$501.51	-2.0
Types of Cases			
3-day pay or quit	74.4%	100.0%	25.6
3-day perform or quit	2.3%	—	—
3-day to quit	2.3%	—	—
30-day to quit	2.3%	—	—
§1161a foreclosure	11.6%	—	—
Other	7.1%	—	—

Table 5
Estimated Regression Coefficients
Dependent Variable: Days From Filing
Complaint to Issuance of Writ of Possession
(Traditional System vs. Pilot Project)
U-Cases & P-Cases (N=440)

Variable	(1)	(2)	(3)
Intercept (t-statistic)	38.73 (27.16)*	33.96 (19.83)*	34.70 (10.01)*
Pilot Project	-5.74 (-2.63)*	-2.57 (-1.15)	-2.71 (-1.18)
Trial	——	11.55 (4.78)*	10.87 (2.95)*
Default	——	——	-.80 (-0.24)
N=	440	440	440
Adjusted R^2	.0133	.06015	.05813
F-Statistic	6.9247	15.050	10.031

* Statistically significant at 1% level

Table 6
Time From Filing Complaint to Writ Issuance
(Best and Worst within the Two Systems)
P-Cases (n=347) U-Cases (n=400)

	Fastest 20 cases			Slowest 20 cases	
	P-Cases	U-Cases		P-Cases	U-Cases
	Time (Days)	Time (Days)		Time (Days)	Time (Days)
1.	9	9	1.	165	271
2.	11	9	2.	89	181
3.	12	13	3.	83	131
4.	13	13	4.	82	120
5.	14	13	5.	80	110
6.	14	13	6.	80	105
7.	14	14	7.	71	98
8.	14	14	8.	69	84
9.	14	16	9.	65	83
10.	14	17	10.	64	78
11.	14	17	11.	63	77
12.	14	17	12.	63	77
13.	14	17	13.	62	77
14.	14	17	14.	61	75
15.	14	17	15.	57	72
16.	15	17	16.	57	72
17.	15	18	17.	56	72
18.	15	18	18.	56	70
19.	15	18	19.	55	70
20.	16	19	20.	54	68

a. Time

The most telling portion of the study involved measuring the average processing time from the filing of the complaint to the entry of judgment and issuance of the writ of possession. As previously discussed, the Legislature seeks to reduce the "abuses and delays" inherent in the unlawful detainer system. By reducing the time frame and life span for an unlawful detainer action by fifty percent, the Legislature could consider the project at least partially successful.

The 1997 Pilot Project, or P-cases, had an average processing time from filing of the complaint to entry of judgment of 27.0 days, compared to the traditional, or U-cases, of 34.2 days. When we looked at the time from complaint to issuance of the writ of possession, the P-cases had an average time of 33.0 days, compared to the U-cases having an average time of 38.7 days. These figures represent an average reduction in time of 21.1% and 14.8%,

respectively. *See* Table 3.

We also looked at twenty "fastest" and twenty "slowest" cases of the population of P-cases and of the sample of U-cases by measuring the amount of time that elapsed from complaint to judgment in each. In terms of the slowest or "worst" cases, only one P-case out of the total population exceeded a 90-day life span—lasting 165 days from complaint to judgment. Only fourteen P-cases out of the total population exceeded a sixty-day life span. On the other hand, seven U-cases out of our one-percent sample exceeded a 90-day life-span. One case lasted 271 days from complaint to judgment. Nineteen U-cases of the sample lasted seventy or more days. *See* Table 6.

As far as the fastest cases are concerned, the "P" and "U" system tied with processing at least one case from complaint to judgment in nine days. The "P" system processed fifteen cases out of the total population in fourteen days or less. The "U" system processed eight cases out of the sample in fourteen days or less. *See* Table 6.

It should be noted that each of the fastest cases cited above (the nine-day total elapsed time) involved situations where the tenant did not file a responsive pleading or otherwise defend the action (defaulted). Moreover, in terms of the slowest cases in each of the two systems, there is no evidence in either of those cases that tenants abusively filed motions or invoked other delay tactics to cause the slow down. With respect to the P-case with the 165-day time lapse, the court issued a conditional judgment whereby the tenant won the right to remain in possession provided certain conditions were satisfied. By the time the default occurred, several months had elapsed. Presumably, the landlord received rent payments in the interim—otherwise, the default would have occurred earlier, thereby permitting the landlord to obtain a writ of possession more quickly. With respect to the U-case with the 271-day time lapse, the tenant did not respond to the lawsuit, and judgment was entered following default. The landlord was not represented by counsel, so presumably this delay was attributed to some anomalous situation.

b. Outstanding Health Violations

The next factor we examined involved the number of rental units that appeared to have outstanding health and safety violations. The ability to measure this criterion was difficult because the court judgments did not consistently reflect the court's findings on this issue. However, we concluded that the court entertaining a Pilot Project case reasonably would not award judgment in favor of the landlord if an outstanding health or safety citation existed at the time the complaint was filed. Therefore, we looked for cases where the tenant prevailed in the action as a possible indicator of an outstanding health violation.

This was not hard to do because only seven Pilot Project cases resulted in defense judgments. Of these cases, the court did not identify an outstand-

ing health violation in any of the case files, with the possible exception of one.[153] In order to stay within the statutorily stated parameters, less than one-percent of the cases, or 3.5 total cases, should not have any such violations. It appears, at most, only one of the Pilot Project cases in 1997 had such a violation, which is below the one percent mark.

With respect to the traditional cases, we were unable to determine with any measure of accuracy the number of cases that had outstanding health violations. Unlike the Pilot Project cases, a landlord is not precluded from proceeding through the traditional system even if the subject premises has such an outstanding violation at the time the unlawful detainer complaint is filed. However, very few U-cases resulted in defense judgments, only five cases out of our sample size of 400 (1.6%). Therefore, the likelihood of a significant number of U-cases having outstanding health violations is small.

c. *Appeals*

The Legislature declared that no more than five percent of Pilot Project cases should be appealed in order for it to be deemed successful.[154] With respect to the P-cases, we only found one case[155] where a tenant filed a notice of appeal from a final judgment. On September 9, 1998, the Appellate Department of the Los Angeles County Superior Court dismissed it, apparently due to the tenant's failure to pursue the appeal. However, we also examined the number of U-cases where a tenant appealed a final judgment. In the sample we examined, only two tenants filed notices of appeals. At the time of this writing, both of the appeals[156] were abandoned by the tenants. Therefore, in terms of the number of notices of appeals filed by losing tenants, there is virtually no difference between the two systems. Moreover, the number of cases appealed in the Pilot Project system is well under the statutorily-stated limit of five percent.

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153. Of the seven Los Angeles Municipal Court P-cases that resulted in defense judgments, four did not identify the reason for the court deciding in the tenants' favor. L.A. Mun. Ct. Case Nos. 97P188; 97P201; 97P243; and 97P254. A fifth case (L.A. Mun. Ct. Case No. 97P173) resulted in a defense judgment due to the landlord failing to properly register the rental unit with the Los Angeles Housing Department, Division of Rent Stabilization (*See* Los Angeles Municipal Code § 151.05, mandating landlords to register their rental units located within the City of Los Angeles and constructed prior to 1978 with the city's housing department. Otherwise, the landlord may not levy or collect rent from his tenant. Such a situation negates the validity of a three-day notice, obligating the court to summarily enter judgment in favor of the tenant.) A sixth case (L.A. Mun. Ct. Case No. 97P122) noted that the landlord failed to provide proper evidence for service of the three-day notice to pay rent or quit. A seventh case (L.A. Mun. Ct. Case No. 97P182) noted that the three-day notice to pay rent or quit was "defective." Further investigation into this file seemed to suggest that the landlord had previously been cited by a building, safety, or health agency for dilapidated conditions in the rental unit, thus rendering the three-day notice to pay or quit "defective."

154. *See supra* note 88 and accompanying text.

155. L.A. Mun. Ct. Case No. 97P332.

156. L.A. Mun. Ct. Case Nos. 97U06035 and 97U14247.

d. Defaults

We next looked at the number of tenants who defaulted in their eviction cases and compared them between the two systems. For the "U" sample, we only looked at the total number of tenants who failed to file responsive pleadings to the complaint. We did not include in our study the total number of tenants who filed responses to the complaints but who failed to attend the court trial.

For the "P" sample, we considered that a tenant defaulted if he or she failed to attend the pretrial hearing. The reason for using this criteria is due to the fact that the Pilot Project requires a pretrial hearing held irrespective of whether a tenant files a reply or answer to the complaint.[157]

Tenants defaulted in U-cases at a rate of 41.3% (165 total cases). This is compared to a 51.6% default rate in the P-cases (179 total cases).

However, for the P-cases, we also measured the number of tenants who filed a responsive pleading (either a reply or an answer), the number who filed a responsive pleading and failed to attend the hearing, the number who did not file a responsive pleading but attended the hearing, and the number of tenants who did not either file a responsive pleading or attend the hearing.

The results were quite interesting. Tenants responded in some form 50.1% of the time (174 cases), which would include filing a reply, an answer, a general denial, a pre-hearing motion, or by simply showing up at the pretrial hearing without previously filing any paperwork. They filed reply forms 25.4% of the time (87 cases); answers or general denials 19.6% of the time (68 cases); answer/general denial and a reply form 3.8% of the time (13 cases); and attended the hearing without filing paperwork in advance 9.2% of the time (32 cases). Only 11.8% of the time (41 cases) did tenants file either a reply, an answer, or both, and later fail to show for the pretrial hearing.

e. Attorney Involvement

Next, we measured the frequency of attorney representation in each of the two systems. We hypothesized that the number of attorneys involved in the pilot project system should be significantly less than the traditional system, given the legislative restriction on attorney participation.

Our results were indicative of this restriction. In the U-cases, we found that attorneys represented landlords in 290 cases (72.5%) and tenants in 11 cases (2.8%). In contrast, the P-cases only resulted in attorney representation of landlords in 68 cases (19.6%) and tenants in 4 cases (1.2%). This is a change of 52.9% and 1.6%, respectively.

f. In Forma Pauperis (Fee Waivers)

In Forma Pauperis or "IFP" is a signal that the court grants a litigant a

157. *See* CAL. CIV. PROC. CODE §1167.2(b)(3) (West 1982 & Supp. 1998).

waiver of court fees and costs because he or she falls below certain income threshold limits and therefore should be considered "low-income." We compared the number of IFP litigants who proceeded through each process to see if tenants from low-income rental units were increasingly being exposed to the Pilot Project system.

We found that 23.9% of tenants in the Pilot Project cases qualified for fee waivers. In the U-cases, 35.0% of tenants qualified.[158] This represents a change of 11.1%.

g. Rental Values and Nonpayment Cases

Next, we compared the differences in rental values and types of cases between the two systems. In order to do this, we randomly sampled 37 cases of the total population of Pilot Project cases (representing a sample size of 10.7%) and looked for monthly rental amounts, pretrial rent demands, and types of cases filed. We found that the average monthly rental amount was $501.51, and the average pretrial rent deposit demand was $201.00. By design, all of the Pilot Project cases involved non-payment of rent issues premised upon a three-day notice to pay rent or quit. Our sample did not reveal any commercial tenancy cases.

In contrast, we randomly sampled 43 cases of the original group of 400 U-cases. For each sample, we recorded the total monthly rent amount as well as the type of case involved. We determined that the average monthly rental value was $509.34.[159] With respect to the types of cases filed, 74.4% were nonpayment of rent cases premised upon a three-day notice to pay rent or quit. The remaining 25.6% consisted of section 1161a foreclosure evictions (11.6%),[160] thirty-day notice to quit (2.3%), three-day notice to cure breach of covenant or quit (2.3%), three-day notice to quit (2.3%), employment related evictions (2.3%), and commercial non-payment (4.7%).

From these figures, we compared the average rental amounts stemming

158. It should be noted that a tenant may proceed through the Pilot Project system without being required to remit an appearance fee. The clerk does not charge tenants for filing a "reply" card, which ensures them of their right to at least a pretrial hearing. It is possible for the tenant to remit an oral answer or denial at the hearing, and ultimately defend the entire action without ever filing a single document, which would require the tenant to pay a filing fee. This is not true for the traditional system. Tenants must file a responsive pleading in the traditional system in order to ensure their right to a trial or any other court hearing. Therefore, percentages of tenants in the Pilot Project cases that would have otherwise filed fee waiver applications would actually be higher.

159. Of the 43 cases we sampled, 35 involved residential tenancies and two involved commercial tenancies. The two commercial tenancies had monthly rental amounts of $2,790 and $1,600. We eliminated those two from our sample in order to arrive at the $509.34 figure. Without eliminating them, the average monthly rent amount is $600.46. The remaining five involved California Code of Civil Procedure section 1161a post-foreclosure eviction actions, which are not premised upon landlord-tenant relationships. Therefore, they do not have rental amounts at issue.

160. *See* CAL. CIV. PROC. CODE § 1161a (West 1982 & Supp. 1998).

from each system. The difference was slight, only a $7.83 difference between the two systems. However, it is interesting to see that the Pilot Project cases, however slight, on average involved less expensive rental amounts. *See* Table 4.

h. Entry of Judgments and Issuance of Writs

Another criterion that we measured involved the number of judgments that resulted in favor of either party. We hypothesized that the ultimate outcome of the case on the merits should not be affected by which system the landlord opted to use. However, we wanted to determine whether the court judgments would be affected by proceeding through either system. We measured the number of P- and U-cases resulting in judgments for landlords and for tenants.

The results were very close. In the "P" system, 74.1% of the Pilot Project cases (257 total cases) went to judgment, compared to 76.3% of the traditional cases (305), a difference of 2.2%. In the "P" system, 97.3% of the cases that went to judgment resulted in judgments in favor of the landlord, compared to 2.7% in favor of the tenant. In the "U" system, 98.4% of the cases that went to judgment were entered in favor of the landlord, compared to 1.6% in favor of the tenant.

With respect to issuance of the writ of possession, the difference was actually much greater. After the judgment is entered in favor of the landlord, a writ of possession is needed if the tenant still remains in possession. In the Pilot Project cases, the court clerk issued a writ of possession 54.2% of the time (188 of total cases). In contrast, the traditional system resulted in writ issuances 63.5% of the time (254 of total cases). This represents a 9.3% reduction of writs issued in Pilot Project cases.

C. Regression Analysis of the Time Variable

The most critical component to the unlawful detainer process involves summary adjudication of the relevant issues. The faster the landlord can evict a tenant, the greater the reduction in costs of unpaid rent. In order to determine whether the Pilot Project is accomplishing its primary goal, that is, reducing the time involved such that a landlord may regain possession of his rental unit, we analyzed the relative time between the filing of the complaint to the issuance of the writ of possession in each of the two systems.

In order to statistically analyze our data to test the integrity of the results of the time variable, we conducted a multiple regression[161] using 440 obser-

161. Multiple regression analysis is a procedure used to help the observer understand how one variable (the dependent variable) is influenced concurrently by a number of other variables (the independent variables). *See* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 439 (1992).

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vations[162] between the two systems and reported the results in Table 5. As our dependent variable, we used the number of days that elapsed from filing of the complaint to issuance of the writ of possession. As our independent variables, we examined (1) whether the variable was a P- or U-case, (2) whether a trial occurred, and (3) whether a default judgment had been entered. The purpose of this regression analysis was to test whether the 5.74 day (14.8%) reduction in time from complaint to writ issuance in the Pilot Project is due to the design and structure of the system itself, or if it is due to some other independent variable.

The coefficient on the Pilot Project shown in regression (1) of Table 5 indicates that Pilot Project cases take an average of 5.74 fewer days and is statically significant at the one percent (1%) level. When additional explanatory variables for trials and defaults are included, the coefficient on the Pilot Project falls to 2.57 and 2.71 days, respectively, and is no longer statistically significant. In regressions (2) and (3), the coefficient on trials indicate that the occurrence of a court trial increases the number of days by 11.55 and 10.87, respectively, significant at the one percent (1%) level in both regressions. The coefficient on default judgments in regression (3) is small, not statistically significant, and adds to the estimation of number of days.

The results of regressions (2) and (3) suggest that about one-half of the approximate six-day average reduction in time achieved by the Pilot Project over the traditional system may be attributed to the fact that the Pilot Project produces overall fewer trials, and the occurrence of a trial adds to the number of days of the lifespan of an unlawful detainer. However, to the extent the Pilot Project helps produce fewer trials, the total reduction of 5.74 days for the Pilot Project cases found in regression (1) correctly measures the impact of the new system in reducing the number of days from filing of the complaint to the issuance of the writ of possession. Further research will be necessary to help clarify the role of court trials in this dynamic and its impact on the Pilot Project.

V. EVALUATION OF THE PILOT PROJECT AND SUGGESTIONS FOR ALTERNATIVE PROCESSES

A. *Evaluation of the Pilot Project*

The Pretrial Rent Deposit Pilot Project emerged as the Legislature's response to the seemingly growing complexities, problems, and delays caused by the traditional unlawful detainer system in California.[163] The Legislature believes that landlords in California collectively lose millions of dollars each

162. We started with the total population of P-cases (347) and the total sample of U-cases (400), or 747 cases altogether. From those cases, we eliminated any case that did not result in the issuance of a writ of possession. This left us with 440 total cases between the two systems to use for the multiple regression analysis.

163. *See supra* notes 81-93 and accompanying text.

year in unpaid rent, attorneys' fees, court costs, and other collateral damage resulting from a tenant's failure to pay rent and a tenant's delay of an inevitable eviction by abusing the court process.[164] More specifically, the Legislature pointed the blame at the semblance of an overburdened unlawful detainer system that appeared to take an increasingly longer period of time to effectuate an eviction.[165]

In order to seek to reduce the amount of time necessary to evict a tenant, the Legislature established the Pretrial Rent Deposit Pilot Project, seeking a fifty percent reduction from the time a landlord filed a complaint for unlawful detainer until judgment was entered and possession was restored.[166] Based upon our study of the Pilot Project, this goal was not accomplished.[167]

The Los Angeles Municipal Court, which processed over 30,000 unlawful detainer actions through the traditional system in 1997 in its downtown courthouse alone, had a mean processing time, from filing of the complaint to issuance of the writ of possession, of 38.7 days. On the other hand, it processed the 347 total Pilot Project cases in that same year in an average of 33 days. Although a statistically significant reduction of almost six days, this amounts to only a 14.8% reduction in time, not a 50% reduction in time as hoped by the Legislature.

Another objective criteria that the Legislature set as a goal for achieving success for the Pilot Project is insignificant. The Legislature sought that less than five percent of Pilot Project cases should be appealed.[168] Although less than one percent of Pilot Project cases were appealed (only one person appealed his loss, which is .3 percent of all Pilot Project cases), the traditional unlawful detainer system had virtually no cases appealed either. In our sample, only two traditional system cases were appealed, which is .5 percent.

Finally, the Legislature set a goal for less than one percent of the Pilot Project cases to have outstanding violations.[169] Our study revealed only one Pilot Project case that appeared to have an outstanding health violation. On the other hand, the traditional cases may not have had very many either, perhaps less than one percent as well. As discussed above, we were unable to definitively make this determination. Nonetheless, there was virtually no difference between the two systems considering these two criteria alone.

The most significant measure of success turns on whether "due process" protections for tenants are maintained through the implementation of the Pilot Project eviction system.[170] This criterion is very vague, nebulous, and amorphous. The "due process" rights for tenants are already very limited in

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164. *See id.*
165. *See id.*
166. *See id.*
167. *See* discussion *supra* Part IV.B.3.a.
168. *See supra* note 88 and accompanying text.
169. *See supra* note 89 and accompanying text.
170. *See supra* note 92 and accompanying text.

the existing unlawful detainer system.[171] A system such as the Pilot Project, which only serves to further narrow a tenant's procedural rights, cannot be said to "maintain" due process protections. To the contrary, the Pilot Project seeks to limit attorney representation, alter the manner in which a tenant responds to the complaint, and severely limits the tenant from having the ability to have a trial on the merits.

Besides the statistical failure of the Pilot Project, the design of the system has inherent problems. For example, commentators have noted that indigent tenants, "who often have barely enough money for rent, food, clothing, and other necessities each month, that *have* paid rent to the landlord may not have enough funds to make *another* payment of rent to the court."[172] Although in practice, tenants may wait until the pretrial hearing before rent must be posted and thus have an opportunity to contest this requirement, the statutory design of the system nevertheless mandates a posting of rent prior to (and as a condition of receiving) a pretrial hearing.[173]

Even with the 14.8% reduction in time that the Pilot Project achieved in 1997, it is important to note that the traditional system processed over 30,000 cases in that same year, compared to only 347 cases for the Pilot Project. The traditional system therefore handled eighty-five times more cases during that year. If the Legislature replaced the traditional system with the Pilot Project, it is unclear whether the courthouse administration would be able to process the Pilot Project cases and achieve that same time reduction. Every case would be set for a pretrial hearing, which would no doubt impose a significant burden upon the court's ability to process unlawful detainer actions.

For all of the reasons discussed above, a system such as the Pilot Project, requiring a pretrial hearing and/or a pretrial rent deposit as a condition to receiving a trial on the merits, causes significant procedural problems upon the courts and upon the parties themselves. All of the judicial energy and resources required to administrate this new system may not be worth the 14.8% reduction in time that appears to have been achieved.

B. Proposals for Alternative Systems

Based upon this Article's assessment of the Pilot Project discussed above, it would be an imprudent decision for the California Legislature to

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171. *See supra* notes 8-11 and accompanying text.

172. Gerchick, *supra* note 24, at 848.

173. *See* CAL. CIV. PROC. CODE § 1167.2(b)(2)(C) (West 1982 & Supp. 1998). Notwithstanding this statutory requirement, the Los Angeles Municipal Court nevertheless permits tenants to appear at the pretrial hearing without having first posted a pretrial rent deposit. At the hearing, the tenant may seek a waiver of the posting requirement by, among other things, providing evidence to the court that the rent amount at issue had previously been paid. However, not all courts in California necessarily follow the Los Angeles Municipal Court's interpretation and implementation of this statutory provision. Therefore, it remains unclear how other courts in California testing the Pilot Project deal with this issue.

implement it on any large scale. Certainly, if the traditional system was replaced with one such as the Pilot Project system for all unlawful detainer actions, the courts would become so over-burdened with pretrial hearings that it would only serve to worsen the problem and fall well below the status quo. However, there does remain the concern that landlords need access to a summary eviction system that processes unlawful detainer actions in an expedited manner. The problems that have been presented in terms of delay tactics of the tenant seem to be the exception rather than the rule.[174] However, in lieu of eliminating the traditional system (or even adding a rent-deposit system such as the Pilot Project), better alternatives have been proposed and should be explored.[175] Five of them are discussed below.

1. Alternative Dispute Resolution

Various methods of alternative dispute resolution (ADR) have increasingly materialized over the last several years as ways for promoting a prompt, efficient, and fiscally preferable manner for reducing or eliminating litigation. Those promoting ADR have advanced several obvious and favorable factors for its use over traditional litigation systems: (1) faster dispositions; (2) less costly in terms of time and money; (3) less burdensome on the courts; (4) increased efficiency by using arbitrators or mediators with specialization in the particular area of law as opposed to court judges who must be generalists; and (5) actual compromises and settlements that are more likely to mirror the desires of the parties.[176]

Unlike other forms of civil litigation in California, the unlawful detainer system is presently void of any provision mandating landlords and tenants to participate in some form of alternative dispute resolution, such as judicial arbitration or mediation.[177] However, landlords may include provisions in rental agreements which may mandate disputes surrounding alleged breaches of the implied warranty of habitability be submitted to arbitration.[178] Such an

174. *See* discussion *supra* Part IV.B.3.a.

175. *See generally* Gerchick, *supra* note 24, at 846-58.

176. *See* JANE P. MALLOR, BUSINESS LAW AND THE REGULATORY ENVIRONMENT 32 (1997).

177. In ordinary civil litigation, courts may require the parties to participate in non-binding arbitration as part of the pretrial process in certain types of civil actions. *See* CAL. CIV. PROC. CODE § 1141.11. (West 1982 & Supp. 1998).

178. *See* CAL. CIV. CODE § 1942.1 (West 1982 & Supp. 1998). Section 1942.1 provides, in pertinent part:

> The lessor and lessee, may, if an agreement is in writing . . . provide that any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, pursuant to the provision of Title 9 (commencing with Section 1280, Part 3 of the Code of Civil Procedure), and that the cost of such arbitration shall be apportioned by the arbitrator between the parties.

Id.

agreement does not violate public policy normally suspect when any waiver of procedural rights is involved in a residential tenancy.[179]

As a practical matter, arbitration over residential tenancy disputes is futile unless the tenant truly has the ability to pay rent and is not merely invoking the habitability defense as a delay tactic. Unless an arbitrator's decision is binding, unreviewable, and immediately enforceable, such as providing the landlord with the ability to seek and obtain an enforceable writ of possession to oust the tenant from the rental unit in a speedy fashion, it behooves a landlord to choose this process. Although much of the technical court procedure of judicial unlawful detainer actions would be effectively eliminated and the substantive issues would be processed in a streamline manner, there is always the strong possibility that the tenant will not comply with the arbitrator's decision, or even with the decision reached between the parties. On the other hand, legislative action mandating binding and unreviewable arbitration risks only further depriving tenants of their already limited procedural rights in unlawful detainer actions.[180]

Notwithstanding many of the positive aspects alternative dispute resolution brings to the civil procedural system in California, in its present form, it may not solve landlords' concerns regarding speedy resolution of cases involving non-payment of rent. Perhaps the Legislature can test an ADR process that would work in tandem with the current unlawful detainer system. For example, with appropriate legislation, courts could set some amount (say, ten percent) of all unlawful detainer filings for mandatory judicial nonbinding arbitration/settlement conference within five days of the filing of the tenant's responsive pleading. Local bar associations can (and currently do) offer volunteer attorneys to serve as arbitrators and mediators.[181] These neutral individuals could meet with the parties at the prescheduled conference in order to work towards a resolution of the dispute. Any settlement or stipulation could then be acted upon that day by the law and motion judge or, for those courts with direct calendaring systems, by the judge assigned to that particular case. If the arbitrator or mediator could not resolve the case, no time is lost for the landlord. However, for those contested cases that are resolved, landlords (and tenants) receive some sort of tolerable compromise of their case and the court system is alleviated of some congestion. By using volunteer attorneys, there should be very little (if any) additional cost involved for its implementation.

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179. *See id.* § 1953. However, having such a provision may backfire on the landlord. At least one court has upheld the validity of an arbitration clause in a commercial lease agreement where the tenant sought a stay of the unlawful detainer action pending the outcome of the arbitration. *See* Mleynek v. Headquarters, 165 Cal. App. 3d 1133, 209 Cal. Rptr. 593 (1984).

180. *See supra* notes 8-11 and accompanying text.

181. *See, e.g.*, CAL. CIV. PROC. CODE § 1141.10 (West 1982 & Supp. 1998).

2. *Increased Court Sanctions, Statutory Damages, or Criminal Penalties for Frivolously Invoked Defenses*

Under current law, a landlord may seek punitive or statutory damages in an unlawful detainer action where the landlord proves the tenant acts with "malice" in his refusal to relinquish possession of the rental unit.[182] In order to support an action for punitive or statutory damages, the plaintiff must demonstrate that the defendant acted with malice in exercising his decision to holdover and in creating the action for unlawful detainer.[183] If proven, the plaintiff may be entitled to an award of actual damages or punitive damages up to three times the unpaid rent.[184] If the landlord properly pleads and proves "malice" on the part of the tenant, the plaintiff "may be awarded statutory damages of up to $600, in addition to actual damages, including rent found due."[185]

There are two problems with this current sanction. First, a possible $600 sanction provides very little (if any) incentive for the judgment-proof tenant to avoid engaging in delay-tactic behavior. Moreover, regardless of the amount of the potential sanction, a tenant who does not have the fiscal ability or financial resources to timely vacate the rental unit will not do so.

A second problem with this statutory damages provision lies with the potential danger for further delay of the unlawful detainer complaint. Plaintiffs must sufficiently plead a cause of action for statutory damages on the face of the complaint.[186] Otherwise, stating mere "conclusory allegations of malice" in order to invoke this provision may subject the complaint to a demurrer by the tenant, leading to a substantial delay of the eviction action.[187]

Notwithstanding the current California punitive or statutory damages provision, the Legislature could easily enact new legislation to empower the courts to impose severe civil sanctions or empower the government to seek criminal penalties against those few tenants who severely abuse the defense process.[188] For example, some states have enacted statutes criminalizing behavior whereby a tenant who remains in possession "without justification" is deemed "stealing" a landlord's rental services, thus committing a misdemeanor.[189]

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182. *Id.* § 1174(b).

183. *See id.*

184. "If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded either damages and rent found due or punitive damages in an amount which does not exceed three times the amount of damages and rent found due." CAL. CIV. PROC. CODE § 1174(b) (West 1982 & Supp. 1998).

185. *Id.*

186. *See* Roth v. Morton's Chef Services, Inc., 173 Cal. App. 3d 380, 218 Cal. Rptr. 684 (1985). Plaintiff must allege and prove defendant's "continued possession is malicious," entitling him to punitive damages. *Id.* at 388.

187. *See* MOSKOVITZ, *supra* note 5, § 13.29.

188. *See* discussion *supra* Part IV.B.3.a.

189. Gerchick, *supra* note 24, at 847-48.

However, imposing civil sanctions or criminal penalties may be risky. Certainly, tenants should not be discouraged from zealously defending their legal rights to remain in possession of their rental units. As long as the tenant in good faith pleads recognized defenses supported by some semblance of authenticity, he should not be sanctioned, even if the result is delay in the process. Prosecutors, responding to pressures from local landlord lobbies, could resort to pursuing actions against tenants perceived to be frivolously delaying the eviction but who actually are exercising their due process rights. Perhaps a clearly authored and sufficiently detailed criminal statute could give the government the teeth it needs to criminalize the extreme situations, yet at the same time ensure that no tenant gets prosecuted for raising good faith defenses to the eviction suit.[190]

3. *Vexatious Unlawful Detainer Litigant Statute*

Some tenants repeatedly abuse the court eviction system to delay an inevitable eviction. A way to control this problem may be through invoking a "vexatious unlawful detainer litigant" statute, modeled after California's vexatious litigant statute which declares any individual who brings five unsuccessful lawsuits without having attorney representation in a seven-year period a "vexatious litigant."[191] Such an individual may be required to post a bond in order to proceed with subsequent lawsuits.[192]

However, California's "vexatious litigant" statute is only targeted at plaintiffs in ordinary civil actions. A California "vexatious unlawful detainer litigant" statute could have similar language as the former, but target certain problem tenants. This new statute could mandate that any tenant who has a history of unsuccessfully defending unlawful detainer actions over a particular time period and who invokes various procedural delay devices must obtain court approval *prior to* using the discovery process, issuing subpoenas, or filing motions. For example, a tenant who wishes to serve interrogatories on the plaintiff may do so, unless the plaintiff seeks to have the tenant declared a "vexatious unlawful detainer litigant" as a result of the tenant having the requisite number of prior unsuccessful defenses to unlawful detainer actions and where each of those prior actions involved procedural maneuvers calculated at delaying the action.

The "vexatious unlawful detainer litigant" statute could read as follows:

> Any individual who enters an appearance in at least three unlawful detainer actions in this state in a three-year period that ultimately result in adverse judgments against him *and* where he repeatedly files unmeritorious motions, pleadings or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay is a "vexatious unlawful detainer litigant." In any un-

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190. *See id.* at 848.

191. CAL. CIV. PROC. CODE § 391 (West 1982 & Supp. 1998).

192. *See id.* § 391.1.

> lawful detainer action pending in any court of this state, a plaintiff may move the court, upon five-days notice and hearing, for an order requiring the defendant to seek leave of court prior to using the discovery process, issuing subpoenas, or filing any motions. The motion must be based upon the ground, and supported by a showing, that the defendant is a vexatious unlawful detainer litigant and that there is not a reasonable probability that he will prevail in the unlawful detainer action against the moving plaintiff. The defendant, upon ex parte application, may obtain leave of court to use the discovery process, issue subpoenas, or file motions.

Attorneys representing landlords could utilize one of several eviction reporting services[193] to determine whether the tenant has the necessary prior unlawful detainer cases in order to have him declared a vexatious unlawful detainer litigant. Of course, given that the timeframe of unlawful detainer actions is so short, any motion to have the defendant declared a "vexatious unlawful detainer litigant" must happen quickly, and usually at the outset of the action. Otherwise, the vexatious tenant could successfully delay the process.

Although this proposal seems rather harsh, in practice, very few tenants will fall within the definition of the proposed statute. As concluded in the results of the empirical study above,[194] very few tenants truly employ delay tactics to abuse the system. Therefore, the use of a "vexatious unlawful detainer litigant" statute should be the anomaly, rather than the rule.

4. Restitution Fund

Another possible alternative to help minimize losses associated with problem tenants involves the establishment of a restitution fund aimed at providing partial compensation to those small and relatively low-income landlords who experience difficulty or are otherwise unable to financially survive a tenant frivolously delaying an eviction. The idea of a restitution fund is not new, and it actually comes from the criminal justice system and the California Victims of Crime Program.[195] Under the Victims of Crime Program, any California resident who detrimentally suffers a "pecuniary loss" as a victim of a crime may be eligible to apply for benefits.[196] Any person convicted of a crime in the State of California may be ordered to pay a "restitution fine" for deposit into the Restitution Fund in the State Treasury

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193. California has several credit reporting agencies that provide landlords with information on individuals who have been parties to unlawful detainer actions. These agencies may report information about any individual who was a party to such an action, *even if he ultimately prevailed in the lawsuit. See* U.D. Registry, Inc. v. California, 34 Cal. App. 4th 107, 40 Cal. Rptr. 2d 228 (1995), *cert. denied*, 116 S. Ct. 777 (1996).

194. *See* discussion *supra* Part IV.B.3.a.

195. *See* CAL. GOV'T CODE § 13959 (West 1992 & Supp. 1998). "It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss which they are unable to recoup without suffering serious financial hardship." *Id.*

196. *Id.*

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for the purpose of funding the Victims of Crime Program.[197] The State Board of Control administers this program and uses the "restitution fines" for the purpose of indemnifying other victims of crime.[198]

California could implement a program for the unlawful detainer system very similar to the Victims of Crime Program discussed above. The court clerk can assess a $2 to $3 special assessment, over and above the current $94 to $101 filing fee for unlawful detainer actions, to go into a special restitution fund.[199] For example, in the area covered by the Los Angeles Municipal Court alone, over 30,000 unlawful detainer actions are filed each year,[200] which would result in raising $60,000 to $90,000 annually. The court could administer a "Victims of Abusive Tenants" fund, whereby low-income landlords could file an application for reimbursement for losses that directly result from such problem tenants.

Although the amount available in the fund would be very small compared to the total number of filings each year, this study concluded that even the traditional unlawful detainer system processes cases in a relatively timely fashion. It appears to be the anomaly where a landlord is truly victimized by a tenant who raises frivolous defenses to delay the action. Therefore, the number of claims against the proposed fund should not be enormous. Moreover, criteria could be established to further minimize the number of landlords who would qualify for reimbursement, thus ensuring that those landlords most in need and/or those landlords most victimized actually receive money from the fund.

5. *Priority Setting for Landlord Hardship: The "Small Landlord Remedy"*

Although any landlord endures a heavy burden when he must resort to the court system to evict a non-paying tenant, small-scale landlord operations (such as the individual who owns and lives in one unit of a duplex and leases the other to a renter) may experience an even greater burden than larger property management companies. "Perhaps the greatest financial and personal hardship for a landlord occurs when delays and costs of the eviction process force the landlord to lose her property to a mortgage or tax foreclosure."[201]

The idea of the need for a "small landlord remedy" has previously been proposed in order to assist the "hardship landlord" by extending "priority over nonhardship landlords in setting a trial date, serving the notice to va-

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197. CAL. GOV'T CODE § 13967 (West 1982 & Supp. 1998).

198. *Id.*

199. To file an unlawful detainer complaint for demands up to $10,000, the fee is $94. For demands in excess of $10,000, the filing fee is $101. *See* Coordinated Procedural Rules for Municipal Courts of Los Angeles County (Fee Schedule), Southern California Court Rules, Daily Journal.

200. *See* discussion *supra* Part IV.B.

201. Gerchick, *supra* note 24, at 853.

cate, and conducting the eviction."[202] Although the usual statutory time parameters for notice would remain,[203] these actions could receive priority over other pending unlawful detainer cases.

Like the restitution fund, this proposal "could only be extended to a small proportion of landlords" because of the nature of having such a priority system.[204] Nevertheless, it may be a viable option to help alleviate one of the articulated concerns of the Legislature when it implemented the Pilot Project.[205]

VI. CONCLUSION

For the latter portion of the twentieth century, California law has restricted a landlord's ability to freely evict tenants from his rental units. After the elimination of "self-help" evictions and the advent of court process and the unlawful detainer system, the courts and Legislature have implemented additional procedural mechanisms to protect tenants' property interests in their rental units. As tenants increasingly availed themselves to these protections, the time frame for a judicial eviction proceeding increased, resulting in increased costs and lost profits to California's landlords.

The California Legislature reacted to pressure from landlord lobby groups to alter the method by which an unlawful detainer action should proceed by implementing the Pretrial Rent Deposit Pilot Project in order to accelerate the court eviction process. However, as this study showed, the Pilot Project failed to achieve the primary goal that the Legislature intended, that is, a fifty percent reduction in time from filing of the complaint to restoration of possession. Rather, only a 14.8% reduction was achieved. Although statistically significant, the traditional system proved to have been working satisfactorily all along, with a 38.7 day average processing time from filing of the complaint to the issuance of the writ of possession. This is only about five days longer than the thirty-three day average processing time for Pilot Project cases.

Rather than implement a system such as the Pilot Project, perhaps the Legislature should focus on more constructive alternatives, such as alternative dispute resolution, sanctions and/or criminal penalties for those few tenants who do abuse the eviction process, a restitution fund that certain abused landlords may access in order to remedy their losses, or expedited hearings for certain small landlords who may face extreme hardship unless their court eviction case is processed in an ultra-speedy manner.

The Pilot Project has a "sunset date" of December 31, 1998, at which time the Legislature will determine whether to continue it. From this

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202. *Id.*

203. *See supra* notes 51-60 and accompanying text.

204. Gerchick, *supra* note 24, at 853.

205. *See id.*

author's study and experience, it seems that the traditional system is perfectly capable of handling court evictions in California in a very timely fashion.