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PARK WATCH

LEGAL DEVELOPMENTS NEWSLETTER

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Delete Attorney's Fees Clauses?

Note: Fee Award Against Owner on Tort Claims

By Terry R. Dowdall, Esq.

■**UPSHOT:** in *Don R. Hemphill, Plaintiff v. Wright Family, LLC (Roadrunner Club),* plaintiff 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. 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. One 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 is 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 frivolous, technical claims, *is it best practice* to eliminate attorney's fees clauses *en toto*? We think *yes*. The Mobilehome Residency Law includes an attorney's fees clause as it is, which cannot be waived. But at least all claims aside from Mobilehome Residency Law can be removed from risk of adverse attorney's fees.

■ **FACTS:** Hemphill leased in a 200 acre park consisting of home sites, a golf course, common areas and a large "greenbelt" common area lawn.

Lessor Roadrunner Club maintained 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 allegedly 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 lease provided 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.*

> "Arising out of tenancy" would not cover a slip and fall accident, anymore than the MRL requires lessor to maintain lessee's equilibrium.

The term *"[h]omeowner's tenancy"* is not defined in the lease agreement. The court noticed specifically that the lawyers for lessor offered no definition of the term "arising" out of, nor offered examples of the type of actions "arising" out of a homeowner's tenancy. This is possibly unfortunate, as industry custom and practice would recognize the phrase "arising out of mobilehome tenancy" as meshing with the statutory rights, duty or breach under the provisions of the MRL. *Every* term of tenancy must be in writing. *Civ C* 798.15 (h): [in addition to specified terms being in writing] "All other provisions governing the tenancy." It should remind us of the expert's saying: do you really need a team of lawyers if we can hire one good witness?

Propter Hoc, Ergo Propter Hoc

"Arising out of tenancy" would not cover a slip and fall accident, anymore than the MRL requires lessor to maintain lessee's equilibrium. There is not simply the absence of a statutory tenancy right at issue, there is no bright line established between what "arises" and what doesn't? As it is now, every single volitional act on the park premises "arises" from tenancy because the parties are merely present due to tenancy. This classic fallacy is an example of *propter hoc, ergo propter hoc*. Just because something exists does *not* mean it is the *cause*. Absent some direction, this Court (and others) may say "yes," if it *happened during* tenancy, it *arises* because of tenancy.

The Universal Litigation Predictor in Plain English

Further, don't lose sight of the most elemental principle in landlord-tenant jurisprudence: cases are universally viewed, and often decided, based on the *"big guy vs. little guy"* doctrine. In American courts, the little guy always wins. We love the underdog. Here, without any limiting principle to apply, the Court rushed through all the analytical barriers, and held that there is liability for any harm on the premises.

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 limitless.

The jury found that Hemphill suffered injuries while crossing a common area lawn as a result of Roadrunner Club's negligence. To make this determination, the court had instructed the jury regarding a landlord's duty of care. On the facts, the Court con-cluded 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, take the recommendation made herein. Drop out attorney's fees clauses. It isn't worth it.

■ WHY FORGET ABOUT ATTORNEY'S 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 limited to conventional eviction practice.

The typical eviction "mills" churn out simple contested cases for $300-400. And this where there are no unusual problems or facts, no potential defenses, or other of the many surprises that may lay in store. Here, the "mill" may be fine. But when the mobilehome park case 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: Again, 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. 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.

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, and so on, if the attorney fee clause is present.

6. If you are going to have an attorney's fees clause anyway—

If you are going to use attorney's fees clauses (despite the litigation "magnet" they pose) exploit §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.

7. Limit the focus of the clause to contract claims: The Mobilehome Residency Law requires the award of attorney's fees in cases which deal with it (*Civ. C.* 798.85) and it cannot be waived. Assuming you claim attorney's fees for your evictions based on the statute, perhaps there is no need for a lease clause anyway.

It is best to delete any reference to the Mobilehome Residency Law attorney's fees provisions. The tenant lawyer who reviews the lease may not be aware. Take into account that you probably know much more about the Mobilehome Residency Law than the average lawyer. *Our recommendation?* Omit all reference to attorney's fees.

Do you include any form of 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 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).

8. 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 claims.

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 *Civ. C* 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 recent cases cited above.

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 you have 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.

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Please feel free to contact Terry R. Dowdall, Esq., for further information and questions.

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