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PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

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Delete Attorney's Fees Clauses?

New 2017 Decision Excludes Residential Tenancy from Awards Against Owners on Tort Claims - Reinforces MHP Tenant Rights to Prevailing Party Status on Tort Claims Relating to Mobilehome Tenancy

By Terry R. Dowdall, Esq.

■ ***UPSHOT***: *"We conclude that a tenant's fall while walking across a common area lawn arose out of the homeowner's tenancy and entitled him to an award of attorney fees as the prevailing party in the action"* (all because of an attorney's fees clause).

In *Hemphill v. Wright Family*, mobilehome tenant sued for slip and fall. The court awarded damages. The court also awarded attorney's fees (of $46,206 and $2,185.88), on the grounds that the case arose out of a mobilehome tenancy based on an attorney's fees clause in the lease.

> You can paper the walls with eviction judgments. . . .
>
> [But] Only the park owner can afford to pay attorney's fees.

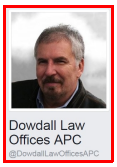
Management claimed that the case was a 'tort' claim, which did not stem from rights of tenancy. The court disagreed, holding that as a cost of suit attorney's fees were to be awarded.

Questions about attorney's fees and costs have been raised for some time. The problem is that under attorney's fees clauses, the tenants cannot afford to pay the fees when levied. You can paper the walls with eviction judgments. If the tenants cannot afford to pay the rent, certainly they cannot afford to pay attorney's fees. On the other hand, if a tenant defeats the landlord over a technicality, the tenant is a prevailing party. The tenant will be awarded attorney's fees and costs. The result? Only the park owner can afford to pay attorney's fees.

Too, since attorney's fees clauses incentivize the tenant lawyer to file suit over technical lawsuits, it is best practice to eliminate attorney's fees clauses. The Mobilehome Residency Law has an attorney's fees clause as it is. It cannot be waived.

But at least all claims aside from Mobilehome Residency Law can be removed from consideration for awards of attorney's fees.

Creative Solutions, Practical Results: Legal Counsel for Park Owner, Housing Providers: And Promoting Safe and Fair Housing for All Owners and Residents *(not a host of excuses why you cannot do "that").*



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Representing Park Owners, Management, Resident-Owned and Managed Communities and Trade Associations for 35 Years

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FACTS: Roadrunner is a 200 acre park consisting of home sites, a golf course, common areas and a large "greenbelt" common area lawn. Plaintiff Hemphill purchased a home at the park and leased the space under a written lease agreement with Roadrunner Club. Roadrunner Club is required to maintain the common area lawns, which are open to residents 24 hours per day, seven days a week. While on the lawn area near his home, Hemphill alleged that he stepped into a sunken and uncovered drainage hole causing him to fall and suffer serious injuries.

Hemphill sued. The jury awarded him $311,899.67. Hemphill then moved for attorney's fees under his lease agreement with Roadrunner. The lease allows the prevailing party to recover fees if the action arose out of, among other things, the homeowner's tenancy. The trial court denied the motion. The appellate court reversed and ruled that fees are proper.

DISCUSSION:

> *"We conclude that the action arose out of Hemphill's tenancy. Accordingly, we need not address Hemphill's alternative argument that the action arose out of the Mobilehome Residency Law."*

Generally, each party to litigation must bear its own attorney fees, unless otherwise provided by statute or contract. But "[i]f a contractual attorney fee provision is phrased broadly enough . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims." The Roadrunner Park lease agreement provides that in " . . . any action aris[ing] out of the Homeowner's tenancy, this Agreement, or the provisions of the Mobilehome Residency Law, the prevailing party or parties shall be entitled to recover reasonable expenses, including without limitation" attorney fees and costs.

The term "[h]omeowner's tenancy" is not defined in the lease agreement. Roadrunner Club has not offered a definition of the term, nor has it offered examples of the type of actions arising out of a homeowner's tenancy. This is unfortunate, as industry custom and practice would recognize the phrase "arising out of mobilehome tenancy" as arising out of statutory rights, duty or breach under the MRL. Arising out of tenancy would not cover a slip and fall accident, anymore than it covers any other claimant such as a postman, fed ex delivery, prospective applicant, or other tort.

Declaring the lease to be ambiguous and hence interpreted "most strongly against the party who caused the uncertainty to exist," the term "[h]omeowner's tenancy" was deemed very broad.

The jury found that Hemphill suffered injuries while crossing a common area lawn as a result of Roadrunner Club's negligence. On these facts, the Court concluded the suit arose out of the homeowner's tenancy. "Roadrunner Club's interpretation of the attorney fee provision renders the term "[h]omeowner's tenancy" meaningless."

So the park owner has options. Be sure to change the terms of a lease which carries forward an attorney's fees clause which is this broad and undefined; or, a recommendation which is made herein. Drop out attorney's fees clauses. It isn't worth it.

WHY ELIMINATE ATTORNEY FEE CLAUSES:

The major reason for attorney's fees clauses to be included in a lease agreement is recovery of the expense of the unlawful detainer action. However, this thinking has its problems:

1. Tenant Cannot Afford to Pay the Judgment; this is why you are evicting him. If he cannot pay the rent, do you think he can pay the attorney's fees?

2. Courts Trim the Actual Fee Spent: The Court will review attorney's fees and costs at trial. The courts are not used to mobilehome evictions. The experience of the judges and commissioners is conventional eviction practice.

The eviction "mills" churn out simple contested cases for $300- $400. And where there is no reason for concern with weak facts, a potential defense, or other of the many surprises that may lay in store, the "mill" is just fine. When the mobilehome park is heard, eyebrows are raised when $700-$800.00 is requested due to the extra work to ready the case.

Some courts use a bench schedule. Some use a percentage of the amount of the judgment. But none give the park owner the full amount of attorney's fees, except the unusual case. For example, the tenant who requires a great deal of pre-trial

discovery and preparation. And many judges may implicitly view attorney's fees as taking advantage of a tenant who is down and out. There is no appreciation for all the extra effort required to prepare the mobilehome tenancy eviction. Instead, we are carefully scrutinized by a piercing glance and wrinkled brow from the bench.

3. Upside: Attorney's fees may be paid not by the tenant, but by a lender. Where a lender would prefer to sell in place and waived its rights to avoid a lien foreclosure, attorney's fees can be requested to reinstate rights. This is a market dependent factor. When owners are paying dearly to keep homes from exiting the park, free rent and all manner of benefits may be offered instead. And sometimes the tenant can afford to pay. Or the parent can do so. The latter circumstance occurs with the warehousing scenario, with children placed in a home on parents' credit, never to be heard from again, after establishment of tenancy. These circumstances are outweighed by the tenants who cannot afford to pay. Then, the best that can be done is to possibly use attorney's fees as a credit at the lien sale after consulting your legal advisor.

4. Lightning Rods: There is little reason to have a lightning rod for lawyers in your rental agreement.
This writer recalls a discussion with a tenant lawyer, years ago, now deceased. He told me in response to my question about a suit I characterized as frivolous, that he would get paid "by your client on an attorney fees motion." Like a contingency fee, the payment would come from the defendants' pockets. Other stories exist of, to the contrary, claims of refusing to pursue a claim due to the lack of an attorney's fees clause.

5. Encourages litigation

The operation of the attorney's fee clause is not limited to evictions. It is operable in any litigation which arises out of the contract. Tenant attorneys are much more prone to commence litigation on issues such as repairs, overall safety of the neighborhood, and so on, if the attorney fee clause is present. Here is the way this issue is analyzed by the tenant lawyers in some areas.

A. Once the tenant has received his summons and complaint, or the tenant is solicited in the courthouse, he or she will see about retaining counsel. *The first thing this attorney will look for is the attorney fee clause. If he finds it, his strategy is simple. He will demand a jury trial. And press ahead with driving up costs of the proceeding*. It is virtually impossible to settle with these attorneys. There is the realization that prevailing tenants receive all their attorney's fees. They believe that the landlord can afford it.

B. Furthermore, attorney's fees clauses operate in any litigation which arises out of the contract. Tenant lawyers are *much more prone to commence litigation on issues such as repairs, overall safety of the neighborhood*, if the attorney fee clause is present.

6. If you are going to have an attorneys fees clause anyway—

If you are going to use attorney's fees clauses (despite the litigation "magnet" they pose) exploit *Civil Code* §1717 by drafting the attorney's fee clause to provide that it applies only to actions to "enforce the contract" for "breach of contract" or "default" under the contract. Limit the Focus of the Clause to Contract Claims. The Mobilehome Residency Law requires the award of attorneys fees in cases which deal with it (*Civil Code* §798.85) and it cannot be waived.

Do you include any attorney's fees clause anyway? If so, the clause should be narrowed to cases, claim, suits, which arise from the Mobilehome Residency Law, not tenancy. This fatal overbreadth caused Roadrunner to pay $46,000 in fees. Careful drafting avoids the attorney's fees clause spill over to tort causes of action if it is drafted narrowly to apply only to the contract claims. See *Reynolds Metals Co. v. Alpherson*, 25 Cal.3d 124. A clause in a note that provided for attorney's fees for a "default" would apply to the claims on the note but not the tort claims.

In contrast, more recent courts have concluded that broadly worded fee clauses that provide for recovery by the prevailing party in any action "arising out of" or "related to" the contract permit an award of attorneys' fees in tort. *Xuereb v. Marcus & Millichap*, Inc., 3 Cal.App.4th 1338, 1341-1343 (1992); *Palmer v. Shawback*, 17 Cal.App.4th 296 (1993); *Lerner v. Ward*, 13 Cal.App.4th 155 (1993) and *Wilshire Blvd. Bldg. v. W.R. Grace & Co.*, 990 F.2d 487 (9th Cir. 1993).

7. Keep in Mind that some unilateral fee provisions remain in effect and enforceable.

Although §1717 acts to morph a unilateral attorney's fees clause into "reciprocal" right on contract claims, unilateral fee clauses still retain utility in tort. Moallem v. Coldwell Banker Commercial Group, 25 Cal.App.4th 1827 (1994), holds that the "reciprocity" afforded by the general attorney fees statute applies in contract only, and it breathes life into unilateral fee clauses. In that case, Moallem was the assignee of an owner who had entered into a brokerage agreement with Coldwell Banker. Coldwell successfully defended against plaintiff's breach of contract claim arising out of the owner's forfeiture of

a warehouse property. But Coldwell had sublet the property in violation of the owner's lease. The trial court entered judgment against Coldwell in plaintiff's favor on his negligence and breach of fiduciary duty causes of action. The brokerage agreement between Coldwell and the owner contained a unilateral attorney's fees clause in Coldwell's favor that provided:

> *"If broker is required to institute legal action against owner relating to this schedule or any agreement of which it is a part, broker shall be entitled to reasonable attorneys' fees and costs."*

Both parties moved for attorneys' fees under *Civil Code* §1717. The trial court determined that there was no "prevailing party on the contract" and denied both parties' requests for attorney's fees. Coldwell appealed.

On appeal, the court acknowledged Moallem's position that the term "relating to" in the fee clause was broad enough to include his tort causes of action under Xuereb, supra, and its progeny. However, because the fee clause was unilateral and named Coldwell as the recipient, rather than the "prevailing party," the court held that only Coldwell was entitled to recover attorneys' fees, as no reciprocal right was afforded to plaintiff on the tort causes of action. The outcome would have been different had Coldwell not been unilaterally designated as the party to recover attorney's fees.

Whenever your client has the opportunity to leverage a unilateral fee clause, it can provide added protection against an opponent's ability to recover attorney's fees in tort.

This year, the Hemphill case was distinguished, but the appellate court may have done so with an inexcusable faux pas. We all know that the MRL requires a rental agreement in writing, which contains certain required covenants. One of them is the covenant to maintain the park, including common areas. This agreement (a 2 page document) did not contain that covenant. The Hemphill case residency documents did. The failure to abide by the MRL was cited as a reason why the park owner's duty (which would have given rise to the attorney's fees claim) did not exist.

8. New Light on Attorney's fees in Residential (Park-Owned) Tenancies. A recent case handed down a few months ago (2017, *Ramos v. Breeze,* No. D069175) adds gloss to the discussion. Though unpublished, such opinions are helpful for business and preventive planning. The case shows that elimination of attorney's fees clauses and curtaining their scope when included, should be considered.

Basically, the residential tenancy agreement did not contain the familiar covenant requiring maintenance of common facilities. See *Civil Code* §798.15 (d). The omission of that covenant in the residential rental agreement saved the landlord from an attorney fee award. While that omissions is not allowable in the MHP rental agreement, it can apply to park - owned renters. Yet another reason to use a different rental agreement for park owned renters.

9. The MRL Requires A Covenant to Maintain and Thus Raises the Specter of Covered Tort Claims. The MRL says,

> *The rental agreement shall be in writing and shall contain, in addition to the provisions otherwise required by law to be included, all of the following:*
> *(d) A provision specifying that (1) it is the responsibility of the management to provide and maintain physical improvements in the common facilities in good working order and condition . . .*

Unlike the agreement in the *Ramos* case, the lease agreement in *Hemphill* expressly imposed a contractual duty on the landlord to maintain the common areas in good working order and condition for use by its tenants. (*Hemphill,* 234 Cal.App.4th at 914). Hemphill did not therefore support a conclusion that the attorney fees provision requires an award of attorney fees to the prevailing party in an action alleging personal injury based on Landlord's negligence in maintaining its common areas. (*Ramos v. Breeze* (Jan. 17, 2017, No. D069175) ___Cal.App.4th___ [2017 Cal. App. Unpub. LEXIS 351, at *18]). The park owner is doomed but not the residential landlord—or, park owned rentals.

It shows that the field of attorney's fees awards in mobilehome park cases still sides with the *Hemphill* case to allow contractual tenant attorney's fees, aside from the statutory duties under *Civil Code* §798.85 (all actions arising under the MRL). Park owned rentals are not subject to this trap.

Sen. Judic. Chair, GSMOL Reject Resident Protection Bill!

– GSMOL 'OK' With Less Protection than Residential Tenants, Rejecting Right of Eviction in 3 days (Not 60). Will Residents Who Value Security and Safety Give Up on GSMOL?

By Terry R. Dowdall, Esq.

■ ***UPSHOT**: Big News. GSMOL sells out its members on SB470, Resident Protection. GSMOL Clovis officers agree with the Senate Judiciary Chair that proposed law to allow **immediate eviction** of **dangerous tenants** is a **"Mental Health"** issue and not grounds to immediately evict. **Will Tenants Boycott the GSMOL?***

*For several years, the WMA Legislative Committee has spearheaded efforts to clarify and add to the protection of residents by providing for 3 day eviction of a dangerous tenant (a menace to others in the community). **It is already law in residential tenancies.** If a dangerous tenant commits violence on others in an apartment or park-owned rental, the 3 day eviction is allowed. If in a mobilehome tenancy, eviction cannot start for 60 days, while the menacing or mentally ill tenant continues to prey on, victimize and bully others. Result? A de facto lock-down of the entire park for 60 days. **The GSMOL, in a revealing exposure of their thinking, argued a position holding that residents should continue to suffer dangerous tenants for 60 days instead of 3 days as newly proposed.***

*Now, the Senate Judiciary Committee on May 2, 2017, who, in the face of a 550 signature petition, chose to rely on the existing "substantial annoyance" language as being more protective of today's residents. They rejected new tailored language to authorize 3 days notices on dangerous tenants, just like apartment tenants**, instead of 60 day notices**.*

In doing so, the committee chair observed, quite remarkably, that residents subject to termination of tenancy have mental health issues— are therefore "mentally ill."

Senate Judiciary Committee:

Residents who are subject to termination of tenancy are mentally ill.

FACTS:

Senator Stone (Temecula) carried SB470, which is a law to provide 3 day evictions of dangerous tenants. Right now, it takes 60 days to start any eviction. This office helped fashion the bill due to resident outcry of the inability to do anything about criminals who make bail after a felonious assault, murder of other residents or other outrageous criminal conduct.

In a letter from this office explaining why a 3 day *notice–just like in the residential rental context–should* be added to the code—we said:

"I have lived through termination cases for truly violent, dangerous and ghastly conduct. Included would be assaults and battery, wielding a chain saw, swat team standoffs, attacks on others, drug manufacture and sales."

"In all cases, the owner must wait 60 days before we can seek relief (Civil Code §798.55(b))...Near-by residents are rightfully terrified when the assailant makes bail and returns to the park. That assailant has at least 60 days to continue to intimidate, harass and endanger others. Once terminated, they do anything they want, because the tenancy is already over. Park management cannot effectively (or safely) confront or request compliance–they are already terminated. The park and the management remain terrorized until eviction. Elderly residents are helplessly exposed to these dangers. As said by an El Cajon police officer, crouched on a resident's porch aiming a rifle on the holed-up culprit's mobilehome, "stay in your home, get on the floor, stay there." Grandchildren were visiting at the time. Is this the way seniors should spend a bright beautiful Saturday?

"This prolonged exposure to risk occurs only in a mobilehome park. In a residential rental setting, a three (3) day notice can be served. In a mobilehome park, a sixty (60) day notice is required."

"If the park owner owned and rented out the mobilehome, the dangerous person would be under general residential landlord-tenant law and subject to a three (3) day notice of termination. His next door neighbor, under the Mobilehome Residency Law (Civil Code §798.55(b)) must receive a sixty (60) day notice of termination.

"[I]f criminals and perverts can't live in mobilehome parks where else can they live?"

"There is simply no reason why dangerous conduct should be treated differently because of location, or type of tenancy. The nature of the conduct defines the response. And, the burden of proof is not changed with this bill. It merely allows the owner an earlier trial. All procedural protections always continue to apply. It just squares the mobilehome tenant victim's interests with the rights set forth in general landlord-tenant law."

"Why are elderly mobilehome tenants treated worse? AB 470 would help to protect all residents by empowering owners to deal immediately with indisputably dangerous conduct. AB 470 would go a long way to protect vulnerable seniors from immediate dangers posed by others."

Current law allows for eviction for any substantial annoyance. AB 470 provides for the eviction of extreme and outrageous conduct.

SEN. JUDICIARY HEARING:

At the hearing on May 2, 2017, the chair compared the situation to *apartment rentals.* She did not (or chose not to) recognize that apartment tenancies *are already covered with a three day quit notice* for outrageous and incurable breach.

The "fundamental flaw" as she reviewed her notes looking down, had to do with "what the language means." Apparently the language "substantial annoyance" is more clear to the Chair than "outrageous and extreme." The ACLU agreed, stating that the words allowed for discriminatory application. The ACLU also implicitly argued that existing "substantial annoyance" law is *less* prone to a discriminatory application. But one might say *"substantial annoyance"* is unfathomably more hazy and uncertain. They both thought political speech could be outrageous to some. But they ignore due process and the judicial scrutiny of such action. If ridiculous, a court can sanction the wrongdoer. But no park owner would take such frivilous action. And no attorney would let him or her because of malicious prosecution liability.

The chair was also concerned that some manifest a decrease of respect and civility, calling many of the perpetrators of murder, harm and loss as not having "mental health." The real message: *Get along with the criminals, criminally insane and mentally ill in your neighborhood if they kill, maim, or injure your family.* As Senator Monning said, call 911.

GSMOL ASKING FOR BOYCOTT?

It appears that the GSMOL must be embracing the criminal element as a target for new membership or above its own members' interests by not calling for *immediate ejection* of criminals. Rather than change the law to allow for immediate termination actions, GSMOL openly opposes SB470 (to square the law with residential rentals). GSMOL feels that its members should have less protection than apartment tenants. *The quality of life the GSMOL embraces? Something like "Life with a dangerous predatory criminal is better than a park owner who might abuse the law."*

THE VOTE:

The bill failed on first vote but was granted reconsideration. The final vote count shows that WMA's efforts at plain talk and common sense resonated with many. Not all the committee democrats could side with GSMOL on this bill. Nor is it in recent memory that an association throws its members to the wolves like this; even its lobbyist did not appear. Does this disdain for safety show a widening gap between GSMOL leaders and

members? GSMOL is an association which purports to advance the interests of its members. Quiet enjoyment is such an interest. In this case, it appears that GSMOL is asking for a boycott. It is acting contrary to the interest in ejecting dangerous residents who put neighbors at risk.

Four Democrats abstained from voting on the bill. The mere fact that prominent Democrats could not vote against the bill is loud if not unequivocal condemnation.

COMMENT: No one asks me for moral advice, *so*: bereft of moorings to ethical imperatives or pangs of moral compunction:

Serious criminal harms after an outrageous action occurs, that victimize other residents cannot be blamed on park owners or WMA. We have tried to improve safety for several. So legally, I take some comfort in the proceedings of the committee in this case.

And we can all learn from what did not happen.

■ *Existing Remedies Adequate:* Quote Senator Monning: "Call 911." He also says to wait for the criminal trial.

■ *Reasonable Care Duties Lowered, because Not Even Existing Landlord rights Applicable to Park Owners*: The chair (Senator Hannah-Beth Jackson) lowers the bar on the duty to avoid risks of harm, by her insistence that crime and erosion of respect for each other is a problem in society as a whole (at least where she comes from, apparently) and that mental health needs to be addressed. She does not know what "outrageous in the extreme" means. Park residents need to bear their fair share of the victimization and live with fewer remedies than residential renters.

■ *Insulates Park owners from Liability*: Both legislators implicitly deny the mobilehome owner the existing entitlements and protections possessed by the *residential rental dweller* (who is protected with 3 day quit notices), despite the investment made by the mobilehome residents in a park for peace and quiet. Thankfully, this lets park owners "off the hook." Apartment landlords have a duty to act with right to serve a 3 day notice. Park owners are statutorily barred from that.

■ *Inaction is Statutorily Sanctioned*: The comments of the Senate Judiciary Committee show that the custom and practice of park owners should be to **not** take aggressive actions for termination of tenancy in the event of criminal actions. While inaction may be anathema for many owners, consider:

(1) There is no *reimbursement expectation*, especially in rent control areas of the state.

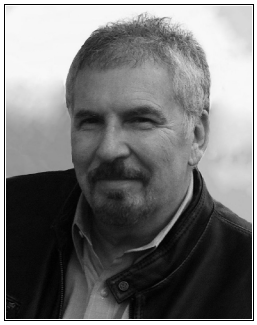
(2) The state prosecutes to adjudicate right and wrong, so park owners can *wait* (according to Senator Monning).

(3) There is little *loss avoidance incentive*, because liability insurance may respond.

(4) The courts largely treat criminal acts as *not* foreseeable. I cite the gang shootings in the *Castaneda* case (bystander shot during a gang confrontation involving a resident of the park, park not liable despite issues of lighting, patrols, security measures.)

The fascinating part of all this is of course the disdain GSMOL has for its *own* members–they reject a level playing field with residential renters *who get more protection that they do without any investment in the housing at all.*

As one park owner said, *"[I]f criminals and perverts can't live in mobilehome parks where else can they live?"*



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