

Lending and Finance

"\$371,829.19" —

Residents Hit with FTM Litigation Costs



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It is time to curb specious resident lawsuits for "failure to maintain" (FTM). The recent *Greenfield Mobilehome Park* case shows why. One hundred and eighty residents, some naive and vulnerable, fell for a slick pitch that now saddles them with a judgment for attorney's fees and costs after their FTM lawsuit collapsed. Safeguards are needed to protect vulnerable residents from falsely seductive and greedy "get rich" claims: To corral fanciful stories devoid of merit, false allegations of injury, harm or damage. Safeguards are needed to protect undeserving parkowners from flagrantly abusive litigation.

Every year, several million vulnerable people fall victim to mass marketed scams such as bogus lotteries; deceptive prize draws and sweepstakes; fake psychics; get-rich-quick schemes and miracle health cures. One can forcefully argue that FTM cases should be added to the list. This case aptly proves such action is overdue.

In *Greenfield*, a courageous community ownership (Abe Arrigotti), attorney (Phillip Woog) and insurer banded together to declare "enough" and stood up to the scandalous claims of the organizers. One hundred and eighty residents joined the FTM suit because of false encouragement and vulnerability to "get-rich-quick" soliciting, promises and illusions. Nothing could be done to

stop the campaign of false advertising and solicitation. Much to the continuing chagrin of many residents who want peace and quiet in their homes, the MRL guarantees abusive residents the right of unlimited door-to-door solicitation day and night. Many residents had no ill will or complaints against management, but went along with the crowd and signed up on a clipboard. Unlike the admonitions given by some resident counsel, this parkowner was not given a chance to work with the residents to find solutions. And, no one told the residents of the ordeal, the time, effort and risk they faced by asserting legal claims in a court of law that lacked genuine merit. The resident organizers' efforts were advanced with media attention (television "consumer" reports), residents were pep-talked, nurtured, encouraged; and, not told of possible adverse consequences. This juggernaut of mindless aggressive campaigning transcended into a dreamy, trance-like sense of invincibility within the resident group . . . until trial.

Refusing extortionate demands for settlement based on the claims of 180 residents, the choice was made to try the case. Some residents joined on the strength of the resident organizers' assertions that all residents had been issued a "death sentence" due to a momentary asbestos cleanup in the pool area during clubhouse renovation.¹ The claim was, that within a short time after unsealed

¹ The claims were variously described like this: "Trisha Valverde thinks her daughter, 6-year-old Sara Louise, is already suffering the consequences of exposure to asbestos two years ago. 'Her breathing is compromised every day,' said Valverde. 'Until recently, I didn't correlate the two, her illness and the asbestos, but it all adds up when I look at her medical records. She had this thickening in her lungs and debris infiltrates.' Legislative advocate Sammi Taylor said, 'Asbestos contamination in the lungs and in the interior portion of the body is a death sentence; there is no reprieve from this.' Taylor serves as an advocate for people who live in manufactured homes." The "interior portion"? Interestingly, no one challenged her on the level of expertise or knowledge for ascribing the effects of asbestos exposure on any "portion" of the body.

asbestos was left at the pool area for 36-hours, the residents had been issued a "death sentence" and several were already suffering ill effects from the exposure.² Other claims included a closure of the clubhouse (Why? It was under renovation so the residents would enjoy virtually new facilities later), closure of the swimming pool (the same), parking issues, improper rotations of the "responsible person" (park managers), and the requirements that the MRL is required to be attached to the rental agreement and often provided each year. Was anyone actually injured? Damaged? Anyone suffer a loss? **No.** These minor violations of the MRL do not produce injury, damage or loss. Yet the legal system allows joinder of hundreds of residents, predicated on the solicitation of a resident organizer hell bent on retribution and profit against park management. No claims are tested for validity; there is no prima facie showing; and no showing of actual loss. The sole indicia of any bona fides are the large number of claimants. As demonstrated in this case, such a measure is illusory. The FTM claims in the *Greenfield case* mock all notions of justice and fair play.³

The Lawsuit Collapses because the Residents' Claims were Groundless

So, several hundreds of thousands of dollars later, the court adjudged that the plaintiffs' claims were groundless. The court even barred the claims of one organizer.⁴ The testimony of the residents showed they had no evidence of real harm, or injury or damage, no documentation, and no proof at all. The trial showed that many residents were simply hoodwinked into signing up.

The trial judge commented that the resident organizer orchestrated a news report that "did little to accurately portray the conditions of the park and served only to unnecessarily alarm and confuse plaintiffs as to the actual conditions of same." This confusion, to a greater or lesser extent, is present in all FTM cases - many residents have little notion of why they joined a suit, a suit which would never be brought individually, and results only when a large collective participation is achieved. Here, the residents were put to the test, and it was shown, like so many cases, that there was no harm, injury, or suffering - just a collection of hyper-technical issues which should not have been asserted

in the first instance. All claims failed.

In sum, the residents tried and failed to take advantage of the parkowner and the court system. The wild-eyed claims of the organizers properly failed. The residents who had been induced by platitudes of profit were horrified to find that their claims were rejected by the court. Justice triumphed.

Parkowner Entitled to Attorney's Fees and Costs

As a prevailing defendant, the parkowner is entitled to require each of the tenants to individually pay for the parkowner's attorney's fees and costs. The final additional award is \$371,829.19, broken down among the residents who signed their names as plaintiffs.

Mr. Woog's firm had been granted two much earlier fee applications with the Court, awarding an earlier collective total of \$21,106.52 (this award was against the residents that were dismissed for failure to respond to written discovery or failure to appear for their depositions. It is not clear whether the residents were ever informed prior to the lawsuit that they would have to reveal personal, confidential information as part of the lawsuit, take time off work for depositions, gather written documents, reveal medical and health records, prepare for testimony, review records, prepare for trial and endure considerable inconvenience and aggravation which is experienced by every court litigant).

After trial Mr. Woog's motion for attorney's fees was against everyone that proceeded to trial; the total cost for the defense of the case was indeed reasonable. The cost which was less than \$400,000 reflects a fair and expected amount to be expended for the defense

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² But, ah, that takes decades to manifest itself? Well, yes. But there is no judicial screening mechanism to uncover and stop such groundless claims, or test the bona fides of organizers' claims or intentions. The law actually protects the organizer in the effort to lead all the followers astray. And how are parkowners to complain in any case? Our condemnations are chalked up to claims of self-interest. Maybe someone should, as many of the residents stuck with a \$355,000 judgment might suggest? Maybe the court system has gone too far allowing mass claims, without real injury or damage, to those who merely sign a slip of paper on a clipboard?

³ What if the tables were reversed? What if a parkowner sued for damages, based on a mere residents's violation of the MRL, or a health and safety code violation? The first question? What real damages? Without real, concrete suffering of harm, injury or damage, general damages claims for violation of the MRL or the Park Act should simply not be permitted.

⁴ In making a retraction of a defamatory article regarding the parkowner, San Diego's Channel 10 stated: "Mr. Woog pointed out that the mother who spoke to 10 News about the asbestos fear was barred from participating in the lawsuit."

of a claim such as this FTM in a competent and prudent manner. In monitoring this action, it became clear that the defense was a hallmark of economical decision-making and extremely efficient. It is, therefore, no surprise that the court granted the request in its entirety.

Mr. Woog divided the plaintiffs into four different classes because some of their cases were terminated by the court at various times during the trial. He also meticulously allocated attorney's fees and costs against the resident organizer because that conduct required substantial additional work which justly was solely allocated. The resident organizer was specifically assessed \$24,569.40.

One of the claims often made in FTM organizing is that "you will not be responsible for costs." In this case, such a false inducement would be inaccurate at least, and possibly constitute actionable conduct. The defense attorney's expended reasonable time and energy which amounts to hundreds of thousands of dollars for which the residents are individually responsible.

Needs for Curbs against Abusive Litigation

Decades ago, the law of habitability was extended in California to allow residents to sue when the landlord failed to provide basic, vital requirements of a habitable premise: Not just amenities or decoration, but basic necessities, such as heat, or electricity. When the serious defect affected all residents (such as lack of heat for an entire building), courts allowed class actions for such claims. A resident representative can testify about his injury, his damage, and the resulting judgment is multiplied by the number of other residents and persons identified as class members. It is no surprise that a "slumlord" is (and should be) vigorously pursued for exploiting needy residents with no alternatives to

basic, decent housing. A mobilehome parkowner does not provide a habitable premises, the parkowner provides real property on which the resident may install a mobilehome. The quality of the housing is a decision of the mobilehome resident. Many FTM cases ironically reflect that the resident's homes are in far greater disrepair than any common facility. Can anyone really complain about dust in the clubhouse, when they are disassembling a Chevy V8 on their living room carpet? Yet the parkowner does provide common areas, utilities and amenities. When residents are physically injured or property is damaged, such an individual claim is cognizable and proper.⁵ But the system is abused when hundreds of residents can, without any contact or consultation with an attorney, sign up as a plaintiff at the behest and badgering of a slick organizer, list a few vague complaints about the closure of a clubhouse (for renovation no less) and seek damages. This is not the injury or damage which the law should contemplate or allow. Yet, attorneys in the field tout the fact that they have earned *hundreds of millions of dollars* for their clients through the years.

Who pays this cost and is it worth it? Has recovery from these suits improved anyone's quality of life since 1980 when these cases emerged? Has the cost to live in a mobilehome park increased? More to the point: Has the cost of

insurance increased? Does the cost of insurance increase for parkowners who have been stung by an FTM claim? And, ahem, who pays for that insurance? I suggest the cost of the FTM claim is paid by residents who honestly have no claims and do not bring false, ginned-up actions when there is no real damage or injury. Those recovering damages from settlements have suffered no harm: their lives do not improve. They may buy a new boat, car or wide screen television, but nothing changes.

The *Greenfield* case may mark a turning point. Many say it's time to curb "failure to maintain" claims in some reasonable way. The camp urging it the most should be homeowners' organizations. Why? Because it is the homeowners, state-wide, who pay for the money-grabbing of a certain particular few.

In *Escola v. Coca-Cola Bottling Co.*, the court stated that the wrongdoer, even absent any negligence ought to pay damages because the risk can be insured: "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.

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⁵ Absence of utilities for an unreasonable time is one thing. But a lack of parking? Or need for more clubhouse hours? Who is damaged or injured?

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” 24 Cal.2d 453, at 462.

The FTM is nearly the same in practice. Except that the loss is shared among a smaller group composed of the plaintiffs and their neighbors. Where the resident is legitimately harmed, one may assume the parkowner is in a better position to provide relief than the resident. Even when the parkowner performs reasonably and without negligence, claims for FTM are made. Where the claim is mere puffery, there is a naked redistribution of wealth when an insurer settles a case to avoid the disproportionately greater cost for attorney’s fees. The recovery rarely goes toward the dealing with the source of the proclaimed harm. *But from whom is the transfer of wealth?* The ultimate cost is borne by the consumer. Mobilehome parks make money; the money necessary to earn a reasonable profit flows from the

rental of the homesites in the park.

One scientist has stated that “As a result of extremely high premiums, very high-risk individuals may not be able to contract insurance and may refrain from engaging in the pertinent activity, which may make the activity safer.”⁶ New mobilehome parks are no longer built. The rare mobilehome park developer shies away from common area facilities, luxuries. Older mobilehome parks close and disappear. Facilities in existing mobilehome parks wane. Premiums increase, and are passed on as an uncontrollable cost of doing business, paid for by all residents, including the honest and ethical who did not sue for they had no reason to. Since judgments in FTM cases are variable, premiums must cover the difficulty in assessing likely losses.⁷

The fact that the real costs of FTM cases miss the intended target of relief is highlighted by the finding that the public: “. . . does not yet understand that they themselves are paying for the damage awards. The erroneous perception that wrongdoers are paying ‘fuels demands for more and higher damages’. Once this misperception has been corrected, there is no ground for supposing that

the public wants to pay for the coverage offered by the liability system. It should be noted that the administrative cost (i.e. the cost associated with administering an insurance program, reflecting the portion of the total amount that does not go to compensation for harm suffered) of first-party insurance and liability insurance differs significantly. Certainly, the administrative cost of liability insurance is much higher than the administrative cost of first-party insurance. As the authoritative American Law Institute concluded, ‘third-party tort insurance is extremely expensive to administer’. Priest reports that in the USA, the administrative cost of first-party plans are approximately 10%, but for third-party, tort-law plans, they exceed 50%.” (Id.)

All this cost is saddled, as a necessary consequence of doing business, on the consumer, the residents in the park. Virtually every rent control law provides, as it must, that insurance is a factor considered in the granting of rent increases. All relevant evidence is always considered.

It is plainly time to overhaul the FTM case, and provide relief where warranted, and a filter to curb abusive litigation. How? Required mediation, testing the basic suitability of the organizer, bona fide intent, genuine existence of a valid claim with real injury, damage or loss, “cooling off” periods, and a full, fair disclosure of risk to all participants should be required. Else the existence of mobilehome parks will remain subject to the spiraling and needless cost of the run-away FTM lawsuit. ■

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6 Environmental Risk Spreading and Insurance, RECIEL 12 (3) 2003, Lucas Bergkamp

7 Id. (“Insurers can handle some degree of uncertainty in this regard but there are limits. If the risk to be insured is the risk of being held liable for damages, the applicable rules govern the size and scope of the risk. This, in turn, means that the law itself must be sufficiently certain and precise. One particular risk seriously undermining insurability is the risk of retroactive changes in the law increasing the scope of liability, as insurers have not set premiums and policy conditions on the basis of such an expanded liability regime, but on the previous narrower regime. Thus, retroactive expansion of liability regimes, by definition, is uninsurable, since the relevant risk in this case is the risk of an unforeseeable court ruling, which is very uncertain and not quantifiable. Note also that where the time lag between the relevant occurrence and the damage increases (i.e. long-tail damage), informational and causal uncertainties increase, retroactive changes in liability law become more likely, and the insurability of the risk decreases”).