CITY OF OAKLAND

BILL ANALYSIS

Date: May 12, 2011

Bill Number: AB 934

Bill Author: Feuer

DEPARTMENT INFORMATION

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RECOMMENDED POSITION: Support
Oakland's Housing, Residential Rent and Relocation Board voted to endorse AB 934 and asked the City Council to also support it.

Summary of the Bill: AB 934 would amend Civil Code § 47, regarding litigation privilege, to remove eviction notices from the protection of the privilege. The litigation privilege protects the maker of a false statement made in the context of litigation from being liable for such statement. This bill would give a tenant more legal recourse against a landlord who serves the tenant with a fraudulent or false eviction notice.

The California Supreme Court extended the litigation privilege to include pre-litigation eviction notices in *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232. This extension of the litigation privilege to eviction notices essentially precludes tenants from being able to bring a wrongful eviction action against a landlord who gives a tenant a false eviction notice. The concept was further extended in *Feldman v. Park Lane Assoc.* (160 Cal.App. 4th 1467) to cover verbal statements to evict. By taking eviction notices out of the litigation privilege, AB 934 would restore the status of the law of wrongful eviction prior to the *Action Apartment* decision, when tenants were able to bring legal action against a landlord who issues a fraudulent or false eviction notice.

Applying the litigation privilege to Pre-litigation notices severely hampers enforcement of eviction laws by tenants and the City. Many tenant simply leave after a wrongful notice because they do not know the notice is invalid or they fear that if the landlord brings an eviction action, they will have to defend it and have an eviction on their credit records. The City Attorney's Office is often constrained from taking legal action because a

landlord's wrongful activity is protected by the litigation privilege. Some landlords bring anti-**SLAPP** lawsuits against tenants who challenge eviction notices.

Positive Factors for Oakland: Removing pre-litigation eviction notices from the litigation privilege makes the Just Cause Ordinance more enforceable by tenants and the City. The City Attorney's Neighborhood Law Corps has seen banks and their agents, following foreclosure, attempt to evict lawful tenants from their homes using invalid notices and other practices. Tenants are protected by the Just Cause Ordinance against arbitrary evictions even after a foreclosure. Not only are tenants removed from their homes unlawfully, but the City is left with more vacant units. By covering pre-litigation notices under the litigation privilege, tenants have little recourse against a landlord giving a false eviction notice. Including eviction notices within the litigation privilege also makes it difficult for tenants and the City Attorney's Office to enforce the Just Cause Ordinance.

Negative Factors for Oakland: Removing pre-litigation notices from the litigation privilege makes evictions riskier for landlords and may discourage some landlords from evicting tenants.

PLEASE RATE THE EFFECT OF THIS MEASURE ON THE CITY OF OAKLAND:

___ Critical (top priority for City lobbyist, city position required ASAP)

_X_ Very Important (priority for City lobbyist, city position necessary)

___ Somewhat Important (City position desirable if time and resources are available)

___ Minimal or ____ None (do not review with City Council, position not required)

Known support: Los Angeles City Attorney,
Santa Monica City Attorney
Los Angeles Center for Law and Justice
National Housing Law Project
Public Counsel Law Center
San Francisco Tenants Union

Known Opposition:
California Apartment Association
California Association of Realtors

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Apartment Association of Greater Los Angeles
Apartment Association of Orange County
San Francisco Association of Realtors

Respectfully Submitted,

Nancy J. Nadel, Councilmember
Oakland City Council, District 3

Approved for Forwarding to
Rules Committee

Office of City Administrator

Item: _____
Rules & Legislation Comte.
May 12, 2011

CURRENT BILL STATUS

MEASURE : A.B. No. 934
AUTHOR(S) : Feuer.
TOPIC : Privileged communications.
HOUSE LOCATION : ASM
+LAST AMENDED DATE : 03/29/2011

TYPE OF BILL :
Active
Non-Urgency
Non-Appropriations
Majority Vote Required
Non-State-Mandated Local Program
Non-Fiscal
Non-Tax Levy

LAST HIST. ACT. DATE: 03/30/2011
LAST HIST. ACTION : Read second time. Ordered to third reading.
PILE : ASM THIRD READING
FILE DATE : 05/02/2011
ITEM : 22

COMM. LOCATION : ASM JUDICIARY
COMM. ACTION DATE : 03/22/2011
COMM. ACTION : Do pass as amended.
COMM. VOTE SUMMARY : Ayes: 07 Noes: 00 PASS

TITLE : An act to amend Section 47 of the Civil Code, relating to privileged communications.

AMENDED IN ASSEMBLY MARCH 29, 2011

AMENDED IN ASSEMBLY MARCH 10, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL No. 934

Introduced by Assembly Member Feuer

February 18, 2011

An act to amend Section 47 of the Civil Code, relating to privileged communications.

LEGISLATIVE COUNSEL'S DIGEST

AB 934, as amended, Feuer. Privileged communications.

Existing law provides that libel is a false and unprivileged written publication that injures the reputation, and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Existing law makes certain publications and communications privileged, and therefore protected from the threat of civil action, including communications made in a legislative proceeding, judicial proceeding, or other proceedings authorized by law, except as specified.

This bill would identify specified communications that are not made privileged under those provisions, including communications authorized, or made unlawful, by certain provisions of state law relating to real property transactions, or by local ordinances *laws* regarding the regulation of rents, termination of tenancy, eviction, or harassment of residential tenants, or discrimination against residential tenants.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 47 of the Civil Code is amended to read:

47. A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(5) This subdivision does not make privileged any communication made pursuant to or authorized by Section 827, 1946, 1946.1, 1946.5, or 1951.3 of this code, or by Sections 1161, 1161a, and 1161b of the Code of Civil Procedure. *However, an allegation or averment contained in a pleading or affidavit filed in an action for unlawful detainer shall be privileged as to a subsequent cause of action for defamation, as defined in Section 44.*

(6) This subdivision does not make privileged any communication made unlawful by any provision of Part 2 (commencing with Section 43) of Division 1 or Title 5 (commencing with Section 1925) of Part 4 of Division 3 of this code, or Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure, or Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Govemment Code, or by a local ordinance *law* regarding the regulation of rents, termination of tenancy, eviction, or harassment of residential tenants, or discrimination against residential tenants. *However, an allegation or averment contained in a pleading or affidavit filed in an action for unlawful detainer shall be privileged as to a subsequent cause of action for defamation, as defined in Section 44.*

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or quahfications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

(d) (1) By a fair and true report in, or a communication to, a pubhc journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a pubhc official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged aiy communication to a public joumal that does any of the following:

(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fah and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawfiil purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

(f) In enacting paragraphs (5) and (6) of subdivision (b), it is the intent of the Legislature to invalidate the holdings in Action Apartment Ass'n v. Santa Monica Rent Control Bd. *Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232 and Feldman v 1100 Park Lane Associates (2008) 160 Cal.App.4th 1467.

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BILL ANALYSIS

ASSEMBLY THIRD READING
AB 934 (Feuer)
As Amended March 29, 2011
Majority vote

JUDICIARY 7-0

Ayes:	Feuer, Wagner, Dickinson, Huber, Huffman, Monning, Wieckowski		

SUMMARY : Amends the state's "litigation privilege" statute to exempt certain actions arising in the context of landlord-tenant law. Specifically, this bill :

1) Exempts from the definition of a "privileged communication," for purposes of the litigation privilege statute only, any communications made pursuant to or authorized by those sections of the Civil Code that authorize and regulate notices to tenants regarding change or termination of a lease and sections of the Code of Civil Procedure that authorize and regulate notices to quit and the filing of an unlawful detainer for recovery of rental property.

2) Exempts from the definition of "privileged communication," for purposes of the litigation privilege only, any communication made unlawful by state statute, including forcible detainers and violations of civil rights and housing discrimination laws, or communications made unlawful by a local ordinance regarding the regulation of rents, termination of tenancy, eviction, harassment, or discrimination against residential tenants.

3) Specifies, notwithstanding the above provisions, an allegation or averment contained in any pleading or affidavit filed in an action for unlawful detainer shall be privileged as to a subsequent cause of action for defamation.

4) Specifies that the above provisions are intended to overrule the holdings in Action Apartment v. City of Santa Monica (2007) 41 Cal. 4th 1232, and Feldman v. 1100 Park Lane (2008)

160 Cal. App. 4th 1467.

EXISTING LAW :

1) Provides that libel is a false and unprivileged written publication that injures the reputation, and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Provides that an action for defamation may be brought for either libel or slander.

2) Makes certain publications and communications privileged, and therefore protected from the threat of civil action, including communications made in a legislative proceeding, judicial proceeding, or other proceedings authorized by law, subject to specified exemptions.

FISCAL EFFECT : None

COMMENTS : This bill seeks to address the troubling implications of recent court opinions that extend the "litigation privilege" far beyond its original purpose of protecting litigants from later defamation suits for statements or communications made in the course of a judicial or legislative proceeding. The laudable purpose of that privilege, especially as to judicial proceedings, is to "ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgment, and avoid unending litigation." Although the author is strongly committed to this ideal, he nonetheless maintains that the privilege was never intended to prevent a tenant from bringing a wrongful eviction action against a landlord who issues unwarranted eviction notices or files an unlawful detainer (UD) in order to encourage an unwanted tenant to move, even when there is no legal or factual basis for the eviction. Yet, in Action Apartment the court did just that: holding that even a "malicious" use of an eviction notice or UD filing would be protected by the litigation privilege and could bar a tenant's action for unlawful eviction under a local anti-harassment ordinance. (Action Apartment v. City of Santa Monica (2007) 41 Cal. 4th 1232.) A year later an appellate court, relying on Action Apartment, held that a landlord could invoke the litigation privilege to dismiss an action alleging wrongful eviction and retaliatory eviction under state statute and common law. (Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467.) The author notes

that the litigation privilege does not merely provide that statements made in a judicial proceeding cannot be used as evidence, but blocks the action in its entirety if the allegation for wrongful eviction or retaliatory eviction is based on the notices or the UD - even if the underlying service

of eviction notices and UD filing were illegal.

This bill will preserve tenant rights and restore the original intent of the litigation privilege by adding an express exemption for eviction notices and UD filings, or otherwise using notices or judicial proceedings for a purpose that is deemed unlawful under existing law. Civil Code Section 47 (b)(2) already contains four statutory exemptions relating to: 1) certain pleadings in marital dissolution and separation cases; 2) communications or actions taken in furtherance of altering evidence; 3) communications that attempt to conceal the existence of an insurance policy; and, 4) a lis pendens that fails to identify a previously filed action. In each of those instances, the exemption applies to a situation in which the judicial proceeding (broadly defined to include pre-litigation communication) constitutes the alleged wrongful behavior. This is precisely why the litigation privilege has not been applied to an action for malicious prosecution or abuse of process, since to apply the litigation privilege would, by definition, negate those causes of action. By the same reasoning, where a landlord is using the legal process, including preliminary notices, to harass or unlawfully evict a tenant, the litigation privilege should not apply. This bill, therefore, appears fully consistent with the original purpose of the litigation privilege and other statutory exemptions. In addition, this bill expressly states the intent of the Legislature to overrule the holdings of Action Apartment and Park Lane as to the scope of the litigation privilege.

According to the tenant's rights groups, legal aid clinics, and public officials who support this bill, the recent opinions expanding the litigation privilege have already had a profound and negative effect. These groups claim that the landlord's ability to invoke the litigation privilege in the wake of these opinions makes it very difficult for tenants and local officials to hold landlords accountable for unlawful eviction. Supporters point to several examples from around the state in which landlords have issued allegedly unlawful eviction notices in effort to force tenants into vacating, either to raise rents or

push out tenants in recently foreclosed upon rental property. In some of these cases, the landlords have invoked the litigation privilege when challenged. In others, tenant's rights groups or local officials decided not to pursue the matter because, since Action Apartment, those actions will fail if the landlord invokes the litigation privilege.

The author points to the irony of the courts' recent extension of the litigation privilege into landlord-tenant law. As the California Supreme Court noted in Silberg v. Anderson (1990), more than a decade before the first Action Apartment decision, the purpose of the litigation privilege is to "give litigants

and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (50 Cal. 3d 205, 213.) Yet, by allowing landlords the ability to use the litigation privilege to dismiss tenant actions for wrongful eviction and related actions, the court now permits use of the litigation privilege to deny tenants "the utmost freedom of access to the courts."

The bill's opponents - various landlord and realtor associations - claim that this bill will expose landlords to meritless litigation, even when eviction notices and UD actions are fully warranted. They also contend that the bill is unnecessary because tenants already have other remedies, such as raising a defense in the UD action or bringing a subsequent action for malicious prosecution. The author and supporters respond that these options are not viable for a variety of reasons. For example, where a landlord only issues eviction notices, there is no opportunity to raise a defense and no basis for a malicious prosecution eviction, since the latter requires prevailing on the merits in an underlying action. Even where a UD is filed, the author and supporters maintain that this summary procedure does not provide adequate time or an adequate forum for fleshing out wrongful eviction allegations. In addition, many of the other options cited by the opponents - such wrongful or retaliatory eviction - were held to be subject to the litigation privilege in the Park Lane decision.

Analysis Prepared by : Thomas Clark / JUD. / (916) 319-2334

FN: 0000140

BILL ANALYSIS

Date of Hearing: March 22, 2011

ASSEMBLY COMMITTEE ON JUDICIARY
Mike Feuer, Chair
AB 934 (Feuer) - As Amended: March 10, 2011

As Proposed to be Amended

SUBJECT : Privileged Communications: TENANT PROTECTION

KEY ISSUE : Should the "litigation privilege," which was originally intended to shield litigants from derivative defamation suits, be UPDATED in response to recent judicial opinions that permit the use of the privilege IN ORDER to prevent a tenant FROM PURSUING A POTENTIALLY meritorious action for unlawful eviction?

FISCAL EFFECT : As currently in print this bill is keyed non-fiscal.

SYNOPSIS

This bill addresses the troubling implications of some recent court opinions that extend the protections of the so-called "litigation privilege" seemingly far beyond its original purpose of protecting litigants from derivative defamation suits for statements or communications made in the course of a judicial or legislative proceeding. The laudable purpose of that privilege, courts have held, is to "ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgment, and avoid unending litigation." Although the author is strongly committed to this ideal, he became very concerned that the privilege was never intended, contrary to recent court opinions, to bar a tenant from pursuing his or her day in court by bringing a wrongful eviction action against a landlord who issues unwarranted eviction notices or files unlawful detainers in order to pressure an unwanted tenant to move. The tenant in such a situation does not object to the statements, the author notes, but rather to the conduct of abusing notices and unlawful detainers for illegitimate purposes. Yet, in Action Apartment v. City of Santa Monica (2007) , the court held that a landlord could invoke the litigation privilege against a tenant alleging wrongful eviction under a local ordinance, even if the landlord acted with "malicious" intent and had no factual or legal basis

for issuing a notice or filing an unlawful detainer. And in

Feldman v. Park Lane (2008) , the court extended the privilege beyond actions brought under a local ordinance to include state law and common law actions for wrongful eviction and related actions. This bill therefore simply seeks to restore the scope of the litigation privilege to its pre- Action Apartment status by providing an exemption for actions made pursuant to specified provisions of landlord-tenant law. The bill seeks to ensure that landlords who illegally evict tenants will reasonably be held accountable by tenants and local government authorities, just as they were before Action Apartment . The author will amend the bill in Committee to clarify that the bill will not prevent a landlord from invoking the litigation privilege where the action alleges defamation. The bill is supported by the Los Angeles City Attorney's Office and several legal aid and tenant's rights groups. It is opposed by various apartment owner associations, realtors' associations, and individual landlords.

SUMMARY : Amends the state's "litigation privilege" statute to exempt certain actions arising in the context of landlord-tenant law. Specifically, this bill

1) Exempts from the definition of a "privileged communication," for purposes of the litigation privilege statute only, any communications made pursuant to or authorized by those sections of the Civil Code that authorize and regulate notices to tenants regarding change or termination of a lease and sections of the Code of Civil Procedure that authorize and regulate notices to quit and the filing of an unlawful detainer for recovery of rental property.

2) Exempts from the definition of "privileged communication," for purposes of the litigation privilege only, any communication made unlawful by state statute, including forcible detainers and violations of civil rights and housing discrimination laws, or communications made unlawful by a local ordinance regarding the regulation of rents, termination of tenancy, eviction, harassment, or discrimination against residential tenants.

3) Specifies that the above provisions are intended to overrule the holdings in Action Apartment v. City of Santa Monica (2007) 41 Cal. 4th 1232, and Feldman v. 1100 Park Lane (2008) 160 Cal. App. 4th 1467.

EXISTING LAW :

1) Provides that libel is a false and unprivileged written publication that injures the reputation, and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Provides that an action for defamation may be brought for either libel or slander. (Civil Code Sections 44-46.)

2) Makes certain publications and communications privileged, and therefore protected from the threat of civil action, including communications made in a legislative proceeding, judicial proceeding, or other proceedings authorized by law, subject to specified exemptions. (Civil Code Section 47 (a)-(b).)

COMMENTS : This bill seeks to address the troubling implications of recent court opinions that extend the "litigation privilege" far beyond its original purpose of protecting litigants from later defamation suits for statements or communications made in the course of a judicial or legislative proceeding. The laudable purpose of that privilege, especially as to judicial proceedings, is to "ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgment, and avoid unending litigation." Although the author is strongly committed to this ideal, he nonetheless maintains that the privilege was never intended to prevent a tenant from bringing a wrongful eviction action against a landlord who issues unwarranted eviction notices or files an unlawful detainer (UD) in order to encourage an unwanted tenant to move, even when there is no legal or factual basis for the eviction. Yet, in Action Apartment the court did just that: holding that even a "malicious" use of an eviction notice or UD filing would be protected by the litigation privilege and could bar a tenant's action for unlawful eviction under a local anti-harassment ordinance. (Action Apartment v. City of Santa Monica (2007) 41 Cal. 4th 1232.) A year later an appellate court, relying on Action Apartment, held that a landlord could invoke the litigation privilege to dismiss an action alleging wrongful eviction and retaliatory eviction under state statute and common law. (Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467.) The author notes that the litigation privilege does not merely provide that statements made in a judicial proceeding cannot be used as evidence, but blocks the action in its entirety if the

allegation for wrongful eviction or retaliatory eviction is based on the notices or the UD - even if the underlying service of eviction notices and UD filing were illegal.

AB 934 will preserve tenant rights and restore the original intent of the litigation privilege by adding an express exemption for eviction notices and UD filings, or otherwise using notices or judicial proceedings for a purpose that is deemed unlawful under existing law. Civil Code Section 47 (b)(2) already contains four statutory exemptions relating to (1) certain pleadings in marital dissolution and separation cases; (2) communications or actions taken in furtherance of altering evidence; (3) communications that attempt to conceal the existence of an insurance policy; and (4) a lis pendens that fails to identify a previously filed action. In each of those instances, the exemption applies to a situation in which the judicial proceeding (broadly defined to include pre-litigation communication) constitutes the alleged wrongful behavior. This is precisely why the litigation privilege has not been applied

to an action for malicious prosecution or abuse of process, since to apply the litigation privilege would, by definition, negate those causes of action. By the same reasoning, where a landlord is using the legal process, including preliminary notices, to harass or unlawfully evict a tenant, the litigation privilege should not apply. AB 934, therefore, appears fully consistent with the original purpose of the litigation privilege and other statutory exemptions. In addition, this bill expressly states the intent of the Legislature to overrule the holdings of Action Apartment and Park Lane as to the scope of the litigation privilege.

Background: Implications of Action Apartment and Park Lane . In Action Apartment the California Supreme Court held that a Santa Monica "anti-harassment" ordinance was pre-empted by the litigation privilege statute. The ordinance permitted tenants to bring an action to recover damages against a landlord if the landlord issued evictions notices or filed a UD knowing that there was no legal or factual basis for the eviction. The ordinance was prompted by concerns that landlords were issuing bogus eviction notices in order to intimidate tenants to vacate - thereby providing an opportunity to raise rents under the "vacancy de-control" provisions of Costa-Hawkins. The Court held that creating a cause of action against landlords who issued eviction notices or brought UD actions conflicted with the state litigation privilege, which was meant to exempt

statements made in judicial proceedings from subsequent litigation arising from those statements. The Court held that all UD actions were covered by the privilege, even if malicious and without merit. The Court held that an eviction notice was covered by the litigation privilege so long as it was issued with "good faith" intent to later bring a UD action.

Read most narrowly, Action Apartment arguably only preempted the anti-harassment ordinance and thus the litigation privilege could still be invoked against actions brought under such an ordinance. Significantly, however, the court preempted the ordinance because the litigation privilege extended to UD actions and eviction notices issued in anticipation of litigation. By extension, any wrongful action, whether based on local ordinance, state law, or common law, could be subject to the litigation privilege. In the Park Lane case, an appellate court took this step and went beyond Action Apartment in two ways: First, Park Lane held that the litigation privilege could be invoked in many other causes of actions, including actions for retaliatory eviction, wrongful eviction, breach of contract, breach of covenant of quiet enjoyment, and, to the extent it was based solely on the notice and UD, unfair business practices. The actions were dismissed without any consideration of the merits of the tenant's claims because the landlord successfully invoked the litigation privilege. The Court concluded that only an action for malicious prosecution would be exempt from the privilege.

Second, Park Lane went beyond Action by holding that issuing eviction notices and filing UD actions were "protected activity" within the meaning of the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, which allows a defendant to make a motion to strike an action against any person who is furthering her or her exercise of the right to petition or free speech. (Code of Civil Procedure Section 425.16.) In Park Lane, the landlord filed a UD against subtenants on the grounds that the sub-tenancy had not been properly authorized. The subtenants filed a cross-complaint alleging retaliatory eviction, wrongful eviction, and breach of quiet enjoyment, among others. The landlord then moved to strike the cross-complaint under the anti-SLAPP statute. Working through the anti-SLAPP two-part inquiry, the court held first that notices and UD actions were "protected activity" under the statute. Although the statute defines protected activity as the constitutional rights "to petition and free speech," it

specifies that this includes "any written or oral statement . . . made before a legislative, executive, or judicial proceeding." The court noted that "judicial proceeding" has been construed broadly to include not only the actual proceeding, but any preliminary action done in furtherance of the judicial proceeding. Therefore, a "protected activity" included both the filing of the UD action and the preliminary eviction notices. Even if the action is a "protected activity," however, the second prong of the test provides that a plaintiff can still survive an anti-SLAPP motion if he or she can show likelihood of prevailing on the merits. However, because of the landlord's ability to invoke the litigation privilege under the Action Apartment precedent, the court reasoned, the plaintiff had no likelihood of prevailing on the merits. In other words, not only does the litigation privilege lead to dismissal of the tenant's cause of action; it also means that the tenant may be required to pay the landlord's attorney's fees under the anti-SLAPP provisions. As long as landlords cloak harassment and illegal conduct in eviction notices, they are largely immune from suit and can even recover attorney fees.

Consequences on the Ground. The implications noted above are not merely theoretical. According to tenant's rights groups, legal aid clinics, and public officials who enforce unlawful eviction laws, Action Apartment and Park Lane have already had a profound effect. For example, the Los Angeles City Attorney's Office reports that it receives hundreds of referrals for prosecution from local housing agencies regarding a variety of landlord violations, including the issuing of illegal eviction notices and the filing of baseless UD actions. With record numbers of foreclosures, the L.A. City Attorney writes that its prosecutors have received "an unprecedented volume of cases involving landlords who have sent unlawful eviction notices to and filed groundless evictions against tenants, often identifying foreclosure as the basis for eviction." Although federal law requires that tenants in foreclosed properties receive at least a 90-day notice, and foreclosure at any rate is

not a permissible basis for eviction under the Loa Angeles Rent Stabilization Ordinance, many tenants are not aware of their rights or simply cannot afford the risk of not prevailing should they challenge the eviction. So they move. Although the City Attorney's office can enforce the law on tenant's behalf, the litigation privilege presents a significant obstacle to holding landlords accountable. The result, according Los Angeles City Attorney Carmen Trutanich, is that tenants "are left without

recourse, because they can neither sue the landlords directly, nor depend on law enforcement to protect their rights."

The reports of other city attorneys and several legal and tenant rights group reinforce the claims of the Los Angeles City Attorney. For example, Tenants Together, a tenant's rights group based in San Francisco, and Bet Tzedek, a legal aid organization in Los Angeles, and the Los Angeles City Attorney's Office have provided the Committee with several examples from around the state in which landlords have issued allegedly unlawful eviction notices and have either invoked the litigation privilege when challenged, or tenant's rights groups or local officials decided not to pursue the matter because, since Action Apartment, those actions will fail if the landlord invokes the litigation privilege. For example:

In Palm Desert, California, in September of 2010, an entire tract of more than a dozen rental homes went into foreclosure and was purchased by a Florida investor. The investor filed eviction notices in violation of the 90-day notice required under federal law. In addition, the notices violated federal provisions requiring successors in interest to honor existing leases. No UD notices were filed after the first notices expired; instead, the landlord issued new notices that were also in violation federal law. Attorneys believed that tenants could have filed actions for breach of covenant of quiet enjoyment, breach of contract, and other claims, but determined that in light of Park Lane - which held these very actions subject to the litigation privilege and anti-SLAPP provisions - the attorneys decided the risks made such a suit impractical.

Fifteen California cities have laws protecting tenants from eviction on grounds of foreclosure. The City of Oakland sued banks for illegal evictions from foreclosed properties, but the Oakland City Attorney's office found that litigation privilege concerns significantly limited its ability to pursue these cases.

In San Francisco, the Lembi/Skyline/CitiApartments landlord group used aggressive tactics to displace tenants in rent-controlled units until they lost most of their portfolio due to foreclosure. A case brought by the San Francisco city attorney showed a pattern in which the landlord group acquired rent controlled buildings and then issued pre-textual 3-day

notices to quit, often on tenants with no history of problems with the prior landlord.

In another San Francisco case, the landlord group referenced above attempted to evict a 71-year old tenant claiming that the tenant was a nuisance. A UD was filed in February of 2008. The tenant, along with other tenants, sued for illegal eviction and other claims, but the landlord group filed a motion to strike the eviction-related claims based on Action Apartment. The case was settled while the motion was pending.

Malicious Prosecution, UD Defenses, and Other Causes of Action are Not a Realistic Option For Most Tenants . As noted in the arguments section below, opponents of this bill claim that this bill is not needed because tenants already have several options if a landlord issues bogus eviction notices or threatens baseless UD actions. Opponents contend, for example, that tenants could bring an action of malicious prosecution. While this is true, the bar for prevailing in a malicious prosecution action is extremely high, including a requirement that the person bringing the action prevailed in the underlying action. Where the landlord is simply issuing notices, as in the foreclosure case noted above, there is no underlying action to which the tenant can prevail. If the tenant tries to raise a challenge to the notices alone, the landlord can invoke the litigation privilege to protect the notices by merely asserting that he had "good faith" intent to file a UD action subsequently. The burden would be on the tenant to prove bad faith. (See Action Apartment 41 Cal. 4th at 1251.) Even if the tenant waits for the landlord to file a UD, the tenant must still prevail on the underlying action. Opponents have also suggested the tenant can raise objections to the legality of the notices and UD actions as a defense, but this presents further problems and risks for the tenant. First, the UD is a summary proceeding and the five days in which the plaintiff has to respond is usually insufficient to develop arguments to support a separate cause of action. Second, the tenant can never be certain that the defense will prevail; therefore, he or she may determine that the risk of trying to fight the UD outweighs the risk of simply moving. Third, because losing the UD is always a possibility, the tenant runs the risk of the UD becoming the black mark on his or her credit report.

Finally, some opponents allege that tenants can bring other

actions under statute or common law, such as wrongful eviction, constructive eviction, retaliatory eviction, breach of quiet enjoyment and the like. However, this argument appears to neglect the fact that Park Lane permitted the use of the litigation privilege against precisely these kinds of actions. It is precisely because the recent rulings either expressly or impliedly provide that the privilege can be used against eviction efforts that are prohibited by existing laws, the author states, that this bill adds paragraph (6) to the list of exemptions in subdivision (b) of Civil Code Section 47.

Will The Bill Expose Landlords to Frivolous Wrongful Eviction Suits ? Opponents claim this bill will expose landlords to retaliatory actions by tenants who have been evicted, even where the landlord has legitimate grounds for issuing a notice to quit or filing a UD action. Opponents further claim that landlords will be reluctant to engage in informal discussions with tenants about late rent payments or other communications about terms of a lease for fear that such communications may become the subject of lawsuit. The author, however, notes that this bill will merely return the situation to what it was before Action Apartment and Park Lane. As noted above, it was only recently that landlords won the right to invoke the litigation privilege against even meritorious tenant actions for wrongful, retaliatory, or discriminatory eviction. The opponents have thus far offered no evidence to the Committee that landlords faced waves of frivolous litigation prior to Action so there does not appear to be any reason to believe that such a wave will follow if this recent and unprecedented extension of the litigation privilege is restored to its original scope. On the other hand, as noted above, proponents of the bill have provided the Committee with many examples in which the litigation privilege, or the prospect that it would be invoked, has caused city attorneys and tenant advocates to abandon meritorious claims that they otherwise would have pursued.

The Bill Will Not Subject Landlords to Libel Suits, Especially as Proposed to be Amended. Many of the opponents claim that this bill would subject landlords to libel suits for statements contained in posted notices and encourage tenants to make accusations of libel and slander. If the landlord only included the generic and limited nature of the information that typically appears on a notice to quit, it seems highly unlikely that it could provide grounds for a defamation suit, especially if the allegations were true. Contrary to what is claimed by the

California Business Properties Association, "any type of factual error" in the posted notice would not appear to be likely grounds for a libel suit. Nonetheless, the author contends that it was never his intent to prohibit the use of the litigation privilege against a defamation suit since this was the original purpose for the privilege. Indeed, the author informed the Committee that he concurs that the litigation privilege should protect all litigants, including landlords, so that litigants

can speak openly, robustly, and zealously in court proceedings. However, the Action Apartment and Park Lane decisions did not involve actions for libel or slander, but rather actions for unlawful evictions brought under local and state laws and various common law doctrines.

The potential confusion about the bill's purpose may therefore stem from the fact that what is called the litigation privilege "statute" is in fact only a definitional section within the defamation statute. If the court had not recently expanded its scope to include actions brought under landlord-tenant law, there would appear to have been little need to amend this statute. In light of the concerns raised, however, the author has informed the Committee that he will amend the bill to specify that the litigation privilege still applies to actions in defamation (which California law defines to include both libel and slander). In this way, he notes, the litigation privilege will be restored to its pre-Action Apartment status and tenants and public officials will not be barred from holding landlords accountable for unlawful eviction attempts.

This Bill Does Not Appear to Falsely Assume that Landlords Routinely Issue Bogus Eviction Notices . Opponents also have suggested that this bill is unnecessary because it falsely assumes that landlords regularly issue baseless eviction notices or file meritless UDs in order to harass tenants into leaving. They point out, no doubt correctly, that landlords naturally want to keep good tenants, and that this is especially true in the present economic climate when vacancy rates are high. The author has stated that he agrees that the vast majority of landlords are fair and reasonable and that only a very few use meritless notices and UD filings to get rid of tenants who otherwise have a right to stay. But, he states, this is no reason for not passing the bill, pointing out that most of our laws targeting bad behavior apply to only a fraction of the general population who are bad actors. Landlords are no more likely to issue bogus eviction notices than tenants are likely

to bring frivolous lawsuits. Still, some do, and this bill seeks to restore proper balance to the array of rights and remedies that tenants and landlords enjoyed before Action Apartment and Park Lane.

"Utmost Freedom of Access to the Courts." Finally, the author points to the irony of the courts' recent extension of the litigation privilege into landlord-tenant law. As the California Supreme Court noted in Silberg v. Anderson (1990), more than a decade before the first Action Apartment decision, the purpose of the litigation privilege is to "give litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (50 Cal. 3d 205, 213.) Yet, by allowing landlords the ability to use the litigation privilege to dismiss tenant actions for wrongful eviction and related actions, the court now permits use of the litigation privilege to deny tenants "the utmost freedom

of access to the courts."

As Justice Corrigan reminds us in her dissenting opinion in Action Apartment, the litigation privilege was enacted as a defense to defamation claims, and while its scope has been enlarged by the court over the years, it was not applied outside of the tort context until the Action Apartment case. For Corrigan, there was certainly no indication in the language of the statute that it was intended to bar other causes of action arising under local ordinances. In addition, Justice Corrigan noted that "the Legislature plainly intended to provide immunity for communications made in connection with judicial proceedings, not to invalidate any particular causes of action." (Action Apartment 41 Cal. 4th at 1254-1255, emphasis added.) In short, the author informs the Committee, he believes that Justice Corrigan correctly identified what should be clear from the language of the statute and its surrounding sections: the litigation privilege was intended to protect communications made in a judicial proceeding from subsequent litigation; it was not meant to create a circular logic that invalidates wrongful eviction actions that are, of necessity, based on the conduct of issuing meritless notices and filing meritless UDs for purposes of harassment.

Proposed Author Amendments : In order to make it clear that this bill will not hamper a landlord's ability to invoke the litigation privilege for its original purpose - to shield statements made in a judicial proceeding from a subsequent

defamation action -the author has informed the Committee he wishes to take the following amendments in this Committee:

- On page 2, line 40 after "Procedure." insert:

However, an allegation or averment contained in any pleading or affidavit filed in an action for unlawful detainer shall be privileged as to a subsequent cause of action for defamation as defined in Section 44.

- On page 3, line 11 after "tenants." Insert:

However, an allegation or averment contained in any pleading or affidavit filed in an action for unlawful detainer shall be privileged as to a subsequent cause of action for defamation as defined in Section 44.

Proposed Correction Amendments :

- On page 3, line 8 delete "ordinance" and insert law

- On page 4, line 7 delete "Santa Monica Rent Control Bd." and insert: The City of Santa Monica

ARGUMENTS IN SUPPORT : The Los Angeles City Attorney's Office

writes that "the abusive practice of iaauing unlawful eviction notices and filing baseless eviction actions has gained traction since the decision in Action Apartments. . . Relying on Action Apartments, lower courts have further extended the litigation privilege in the landlord tenant context, undermining state and local laws that seek to protect tenants from illegal, retaliatory and/or discriminatory evictions." The L.A. City Attorney notes that "the original intent of the litigation privilege was to guarantee access to the courts without fear of legal retaliation. The result of its judicial expansion has been just the opposite. The current interpretation of the litigation privilege prevents most tenants from taking direct legal action to address illegal evictions. Accordingly, my Office is faced with an increased responsibility to enforce the relevant law. Unfortunately, the litigation privilege presents a significant obstacle to law enforcement in holding unscrupulous landlords accountable. Tenants are left without recourse, because they can neither sue their landlords directly, nor depend on law enforcement to protect their rights." The

L.A. City Attorney adds that "unscrupulous landlords have an additional incentive to illegally vacate their properties in rent-controlled jurisdictions such as Los Angeles, where the departure of a tenant deregulates a unit and allows it to be rented at market rate. To make matters worse, the majority of illegal eviction cases referred to our Office are in low-income neighborhoods. These landlords are targeting particularly vulnerable tenants who are less likely to be aware of their rights."

Tenant's Together, a statewide organization for tenant's rights based in San Francisco, writes that "members across the state are being denied meaningful access to the courts due to the unwarranted judicial expansion of the litigation privilege." Tenants Together claims that prior to Action Apartment "landlords who illegally evicted tenants could be held accountable by tenants and by government authorities . . . Ýbut] Action Apartments and its progeny have changed this by extending the state's litigation privilege to cover the service of eviction notices and filing of unlawful detainer actions." These extensions into other areas of landlord-tenant law "have undermined state and local laws that seek to protect tenants from illegal, retaliatory, and/or discriminatory evictions and related misconduct."

In addition, Tenants Together notes that the litigation privilege combines with the state anti-SLAPP statute, CCP 425.16, to further chill the exercise of tenants' rights, subjecting tenant actions to dismissal under the litigation privilege and requiring tenants to pay the landlord's attorney fees under the anti-SLAPP statute. Finally, Tenant's Together notes that for decades, "tenants have had the right to sue over eviction activity that violates state and local law" and local governments "have been free to file suit to enforce tenant protections against improper

evictions. The unwarranted judicial expansion of the litigation privilege undermines these basic tenant protections, shutting the courthouse doors to tenants and emboldening unscrupulous landlords to engage in abusive conduct."

Bet Tzedek Legal Services supports this bill because it will "ensure that tenants have access to the courts when subjected to illegal eviction activity." Bet Tzedek claims that many studies have shown that low income tenants, who typically

cannot afford a lawyer, will generally move out when confronted with an eviction notice rather than face the prospect of a trial. These trends, Bet Tzedek has learned from experience, "are not lost on the most unethical landlords" who, knowing such tenants have limited legal knowledge and resources, "serve notices and file cases that are deficient, defective, or illegal." Finally Bet Tzedek stresses that AB 934 "does not create any new obligations for landlords. The bill simply restores the ability of tenants and local governments to hold landlords responsible for conduct that is already illegal."

The Public Counsel Law Center (PCLC), the nation's largest public interest pro bono law office, supports this bill because the low-income tenants that it serves are "often the target of illegal eviction activity." PCLC contends that the "expansion of the litigation privilege has increased intimidation and displacement of marginalized populations such as those we serve at Public Counsel." PCLC also believes that AB 934 is consistent with state and federal policies to prevent homelessness during this time of economic recession, "because passage of this bill will help preserve housing for those at highest risk of becoming homeless."

The Western Center on Law & Poverty (WCLP) and the California Rural Legal Assistance Foundation (CRLA) support this bill because it will "return balance to the litigation privilege, and restore access to the courts for tenants challenging unlawful or abusive litigation practices by their landlords." WCLP and CRLA note that attorneys representing foreclosing banks and landlords "use eviction notices or summons, sometimes without merit, as 'tools' to threaten, harass or force tenants to leave their homes prematurely." They observe that tenants have little ability to challenge these notices and must wait for a UD action to be filed before asserting their defenses. AB 934, however, "will allow tenants to affirmatively challenge bogus notices and summons, allowing them to keep the fight out of eviction court, where their credit and rental history can be harmed, even if they win." If AB 934 is enacted "attorneys representing the foreclosing banks and landlords will no longer be protected for issuing bogus notice or summons. Because of the likelihood of having to defend themselves for doing so, they will be more likely to negotiate without litigation or even better, refrain from using these unethical tactics."

Finally, WCLP and CRLA add the following observation: "Opponents will no doubt argue that the bill opens the door to all sorts of friviolus litigation. We submit that that door is already wide open -- frivolous claims are being used to get the tenants out. ŶAB 934] not only imposes a reasonable balance, but it keeps cases out of court by ensuring that both parties are on a level playing field. Accordingly, landlords and tenants have more incentive to 'work things out' before filing lawsuits."

Several other legal aid and tenant rights organizations, listed below, support this bill for substantially the same reasons as those stated above.

ARGUMENTS IN OPPOSITION : The Civil Justice Association of California (CJAC) opposes this bill because it "will lead to additional unjustified litigation by limiting the litigation privilege, an important protection afforded parties in lawsuits." CJAC believes that the court rulings in Action Apartment and Park Lane were correctly decided, agreeing with the court's statement in Action Apartment that there is no communication "that is more clearly protected by the litigation privilege than the filing of a legal action." CJAC contends that where a landlord fraudulently or otherwise unlawfully evicted a tenant . . . then he or she already may be sued for malicious prosecution, fraud, or wrongful eviction." By overturning Action Apartment and Park Lane, CJAC believes that this bill will "create unjustified liability for legally required communications in litigation related to real property, such as eviction proceedings." This in turn will encourage "unwarranted lawsuits against landlords and property owners whenever trying to lawfully recover possession of property for other tort clams." Finally, CJAC contends that this bill would preclude the litigation privilege from applying to a broad array of torts, including defamation, libel, and slander. ŶHowever, it would appear that this final concern, as to defamation actions, would be addressed by the amendment that the author will take in Committee.]

The California Apartment Association (CAA) opposes this bill because it "would remove from the protections of the litigation privilege real property transactions regarding the regulation of rents, termination of tenancy, and eviction actions." CAA believes that AB 934 "goes against the core policy of protecting litigants' access to the courts" and giving all litigants and witnesses "the utmost freedom of access to the courts, without

REGISTERED SUPPORT / OPPOSITION :

Support

Asian Law Caucus
Bet Tzedek Legal Services
California Rural Legal Assistance Foundation
Coalition for Economic Survival
Inner City Law Center of Los Angeles
Los City Attorney's Office
Los Angeles Center for Law and Justice
Myron Moskovitz, Professor of Law, Golden Gate University
National Housing Law Project
Public Counsel Law Center
San Francisco Tenants Union
Santa Monicans for Renters' Rights
Tenants Together
Tenderloin Housing Clinic
Western Center on Law & Poverty

Opposition

Alberts and Associates, Inc.
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
Axis Realty Group
Bluffs II Apartments
California Apartment Association
California Association of Realtors
California Business Properties Association
California Southern Cities Apartment Association
Carly Court Apartments
Homes Management
MG Properties Group
Oak Manor Apartments
Palos Verdes Apartments, LLC
San Diego County Apartment Association
San Francisco Association of Realtors

Santa Barbara Rental Property Association
Shasta Lane Apartment Homes
Torrey Pines Property Management, Inc.
Walters Home Management
Warwick Investments, L.P.
Western Manufactured Housing Communities Association
Five individual landlords

Analysis Prepared by : Thomas Clark / JUD. / (916) 319-2334

DRAFT

Approved as to Form and Legality

Oakland City Council

RESOLUTION NO. _____ C.M.S.

RESOLUTION SUPPORTING ASSEMBLY BILL 934 THAT WOULD AMEND CIVIL CODE SECTION 47 TO REMOVE EVICTION NOTICES FROM THE LITIGATION PRIVILEGE THEREBY PERMITTING TENANTS TO BRING A LAWSUIT FOR WRONGFUL EVICTION AGAINST A LANDLORD WHO ISSUES A FRAUDULENT OR FALSE EVICTION NOTICE IN A POST-FORECLOSURE EVICTION OR OTHER EVICTION ACTION

WHEREAS, the California Supreme in *Action Apartment Assn., Inc. v. City* of Santa *Monica* (2007) 41 Cal.4th 1232, held that eviction notices issued prior to beginning the eviction litigation were protected by the litigation privilege set out in California Civil Code §47, which protects a person from being sued for communications made during the course of litigation even if such communications are false or even malicious;

WHEREAS, application of the litigation privilege to pre-litigation eviction notices has eliminated the ability of a tenant to bring a wrongful eviction lawsuit when a landlord gives a fraudulent or false eviction notice and the tenant moves; and

WHEREAS, the Oakland City Attorney's Office has seen numerous instances of improper and unlawful eviction notices being issued to tenants of foreclosed properties by lenders who simply want the property vacant for resale notwithstanding the tenant's right under Oakland's Just Cause for Eviction Ordinance to remain a tenant at the premises, such unlawful notices often result in tenants being displaced and foreclosed properties remaining vacant; and

WHEREAS, tenants who fail to leave after receiving a fraudulent or false eviction notice risk having an unlawful detainer filed against them which can become part of the tenant's credit history and make renting more difficult in the future;

WHEREAS, the effectiveness of enforcing eviction laws and Oakland's Just Cause for Eviction Ordinance is severely hampered by the inability of tenants or the City Attorney to take legal action against landlords who abuse the litigation privilege by issuing fraudulent or false eviction notices;

WHEREAS, Assembly Bill 934 would address the problems created by the *Action Apartment* decision by creating an exception to the litigation privilege established by California Civil Code §47, such exception would remove pre-litigation eviction notices from Civil Code §47's litigation privilege;

WHEREAS, Oakland's Housing; Residential Rent and Relocation Board has voted to support Assembly Bill 934 and has asked the City Council to join in that support; now therefore be it

RESOLVED: that the City Council hereby provides that it supports assembly Bill 934 and authorizes the City Administrator to communicate to the California State Legislature the City Council support of the bill.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, SCHAAF, AND PRESIDENT REID

NOES –

ABSENT –

ABSTENTION –

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California