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PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

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Can Your Buyer Rely on "Opinions" About The Park?

***Sometimes**, Contrary to Popular Opinion*

By Terry R. Dowdall, Esq.

■ ***UPSHOT**:* You are a seller. In escrow. Your listing agent has lied. He exaggerated the facts to the stars. Buyer believed it–all of it. Agent is now justifiably worried. . .

He asks buyer to disclaim everything he said. Buyer then investigates and discovers the falsity. Buyer closes anyway. Agent is relieved. But buyer sues. How can buyer claim damages if he closed, knowing the truth? He did not rely, he should have backed out, you say? The trial judge says: "The bottom line is that buyer knew before the close of escrow, that the property facts touted were false–buyer proceeded anyway, and hence they had no justifiable reliance on the alleged fraud." You win! *Or do you?*

Nope. The trial court was wrong. Under California law, now, buyer can close the deal and then sue on the tort of fraud deceit, concealment or negligent misrepresentation. Perhaps consider a peer-to-peer deal using one attorney for documentation.

Buyer's discovery of the *true* facts after signing a purchase agreement ("PA"), but before the close of escrow, *does not preclude a finding of justifiable reliance on false representations made by the seller* before the PA is signed.

Buyer's reliance at inception of the PA is enough to sue for fraud. *Answer?* Require purchaser diligence. And be clear.

Opinions Can Count! Even seller opinions can be relied on in certain cases. In general, buyer has the right to rely on statements of material facts made by the seller in connection with the material terms of sale. Especially if buyer is new to the business, ignorant or inexperienced and that inexperience is known to seller.

The right of action may apply where seller is aware of the buyer's reliance and aware that his or her statements involve facts that buyer cannot be expected to know.

Does it Pay to Have an Agent who is Untrustworthy? Knowledge of seller's untrustworthiness renders reliance unjustifiable.

A buyer who doubts seller's or the agent's honesty or statements regarding the sale will probably be unable to show that reliance on the seller's statements was justifiable. Answer? At least run a litigation check. Past suits?

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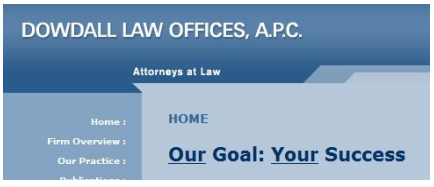

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One Lie Taints the Barrel.

If buyer learns that one representation by a seller is false, buyer will not be able to justifiably rely on other representations absent independent corroboration. Buyers generally may not justifiably rely on statements of opinion, including legal conclusions drawn from true statements of fact.

What's the Line between Fact and Opinion?

The difference between a statement of opinion and one of fact is unclear sometimes. If an opinion is given under circumstances and in a way that renders it a positive assertion of fact, it will be treated as a representation of fact for purposes of an action for fraud.

Off the Hook for Sheer Hyperbole.

But. . . A seller is generally not liable for "puffery" and other exaggerated opinions. However, courts are narrowing allowable hyperbole for broad statements made by manufacturers about quality, thus establishing precedents that could spill into real property cases. A statement claiming a product is safe, for instance, is usually held to be an actionable statement of fact.

Future Value Claims are Not Actionable.

Inaccurate forecasts about future fair market value are not actionable. A misrepresentation must be made about false past or existing facts to sue. We would be suing fortune tellers otherwise.

What If The Opinion Maker Doesn't Believe it?

Actionable statements of opinion include an opinion not in fact entertained by the one expressing the opinion. Here are some rules to know (if not to live by).

- *Suit for fraud is possible if the maker "does not honestly entertain that opinion" or has "superior knowledge or special information" about the matter.*
- *Fraud may lie if the opinion amplifies false assertion of fact.*
- *Fraud claims lie if the opinion is given in a manner that implies a factual basis that does not exist.*
- *Suit is allowed where the opinion is expressed as a fact.*
- *Fraud lies if the opinion is expressed by a party possessing superior knowledge to that of buyer.*
- *A fraud claim lies if the opinion is expressed by a seller who has a fiduciary relationship with buyer.*

A court will not necessarily determine if a statement is fact or opinion. If there is reasonable doubt as to whether a statement is fact or opinion, the ultimate decision is delegated to the jury.

Legal remedies for buyers.

The strongest remedy is to sue to compel sale--for "specific performance." A court can order seller to deliver the deed as agreed in the PA. Because every property is unique, specific performance is appropriate since monetary damages are deemed inadequate to compensate buyer. Remember the lis pendens.

But for a court to grant specific performance, the PA must be precisely worded with no vague, indefinite terms. Your lawyer can help with that. Seller defenses include inadequate consideration, hardship, or consent to the PA being obtained by fraud, mistake, duress, misrepresentation or unfair practices. Buyer can also sue for damages due to misrepresentation, fraud, breach of contract, etc. (such as concealment of a material defect). Still another remedy is rescission. If property was substantially misrepresented and the buyer doesn't feel money damages are adequate, rescission puts the parties back in their original positions (status quo ante).

Legal remedies for sellers.

If a buyer fails to complete the purchase, the seller's most practical remedy is to sue buyer for money damages. Usually, the property is listed anew or a new peer located, and it is sold to another buyer, then the seller sues the first buyer for damages, such as reduced price and additional carrying costs. However, in special situations, specific performance may be available to a seller to force the buyer to complete the purchase. A court ordered specific performance by a buyer who contracted with seller to have an 840-unit hotel built to his specs. When he failed to complete the $6,825,000 purchase and no other buyer could be found, the court ordered buyer to complete his purchase as agreed.

Finally, many deals involve one listing agent. Bear in mind that the California Supreme Court has held that listing agents owe fiduciary duty to buyers when buyer and sellerare represented by the same brokerage. The court also said that "Even in the absence of a fiduciary duty to the buyer, listing agents are required to disclose to prospective purchasers all facts materially affecting the value or desirability of a property that a reasonable visual inspection would reveal."

Strategy: Consider a "snapshot" arbitration clause which resolves pre-COE disputes and claims about quality, condition and p&l's, etc. In 30 days before COE. Get it over with. If you deal with a problem now, post COE claims, courts and protracted litigation may be avoided, benefitting both sides.

DEFENDING MHP TENANT CLASS ACTIONS FOR BREACH OF TENANCY DUTIES AND UNFAIR BUSINESS PRACTICES

–*SUMMARY JUDGMENT ENDS CASE EVEN BEFORE CLASS CERTIFICATION*

Upshot

By Terry R. Dowdall, Esq.

A class action against a mobilehome park owner is a dangerous and frightening risk. Why? The *multiplier* effect and the attorney fee reward. In a class action case, just one representative tenant has damages and he or she represents all other tenants similarly situated in the park. They are generally included automatically unless they affirmatively opt out. The amount of damage to the representative is multiplied by the number of tenants in the class. The attorney fee reward is multiplied by an amount to incentivize attorneys to pursue future class actions.

Example: one tenant swears to suffering $1,000 in injuries and damages. If there are 100 tenants, $1000 becomes a total of $100,000 ($1,000 x 100). A small claims nuisance can become an enterprise-threatening nightmare. The attorney fee is $100,000.00 on an hourly calculation ("lodestar"). The court doubles or triples the fee to send a message to others.

Owner Finally Turns to DLO

In a case just decided in Los Angeles County, complex litigation seeking class action relief, punitive damages, and attorney's fees and costs, based on violations of the Mobilehome Residency Law (Civil Code §§798, et seq.)("MRL") and unfair business practices in a 200 space mobilehome park was brought to sudden halt on summary judgment motion filed by Terry R. Dowdall.

The park owner and 2 different firms floundered for months of time lost. DLO immediately confronted the esoteric nature of the legal claims, explained why custom and practice in the arcane MRL was misunderstood, and showed the court why there were no claims to try to a jury.

Facts

It all started with an eviction action. The park owner tried to evict a tenant for nonpayment of rent, which included a specified "pass-through" each month. The tenant attorney challenged the pass-through in the eviction and when the home then sold anyway, the case was dismissed by the park owner. But the dismissal did not include a general release. A general release might have cut off the class action claim. But it also made little sense to litigate an eviction when the tenant had sold the home. The tenant attorney claimed he was reimbursed his attorney's fees and prevailed.

The tenant attorney then demanded to know what the pass-through was for. Civ. C. §798.31 only allows charges for rent, utilities and service charges. But the park owner refused to offer

that type of glimpse into internal confidential business matters. Would you open your books and records to a past lawyer who was defending a defaulting tenant? So undeterred, the new claims was stated by the plaintiff tenant as follows:

> . . . the park owner never provided to plaintiff any explanation of what the charge being "passed through" was or is, never gave to her any notice of its intent to charge the fee at all much less 60 days before its imposition, and has never noted on the rent statements any expiration date for such charge.

All of this is true. But does it give rise to a class action claim for a violation of MRL? The trial judge in various conferences thought an explanation should be required–our job was to explain why the MRL clearly defined the extent of the owner's duties to the exclusion of common law instinctual obligations and responsibilities. Said the tenant attorney:

> *My client requests . . . the following information relating to the pass-through charge(s) assessed against her:*
>
> *1. State what each charge being passed through was for, who (name, address and telephone number) furnished or rendered the goods, services and/or other consideration for which the charge was incurred, each date on which such furnishing or rendition occurred, the date of each charge incurred, the amount of each charge incurred, and the date and amount of each payment made by you to satisfy the obligation represented by each such charge.*
>
> *2. State, by month and year, each pass-through charge increment assessed against my client Karen Robinson from the beginning of her tenancy through and including August 2011, and January 2013 to the present.*
>
> *I would appreciate a response by June 5, 2013. If I have not heard anything from you by then, I will proceed appropriately.*

We recommend:
LONG TERM LEASING;
HOME IMPROVEMENT ALLOWANCES;
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FEDERAL ARBITRATION CLAUSES;
MANDATORY MEDIATION;
BROAD 'FACILITIES RELEASES'

The park owner continued to rebuff the tenant attorney. The tenant sued. In summary, the allegations against the park owner were serious, unless you are well versed in the MRL and supporting case law, which is not necessarily complex, but replete with minutiae, custom and practice which when combined with legislative intent, has confused and confounded many fine legal minds through the years. No subject is more susceptible to misunderstanding than pass-throughs. It took a supreme court case to straighten out the entire tenant bar as to the propriety of pass-throughs paid by tenants as part of the right of tenancy. Consider these claims:

> *Plaintiff brings this action on her own behalf and on behalf of all persons similarly situated. The class that plaintiff represents is composed of each person who as a tenant in All American Deluxe Estates in Fracville, Los Angeles County, was charged and who paid an unlawful "pass-thru" charge of $x.xx per month in the period of the 48 months immediately preceding the filing of this action or before, and after the filing of this action.*
>
> *This action is brought and may properly be maintained as a class action: . . . [T]he plaintiff class is so numerous that the individual joinder of all members is impracticable under the circumstances of this case. The exact number of class members is presently unknown, but is estimated to be at least 200 but not more than 300 based upon the number of rental units in All American. . . [C]ommon questions of law and fact exist as to all members of the plaintiff class and predominate over any questions which affect only individual members of the class.*

These common questions include, without limitation:

> *(i) whether the subject pass-thru charge was one that was authorized by contract and/or statute;*
> *(ii) whether defendant assessed said pass-thru charge in uniform amount and frequency against the members of the plaintiff class;*
> *(iii) whether defendant assessed said pass-thru charge against the members of the plaintiff class despite defendant's knowledge that such charge was illegal;*
> *(iv) the effect upon and the extent of injury to the members of the plaintiff class and the appropriate type and/or measure of damages/restitution, penalties, and punitive damages.*
>
> *Plaintiff's claims are typical of the claims of the members of the plaintiff class. . . because the course of conduct toward her and the deprivation of money from her was substantially identical for all class members. . . [T]he injuries and damages of each member of the plaintiff class were caused directly by defendant's wrongful conduct*

in violation of law alleged herein.

Plaintiff will fairly and adequately protect the interests of the members of the plaintiff class. Plaintiff has been a tenant in Fracville and has been subjected to the illegal pass-thru charges for over 10 years and has no interests which are adverse to the interests of the absent class members. Plaintiff has retained counsel who has over 35 years experience in the prosecution and/or defense of complex civil litigation, including but not limited to real estate and specifically landlord-tenant issues and who is competent to prosecute this matter as a class action.

. . . A class action is superior to other available means for the fair and efficient adjudication of this controversy since individual joinder of all members of the class is impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would engender.

All American did issue a bill ("rent statement") to plaintiff which details amounts claimed due under the tenancy for that month for space rent for Space 666, and plaintiff's share of "utility charges", which are charges and taxes thereon for gas, electricity, water, trash and sewer services allocated to her space. Each rent statement has also included a charge which is described as a "Pass Thru"("pass-through charge"). Plaintiff always paid the full amounts billed for the space rent, utilities and pass-through charge. Plaintiff also stated:

Under Civil Code §798.31, All American is prohibited from charging a tenant homeowner any fee other than rent, utilities, and incidental reasonable charges for services actually rendered.

Under Civil Code §798.32(a), All American is prohibited from charging a tenant homeowner a fee for services actually rendered which are not listed in the rental agreement unless All American has given notice of its intent to charge the fee at least 60 days before the imposition of the charge.

Under Civil Code §798.32(b), All American is required to state any authorized charge for incidental services actually rendered separately from other charges on any monthly or periodic billing to the tenant homeowner, and if the fee or charge has a limited duration or is amortized for a specified period, the expiration date shall be stated on the initial notice and each subsequent billing to the tenant homeowner.

The heart of the claim is that the park owner never provided to plaintiff any explanation of what the charge being "passed through" was or is, never gave to her any notice of its intent to charge the fee at all much less 60 days before its imposition, and has never noted on the rent statements any expiration date for such charge. ¶13 of the lawsuit stated:

13. Plaintiff is informed and believes and thereon alleges that [All American] has never provided to any other tenant any explanation of what the charge being "passed through" was or is, never gave any notice of its intent to charge the fee at all much less 60 days before its imposition, and has never noted on the rent statements any expiration date for such charge.

All of this is true. But does it properly state claims for relief under California law and under the Mobilehome Residency Law (Civ. C. §§798, et seq.)(“MRL”)?

Plaintiff contends that it does:

By charging to and collecting from plaintiff and each other member of the plaintiff class such charge, [defendant] has violated the rights of plaintiff and each other member of the plaintiff class of their rights under Civil Code §§ 798.31 and 798.32 and under common law, by stealing from each of them $xx.xx per month for a period the true length of which is presently unknown. . .

. . . [Defendant’s] course of conduct in assessing and collecting the pass-through charge from plaintiff and each other members of the plaintiff class was intentional, done when All American knew or reasonably should have known that such assessment and collection was a violation of Civil Code §§ 798.31 and 798.32.

. . . Such conduct was also fraudulent, in that [defendant] represented to plaintiff and each member of the plaintiff class that the pass-through charge was due and owing while at the same time omitting to give each of them adequate material information upon which to verify the accuracy of the representation or to even suspect that such representation was inaccurate, intentionally seeking to exploit the natural trust that [defendant] was telling the truth when it said the money was owed and to exploit for personal gain the high likelihood that, because of unsophistication and/or lack of monetary resources, and the relatively small amount of such charge that would make it not worthwhile to expend resources, the park tenants would not question or take action to question the charge.

. . . Such conduct was also undertaken with malice, because All American acted in conscious disregard of the rights of plaintiff and the other members of the plaintiff class in depriving them of their right to retain that money without the fear of being charged by All American with breach of their respective lease contracts and possible eviction from the park with full knowledge that it was not legally entitled to deprive them of their money. Accordingly, All American is liable to plaintiff and the other members of the plaintiff class for statutory penalties and/or punitive damages, in amounts to be proven at trial.

". . . The conduct alleged herein violates Business & Professions Code § 17200, because the acts and business practices alleged constituted and constitute a common, continuous and continuing course of conduct of unfair competition by means of unfair, unlawful and/or fraudulent business acts or practices within the meaning of Business & Professions Code § 17200 et seq."

". . . Plaintiff and each other member of the plaintiff class are entitled to full restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits which may have been obtained by [PARK] as a result of its unlawful business acts or practices."

■ Explaining the MRL to a Trial Judge in Complex LA Superior Department

In Los Angeles County, a case is indexed and assigned based on its complexity and amount in controversy. Class action cases are complex cases due to the size and additional procedures that apply to the adjudication of such claims. The judge assigned to the Fracville controversy was reputed to be tenant oriented and partial to the interests of consumers.

The park owner went through two different industry attorney firms before engaging Dowdall Law Offices, A.P.C. The former firms did not immediately recognize the fatal flaws which shone through the porous claims made against the park owner, and were evidently set upon engaging in the usual pattern of lengthy written discovery to prepare to change the effort to have the class approved or "certified." The park owner stayed abreast of developments in the field and believed the claim was improper as stated however, obviating the need for extensive discovery. He made a regular practice of reading ParkWatch™.

We conceived a plan to avoid discovery costs, attack the suit for substantive absence of merit. First, the court heard a claim to dismiss for failure to state adequate claims (a "demurrer" in California State courts). The trial judge made it clear that he did not entertain demurrer claims. Even then, we succeeded in striking punitive damage claims.

A summary judgment motion forces the plaintiff to give evidence of its claims.

Our problem:

There were no copies or evidence at all of the addition of pass-throughs of any kind. Old records were routinely discarded, as in most typical *'mom and pop'* operations. This included resident files. Our problem was that the pass-through notice had been given years before the plaintiff moved into the community; plaintiff inherited the tenancy without formal approval procedure from relatives. We did not have a copy of the original notice of pass-through. Or rental agreements, rules or other indicia of tenancy for the former tenants. Gone. We did not even have an exemplar of the notice of the pass-through. We did have park management with exemplary memory, which won the day with a strong declaration of facts. And, we had invoices from the billing company that reflected the amount of the pass-through. Invoices billed each month showed the passthrough.

Invoices are Proof:

However, the invoice alone did not tie the pass-through to the amount of park expense which was prorated to all the tenants in the park. We were advised that the pass-through was for the purpose of breaking out and charging property taxes separately. But we did not have property tax records which went back nearly 20 years.

Appropriate investigation did reveal historical copies of the records, reproduced through highly specialized vendors, with access to the micro-fiche on which ancient records continue to be maintained. In combing through the years, we discovered that in one year in the late 1980's, the total property tax, divided by the rent producing number of spaces in the park on a monthly

basis, equaled the amount of the prorated pass-through to the penny. The park owner could then swear that the mathematics were used in that year to determine the pass-through for property taxes to be added on to each of the tenant's spaces.1[1]

The winning description of the proof of notice was set forth. See note.

Was plaintiff and each other member of the plaintiff class entitled to full restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits which may have been obtained by the defendant as a result of its "unlawful business acts or practices" ? The court ultimately ruled in favor of the park owner. The Summary Judgment motion. As soon as the court set the early date for motion to certify the class of tenants, we attacked with a motion for summary judgment. We attacked before the class could be certified, which may have built up significant momentum in the park. We attacked before a single deposition was taken.

The Legal Analysis:

"Pass-through" charges had once been the subject to bitter, controversial status in the mobilehome park industry. But in *Cacho v. Boudreau*, the Supreme Court held that a pass-through for property taxes is merely "rent." Government fees and assessments passed through to the tenants are a category of business expense that owners of mobilehome parks and other rental property have traditionally recovered from their tenants through the amount charged as rent. The court analyzed the interplay between Civ. C. §§798.31 and 798.49 as follows:

> Because . . . property tax expenditures have traditionally been recoverable components of rent, even under rent control ordinances, section 798.31 does not prohibit a park owner, or a local rent control ordinance, from structuring mobilehome park space rent to allow pass-throughs for . . property taxes as charges separate from a base rent.

We argued that charging the "Pass-through" at inception the plaintiff's tenancy is integral to the required elements of tenancy *ad initium*. The invoice that goes unpaid is a default. Plaintiff's payment of the presented invoices and constant "pass-through" since inception commencing 2002, is conclusive and binding to show agreement, consent and terms of the tenancy.[2]

Thus, Plaintiff's claims that no "incidental service charges" may be charged absent a 60-day notice under Civ. C. §798.32(a) was of no moment. The "pass-through" was rent, not a "fee for a service actually rendered." the statutes which discuss pass-throughs did not apply. Moreover, a 60-day notice was given prior to the inception of the charge. Plaintiff just had not then established tenancy. Moreover, Plaintiff paid the pass-through at inception of her tenancy, making it a term of initial tenancy–not a supplemental charge added later.

Plaintiff claimed that the owner violated Civ. C. §798.32(b), in that Defendant never allegedly provided any explanation of what the charge being "passed through" was or is, never gave to her any notice of its intent to charge the fee at all much less 60 days before its imposition, and has never noted on the rent statements any expiration date for such charge. The winning response was, that Defendant gave notice of the charge before plaintiff was a tenant. Receipt of acknowledgment was assured when the invoice was paid. Since Plaintiff established tenancy long after the pass-through was being charged, it accepted the tenancy with the payment of the invoices. Else there would not have been a "meeting of the minds" required by statute to establish tenancy in the first instance. Civ. C. §798.75. As Plaintiff did not sign a rental agreement but just started paying rents and charges, the invoice content contains the terms of the established tenancy. It was a memorandum of the tenancy agreement itself. The

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[1] The written notice of a new pass-through would have been attached to tenant monthly invoices. Such Park-wide notices were served, as standard practice, by affixing them to the monthly invoice for each space. The notice would have been given 60 days before the charge became payable, and this took place in or about 1988. This satisfied the rent increase statute (Civil Code 798.30) which called for 60 days notice back in 1988 (it later changed to 90 days in advance). I know this because the pass-through has been charged and collected since on or about 1988. This method of service remains in practice today when all tenants must receive a notification which calls for reliable acknowledgment of receipt. The notice would have been a strip of paper, from a full page of duplicate notices cut into numerous separate strips, mimeographed using blue liquid-ink and a mimeograph machine. A xerox machine would be used today. The notice of the added pass-through for property taxes would be stapled to the monthly invoice. If the tenant paid the rent for the month in question, I had proof that the notice was received. Otherwise, the tenant would not be able to pay the monthly charges, as they change each month (a unique total of rent, utilities and service charges for the month in question–the only constant is the base monthly rent and passthrough). If the tenant pays the full invoiced amount, it is certain the written notice affixed to the invoice was also received.

[2] The rule of law is that even absent formal notice, a construction given to an agreement by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

"pass-through" was an explicit, discrete obligation for Plaintiff to perform from the outset. Folks, hang on to those monthly invoices.

■ Park Owner Wins Motion, Case, Obtains Summary Judgment

In sum, the Court ruled:

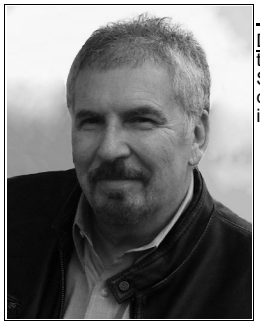
> According to [Defendant's president], Defendant had information from the mobilehome park owners' industry group (Western Manufactured Housing Communities Association) to form the belief that under rent control, pass throughs as a separate component of rent were a way to obtain reimbursement for the actual operating cost of property taxes without being subject to a hearing for a rent board's approval. As such, [the president of operations] claims that Defendant could increase the property tax charge each year as an allowable "pass-through" separate from the controlled base rent increase. . .
>
> ¶Further, the evidence submitted by Defendant satisfies its burden of demonstrating there has been no violation of §798.32(b). Again, §798.32(b) states: . . . The pass-through, based on Defendant's evidence, satisfies Defendant's initial burden that the charge does not constitute a "fee" or charge for a service actually rendered.

Notice of Ruling, pp.11-12.

■ Lessons and Conclusions

The entire case was therefore disposed of by way of summary judgment motion. In technical claims against park owner involving the Mobilehome Residency Law (Civil Code §§798, et seq.), time and effort may be spared by engaging knowledgeable counsel from the outset. Just knowing of the latest cases, strategies and law may save enormous cost. This entire class action case was disposed of for much less than the six figure attorney fee which discovery, motions, delay, certification or trial would have produced.

One of the benefits of technology is the ability to scan and keep large volumes of information at virtually no charge. I recommend you not discard anything; and that the files and records be scanned and maintained in perpetuity. This park owner escaped scrutiny because prudent investigation and sound presentation was effective in unearthing critical information located in elusive analogue public records requiring hand searches by specialized contractors. Presentation of the case was successful because we grasped the narrow applicability of the MRL and more importantly, how it did not apply in our case. A pinpoint defense made a shotgun approach simply inapt.



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