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# PARK WATCH ™ LEGAL DEVELOPMENTS NEWSLETTER

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# How to Settle Disputes For Less Than the Amount Due, and How to Avoid Traps for the Unwary in Receiving Partial Payments: Illegal Charges You Cannot Impose

*By: Terry R. Dowdall, Esq.*

## Upshot

Money disputes with homeowners, contractors, and vendors, can all be frustrating and difficult. The press of business makes continued feuding over the amount billed and disputed both time consuming and costly. Irritating, really.

One way to deal with a financial difference in opinion is to issue a check for less than the amount claimed to be due, and on the face of the check write: "full and final payment" or words to that effect. You are thinking that if the check is cashed, the dispute is over. *Is it?*

If a tenant writes a check with the words "under protest" do you cash it or return it? If you return it is it deemed a satisfaction of the payment due because the tender was conforming to the requirements of the underlying contract?

Under current California law, maybe, maybe not. Here is what to do to protect yourself on the game field of every day skirmishes with the opponent *de jour.*

***Creative Solutions, Efficient, Practical Representation, Profitable Parks***

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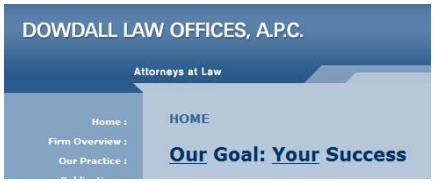


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**Courtesy MRL, TITLE 25, TITLE 24**

## Park Owner and the Contractor

Here are two situations to consider.

The Pool Deck Controversy: Suppose a park owner hires a contractor to resurface the park pool deck. The contract price is $50,000 up front; $50,000 on completion. Before final payment, the finish begins to lift and separate in several areas. Park owner, thoroughly frustrated with delays and broken promises, is through. Park owner tenders a check for just $10,000.00 and marks it "payment in full." He sends a separate letter and tells the contractor he should consider it lucky he paid that much. What should the contractor do?

Electrical Charges Too High: A tenant disputes her electricity bill after re-certification of the meter. The old ran slow, the new is accurate. Tenant demands the meter be checked again. Park owner complies and lets the electricity bill slide for a month. Costs remain unchanged the next month. Now there are two months of electricity due. Tenant timely tenders a check

 

for the full amount of the invoice, except for the electricity for 2 months. The bill is now $210.35. Tenant shorts the park owner by paying $100 and marks the check " electricity paid in full." What should the park owner do?

This is one of those cases in which a reading of California law, by itself, is not enough to answer competently. Pursuant to Civ. Code 1526, a park owner could contest the "payment-in-full" language on a check. The creditor-friendly law permits a park owner to keep the amount tendered by a "payment in full" check and then demand the remainder. Civ. Code 1526 says where a claim is disputed and a check is tendered and the words "payment in full" or other similar language are on the check,

> "the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation."

! Under section 1526, still on the books today, you can strike out the language and pursue the rest of the electricity bill. *But this would be a foolhardy tactic*.

!! Under subsequently enacted *Commercial Code* 3311, the disputed claim would be considered discharged and settled *if the check clearly contained a statement that it was in full satisfaction and it was not refused.*

In fact, the assertion of satisfaction of the debt is sufficient if it is in a cover letter, or the creditor received other knowledge of the assertion of satisfaction before depositing it. If the payment is made to a night drop box and deposited by a clerical worker without authority, the assertion will not apply. *Commercial Code* 3311 is the polar opposite of the creditor-friendly section 1526. And each is on the books today. Which one controls? Which is enforceable? Both, None?

In a dilemma like this, the courts pose the question: *"[i]f everyone in Sacramento had not been asleep at the switch, and stayed awake long enough to give this obviously unimportant bill any scrutiny, what might they have said about it?"* And then, *"what would the legislators have done with that knowledge?"*

Well, under familiar rules of statutory interpretation, the last enacted law is deemed to be controlling. The courts make the analytical leap, that the voting legislators probably would have decided to sunset the earlier of the laws (section 1526). In California, this is an eminently logical conclusion, as the newest of the two laws, *Commercial Code* 3311, is *anti-creditor*, and has the effect of denuding the effectiveness of *Civ. Code* 1526.



The Tenant with the High Electricity Bill. So if you wish to collect the entire electricity bill, do not accept the check. She will repeat this behavior every few months. And allowing her to do it, may cause her to argue an amendment in fact to the rental agreement that locks the park owner into being required to accept her payment method. That is a precedent that cannot be tolerated. She must pay. However, by termination of tenancy? You *may consider* a small claims suit, because an eviction over a "good faith dispute" (that is what the judge may say) respecting electrical costs will be costly and difficult.

The Incompetent Contractor. If the contractor accepts your short payment of $10,000 when $50,000 is due for the defective pool deck re-surface, the dispute ends by acceptance of the check. The contractor could reject part payment, in which case the park owner will then keep close tabs on the costs of the "cover" contractor, complete the job and counter-sue the contractor for the extra expense of getting the job done right.

What if there is no dispute and the resident is simply making part payments? Use of the "paid in full" assertion is not applicable unless there is a dispute over the amount owed. ("Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute"). The dispute is the fuel—the new consideration, that supports the creation of the contract to settle. If there is no dispute the debtor offers nothing of value to the creditor to support a discount.[1]

[1] Without an honest dispute, there is no consideration for the parties' agreement to accept less or other than what is actually owed. Thus, a debtor's arbitrary refusal to pay based on pretense and made for the purpose of exacting more favorable terms for the debtor is not an honest dispute on which an accord and satisfaction may be based.

 

Section 3311 applies when:

*(1) a claim is unliquidated or subject to a bona fide dispute,*
*(2) the debtor tendered in good faith a check in full satisfaction, and*
*(3) the claimant obtained payment of the check.*

As to the tenant situation, when the park owner is confronted with a "paid in full" situation, you have two choices:

*(1) reject the tendered check and begin collection action on the remainder or*
*(2) cash the check and waive any claim to the remaining balance.*

To be effective, the words creating the accord must be clear and conspicuous. There must be no question that the offering party intends the amount tendered to resolve the dispute.

*What if the check is cashed in error?* Section 3311 provides that the creditor has 90 days to discover the error and return the proceeds to the debtor. If that is done, the debt is reinstated.

The **CAVEAT:** So, *Civ. Code* 1526(a) provides the creditor with a third option of striking the "payment in full" language, cashing the check and collecting the remainder of the debt owed. **Ignore it.** Two cases annotate the statues and add to the understanding of the remaining effectiveness. Only *Commercial Code* 3311 survived the battle. Reliance on *Civ. Code* 1526 means you will lose the argument and your case–if the claims come up in an eviction action, tenant will stay and you will owe attorney's fees and costs to the tenant. It is also possible that the tenant may strike back with a malicious prosecution action against you.

First case: *Directors Guild of America v. Harmony Pictures, Inc.*, 32 F. Supp. 2d 1184 at 1185. The federal court held that the latest of the two statutes, *Commercial Code* 3311, would control. The court concluded, a party may not simply strike out the words on the check, cash it, and continue to press for the balance due. Rather, to avoid the application of accord and satisfaction, the creditor must return the check to the debtor (32 F. Supp. 2d at 119-192).

Applying the provisions of Section 3311, the court that acceptance of the check marked "Full and final settlement for the audit period 6/1/90 to 5/31/94" resulted in a settlement and discharge ("accord and satisfaction") even though creditor crossed out that language before cashing the check and mailed a letter stating that the payment was not a full settlement.

*What can we learn? Civ. Code* 1526(a) is no longer enforceable. To avoid this, park owners should not cash checks for less than the amount owing and which carry the notation "payment in full" or similar language.

Second Case: *Woolridge v. J.F.L. Elec. Inc.*, 96 Cal. App. 4th Supp. 52. "Whether an accord and satisfaction has been reached," wrote the *Woolridge* court, "is a question of fact." Accordingly, the parties in most cases must endure an expensive trial to determine factually whether an accord and satisfaction occurred.

Rejection of the tendered amount with an insistence on a fully-negotiated and formal settlement agreement may be preferable. The *Woolridge* court's opinion that whether the discharge of liability has occurred "is a question of fact." In lawyer parlance, that means you have to have a trial to decide. No motion of summary judgment. That means expense and uncertainty. So if the amount of money is significant, it may be best not to rely on the artifice of the "paid in full" check. It may buy you a lawsuit in the end. When on the receiving end of such a payment, a rejection and continued assertion of rights will, likewise, avoid the possible risk that the park owner is saddled with a "paid in full" resolution to a billing.

!! Tip: To clarify the park owner's position as to disputed sums, property management can send to defaulting homeowners a notice that all communications concerning disputed rents, invoice charges, pass-throughs and other fees, including checks tendered as full satisfaction of the amount owing, need to be mailed or sent to a designated person or office. If the amount tendered in full satisfaction is not sent to the designated person or office, then such tender would not be

 

considered full payment pursuant to *Commercial Code* 3311(c).

And don't think for too long about what to do. The retention rule is to the effect that where a debtor sends his or her check to a creditor in satisfaction of his or her claim, and the creditor does not return the check, but retains it for an unreasonable period of time, such retention operates as an acceptance of the payment. A conforming tender, held for more than 30 days, may cause it to be deemed an acceptance.

# Illegal Charges You Cannot Impose

*By: Terry R. Dowdall, Esq.*

## Upshot

The charges a tenant is expected to pay must be in writing to be enforceable. Indeed, all terms of the tenancy must be in writing. *Civ. Code* 798.15. To charge a fee requires that it be in writing. The writing may be an invoice; or monthly statement, or letter or notice. That hurdle cleared, the next issue is whether the charge is a lawful one.

Let's examine the charges you may not impose on your homeowners–before they let you know. You see, illegal charges are unlawful business practices. Unlawful charges may also be violations of the Mobilehome Residency Law (*Civ. Code* 798, et seq.)("MRL"). Therefore, if there are unenforceable charges, deletion from the rental agreement should be a priority.

## Unlawful Charges for Mobilehome Tenants

Many charges are not lawful. Some are totally appropriate. Pass-throughs as drafted into a long term lease? Totally permissible. How about a charge–a premium—for a long term lease? Again, totally proper. A park owner may charge for the offering of a long term lease. But then on the other hand, many charges are illicit and not proper. Let's list them for you.

■ No fees for the enforcement of rules and regulations is permissible. You cannot "ticket" a tenant for littering, improper parking, not picking up after a pet. Fees under a 14 day notice properly drafted are enforceable.

■ Cannot charge a fee for the entry, installation, hookup, or landscaping as a condition of tenancy. It is permissible to charge for an actual fee or cost imposed by a local ordinance related to the occupancy of the specific space and not incurred as a portion of the development of the mobilehome park "as a whole." Fees charged for rent control administration for example–are permissible. Of course under a long term lease, the City or County may not charge you or the tenants for that law. *Civ. Code* 798.37. *Comment: Ironic isn't it? That the tenants under rent controls pay more than those who are not? Rent controls promote affordable housing? Not really. It promotes profiteering by departing incumbents, the new tenants pay full market prices.*

■ Park owner may not require the purchase, rent, or lease goods or services for landscaping, remodeling, or maintenance from any person, company, or corporation.

■ A fee for items other than rent, utilities, and incidental reasonable charges for services actually rendered.

■ A fee for obtaining a lease on a mobilehome lot for (a) a term of 12 months, or (b) a lesser period requested by the homeowner.

■ A fee for use of the clubhouse for functions as to which all tenants are invited.

■ A fee for services actually rendered that are not listed in the rental agreement (unless the homeowner is given written notice 60 days before imposition of the charge. Such fees and charges must be separately stated on the homeowner's regular billing, with a notice of the expiration date if applicable).

■ A fee for keeping a pet, unless special facilities or services are provided. If special facilities are maintained by the management, the fee charged must reasonably relate to the cost of maintenance of the facilities or services and the number of pets kept in the park.

 

■ A fee for a guest who does not stay for more than a total of 20 consecutive days or 30 days in a calendar year. What about for more than these periods. Yes. How to calculate them? A bit of a riddle. Start by thinking about the value of the housing you offer.

■ A fee for a person who is living alone and wishes to share the mobilehome with one other person.

■ A fee based on the number of members in the homeowner's immediate family–or the number of persons in the household at inception of tenancy.

■ A fee for caregivers (a person over 18 years of age who provides live-in health or supportive care to a homeowner who is 55 years of age or older).

■ A fee for care-receivers (a parent, sibling, child, or grandchild of a homeowner who is 55 years of age or older in an age-restricted mobilehome park may share the mobilehome with the homeowner without charge, if that relative is over 18 years of age and requires live-in health or supportive care).

■ A fee or rent increase that reflects the cost of any fine, forfeiture, penalty, money damages, or fee assessed by a court against management for violating the *Mobilehome Residency Law*, or related attorneys' fees or costs. This provision does not apply, however, to Mobilehome Parks Act violations for which the mobilehome's registered owner is initially responsible pursuant to *Health & Saf.C.* § 18420(b). It also does not apply to, for example, pass-throughs for compliance costs and uninsured loss due to compliance with laws, judgments and awards respecting fair housing, including providing reasonable accommodations for the disabled, compliance with environmental laws, OSHA and other such mandated compliance costs.

■ A fee for maintenance of trees. Management responsible for tree maintenance expense where the tree is a specific hazard or code violation.

■ A fee for driveway maintenance: where management installed it or it cannot be determined who installed it. (However, homeowners under rental agreements entered into, renewed or extended on or after January 1, 2001 are responsible for the maintenance, repair, replacement, paving, sealing and expenses related to the maintenance of a homeowner-installed driveway. A homeowner may also be charged for the cost of any driveway damage caused by the homeowner or by a breach of the homeowner's responsibilities under park rules and regulations (so long as those rules and regulations do not conflict with other MRL sections).

■ No unilateral lien as security for charges: Management cannot secure a homeowner's rent or other fee obligations by acquiring a lien on his or her mobilehome unless management and the homeowner mutually agree thereto.

■ Unless properly classified as "rent," "utilities" or "incidental reasonable charges for services actually rendered," expenses generally cannot be passed through to homeowners as additional fees.

**NOTE:** Pass-throughs labeled as "additional rent" are permissible, as the courts hold that nothing in the MRL caps the amount of "rent" (as opposed to "fees") that may be charged homeowners. Therefore, except to the extent an applicable rent control ordinance sets a ceiling on rent, management and homeowners are free to negotiate for a pass-through of other costs as "additional rent"; and if labeled as "rent" or increased "rent" in the rental agreement (or, apparently, in a rent control ordinance), the charge is not a prohibited "fee." Thus, rent raises tied to management's increased operating expenses were not unlawful "fees" where the homeowners had agreed to pay same as a component of rent in their rental agreements.

■ Rent increases triggered by sale were not "fees" prohibited by the MRL where the lessee agreed that the buyer would have to accept an assignment of the rental agreement and that rent would then be increased by a specified amount.

■ Capital improvement expenditures are properly reimbursed where accounted for in the long term lease.



Please Feel Free to Contact Us with Any Questions!

*HAVE A HAPPY AND SAFE FOURTH OF JULY !!*

 