Failure to mantain lawsuit defeated

or, Resident gullibilty to community organizers and lessons learned

The failure to maintain (FTM) lawsuit plaguing community owners for a generation remains cause of utmost concern. Th ill-will engendered, the schism in goodwill, the damage to property reputation, the hampering of manufactured home community operations, vandalism, drop in home prices, insurance premium hikes, ability to procure insurance - all these issues and more emerge in the face of such FTM threats. Good maintenance, of course, is important to avoiding such a risk, but the best efforts of the community owner cannot always derail the malicious efforts of organizers who undo positive work and relations in hopes of profit by entangling a large group of residents into a claim which is baseless and unscrupulously organized.

No legislative safeguards protect against persistent and unwanted solicitations and canvassing of residents who wish no more than to be left alone. Threatened with social isolation, many join to stop the harassment of the community organizers, and still others join because they are told they have nothing to lose. And then the reality of a fair court system may leave them exposed to hundreds of thousands of dollars in liability for the insurance companies defense lawyers, as a recent case reflects.

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Some may believe that filing claims against community owners is a risk-free venture, sure to strike gold. Like so many Ponzi schemes, pyramid schemes and others, the vulnerable and greedy alike may fall victim to a slick sales pitch. They may think that others have collected, "now it's my turn;" "nothing to lose;" "safety in numbers;" "sure bets;" all the familiar seductive inducements which have drained billions of consumer dollars. Some may believe that community owners cannot prevail against resident groups. Some may file suits with impunity and without trepidation or reticence of any kind. These beliefs are, of course, plainly incorrect.

An example of such a baseless lawsuit ended in total resident defeat recently in San Diego County, where the community owner prevailed against every of the 180 homeowners, who sued based on the scare tactics and false allegations of community organizers. This claim is emblematic of the ugly underbelly of unscrupulous organizing practices behind some FTM cases, and the consequences of undue influence on residents who may be frail, gullible or avaricious.

Greenfield Estates is a pleasant community in the El Cajon area of San Diego

County, professionally managed and operated by Sierra Corporate Management, Inc., with whom I have worked for more than a decade. However, like so many communities, it is inhabited by some who are avaricious, vulnerable, frail, and quick to believe a sales pitch. About 180 residents were hoodwinked into believing that suing the community owner would be a win-win situation, enriching them all just like other cases.

However, the key feature of a FTM lawsuit was overlooked: its *merit* (the existence of actual claims which caused tangible harm, either personal injury or property damage). The key feature, which inspired community organizers, was the renovation of the clubhouse (for the benefit of the residents, ironically). The community organizers proclaimed that all the residents had been issued a death sentence due to a brief period of time during which some asbestos was removed by a contractor and not properly sealed. The condition was remedied within hours. As the evidence revealed later, no one was exposed and no harm was done. Still, the community organizers were persistent. In some cases, residents who choose not to sue become social pariahs to the rest of the community. This social isolation is a high price for not going along. Often, against their good and moral judgment some join the suit though feel it wrong to use the courts for illegitimate purposes. But browbeating by community resident organizers is apparently welcomed by the Mobilehome Residency Law (MRL), which expressly authorizes door-to-door contact, even if harassment, for resident causes.

Among other claims were a variety of asserted violations of law which caused injury or damages (and which were proven to have resulted in no actionable conduct), including improper closure of the clubhouse (during renovation), closure of the swimming pool, parking conditions, improper rotations of the responsible person (community managers), leasing violations, inadequate sewer and electrical services, and even violations of the requirements that the MRL is required to be attached to the rental agreement and often provided each year.

Despite all reasonable actions to try to settle the claim to avoid the cost of trial (and despite the baseless claims of the residents), no settlement was possible based on the outrageous demands of the plaintiff and the community organizers. They had received media attention with television consumer reports, were pep-talked by the community organizers, and continued on. This juggernaut of mindless aggressive campaigning transcended into a dreamy, trance-like sense of invincibility within the resident group . . . until trial.

Trials are sometimes a rude awakening. Trials are based on real evidence of the happenings and events: what is true, and in reality, lies that cannot be disproved. And after several weeks of trial, final arguments and submission of mounds of evidence, the community owner prevailed on all counts. The judge's comments revealed that the community organizers did nothing to help the residents, but rather exposed them all to *individual liability* for attorney's fees and costs. In all, the judge commented that the community organizers and the television news did more to *alarm and confuse* than to meritoriously represent the residents. The court stated as follows: "The court will limit its comments and observe only that the conduct of (the community organizers) had a seriously detrimental effect on the quality of evidence counsel for plaintiffs was able to produce at trial. Further, the court will limit its comments and observe only that the ABC News consumer report segment on the park orchestrated by (a community organizer) *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.*"

The judge's comments are based on cross-examination of the community organizer, and the judge's interjection as follows:

"**Q.** And armed with all of that knowledge, you make this statement right here, 'Sierra Property Management knew that our clubhouse contained asbestos aterials.' Because you're trying to *sell the lawsuit*; right?

A. I believed at the time they knew, I guess, and I put my beliefs as a fact. Maybe that was an error.

The Court: *Do you think*?"

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"**The Court:** It was *probably* asbestos. It was *probable*. And that was the basis for him not bidding on the job, versus any kind of scientific assessment that it was in fact asbestos. Yet, it appears that you have turned it around and declared this to be a *fact* in no uncertain terms. It is in caps and it is in bold. And it's three times. *Fact*.

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The Court: How about the first one, is it irresponsible to have made that statement?

The Witness: Well, I think that that was just my opinion. And maybe it was irresponsible to put it in."

The final ruling of the court terminated the interests of a community organizer, and all claims of the residents failed. Not a single resident had experienced injury or harms sufficient to bring a claim against Sierra Corporate Management, Inc., and the community owners. The rulings of the Court, *verbatim*, are as follows:

"On the claim of the clubhouse closure, plaintiffs were unable to prove the duration of the actual closure of the clubhouse, the duration, through expert testimony, that a renovation of the type undertaken here would likely take to complete and that the closure rose here to the level of actionable nuisance."

"On the swimming pool issue, plaintiffs were unable to prove the closure amounted to actionable nuisance."

"On the parking issue, plaintiffs were unable to prove any claim and in fact, the evidence demonstrated defendants attempted, at times with limited success, to improve the parking conditions in the park.

Further, plaintiffs failed to establish any damages concerning defendants conduct on the parking issues at the park."

"On the managerial rotations issue, plaintiffs were unable to establish that defendants were in violation of Health & Safety Code Section 18603, subdivision (a)."

"On the failure to provide leasing documents issue, plaintiffs' claims fail based on wholesale failure to produce documentary evidence at depositions and trial. On multiple occasions, plaintiffs for the first time at trial were made aware of documents they had been expected to produce at deposition. While testifying, some explained they had relevant documents at home that might, or might not, be in the category of documents earlier requested and now being examined on."

"Finally, plaintiffs completely misinterpret Civil Code Section 798.15 in advancing their claim of failure to receive a copy of the Mobilehome Residency Law."

"On the failure to respond to issues of inadequate sewer and electrical services, plaintiffs did produce evidence that there were sewer backups and problems especially near space number one. Many of the early claims are not actionable based on the Statute of Limitations bar that plaintiffs failed to address in evidence and closing argument. Evidence concerning the more recent sewer issues was that there continued to be problems but that a remedial plan was in place to correct the ongoing problem of old sewer lines and fixtures. Similarly, the electrical issues that occurred in the summer of 2008, were real but reasonably responded to by defendants."

Many of the residents were terminated from the lawsuit because of releases prepared from earlier transactions with the residents well before the FTM case was brought. Others were rejected for failure to comply with the obligations of pretrial preparation. Residents are often not told of the time, expense and inconvenience of their participation in a FTM case. Lawsuits are unpleasant; they are stressful; they induce anxiety and harm which is part of the price our justice system extracts from all its participants. Never did the community organizers make a disclosure of such realities.

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

Residents responsible for attorney's fees

And now, the consequences. As a prevailing defendant, the residents who were persuaded to join the FTM suit are *each individually responsible for the attorney's fees and costs of suit*. The attorney's fees and costs were incurred largely by the insurance company, which was required to defend this weak FTM lawsuit. As such, the insurance company will, as it must to protect the interests of its owners, seek full and complete reimbursement of the costs of this legal folly from those who chose to participate. While a community owner may have compassion for those duped by the community organizers (as characterized by the judge), the insurance company must seek reimbursement from all without emotional considerations. *Look at the harm the community organizers brought to this resident community!*

One of the claims 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.

Need for curbs against community organizer abuses

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, statewide, who pay for the money-grabbing of a certain particular few. Here's how.

The current legal system processes FTM claims in a similar and familiar fashion. Everyone knows the

rules. Everyone plays along. The suit is ginned up with sufficient resident cajoling and persistence. Then suit is filed, usually carefully including claims covered by insurance. Everyone then mediates early. Everyone tries to settle fast. Why settle? To avoid attorney's fees and costs which spiral up over time. Because the legal system allows hundred of individual residents to join together and burden the court system, such that judges may require nothing be done in a lawsuit until all parties confer with the court. We try to settle within policy limits so the community owner is not personally exposed to uncovered or excess loss. Hundreds of millions of dollars have been transferred in FTM cases.

So, one must ask: if we have a system that seems to be working, who is paying for it? Who is shouldering the cost of multi-million dollar settlements? The insurance company? *No* (yes, in the short run). The community owner? *No*. That is why insurance is purchased. The residents? *Yes!* It is the residents who pay. Now, FTM lawsuits are covered by insurance, usually. The community owners pay premiums for that insurance. The insurance premium costs are spread among the residents as rent. *So, the residents pay the community owner, the community owner pays the insurer, and the insurer uses those funds to settle FTM cases.*

The big picture? All residents are transferring their wealth to other residents who complain. Likewise, the benefit of any reasonable, basic requirements and limitations on baseless FTM cases would flow directly to the residents. Like recent legislation amending operation of the ADA, we need at a minimum, safeguards to filter out bad claims and curb charlatans masquerading as community organizers preying on vulnerable victims in our communities.

With a careful strategy, still, the risk of the FTM case can be neutralized. This result was recently brought about in a case in which this office coordinated with management in a proactive effort to educate residents to the negative ramifications of maintaining a FTM action against the owners. After long consideration, the resident lawyers, who were consulted, withdrew.

FTM triggers to avoid

The key factors in FTM cases are poor resident relations: a healthy dislike, hatred, resentment of the owners. I believe this issue is more important than the issue of maintenance, standing alone, in and of itself. Insurers, too, are concerned about how communities are operated and resident relations.

In some cases, rent policies trigger resident lawsuits. The lawsuit is not about a rent increase, but because of the collateral disputes rents engender. A resident thinks, well, higher rent, yet the community looks exactly the same. This is not fair. The result, 120 rent control laws in the state, and FTM cases often in areas without rent controls. Some questions owners already wisely consider: How high are rents compared to market? How often are rents raised and by how much? Are rent increases staggered so all tenants aren't increased on the same date?

Is the community operated by an independent management company? Experience shows that communities operated by professional management companies are sued less. This does not mean a management company is necessarily prudent. Certainly being prepared to show you are doing a good, professional job in managing will be beneficial.

Is the community involved in selling manufactured homes? Some insurers believe that if the community owner or manager is involved in selling manufactured homes, there may be a greater risk of resident unhappiness and lawsuits. Dealing exclusively with a dealer may be a very unwise, indeed unlawful practice.

Does the community plan to reduce services or go out of business? Major reductions in services or going out of business to convert to another use is another common cause of resident lawsuits.

Maintenance and repair. Doing a good job maintaining and repairing your community is essential. Some insurers ask about two common causes for lawsuits: (1) Do you have sewer back-ups or spills; (2) Are your trash bin areas clean or is trash scattered about? And history of past suits.

Have you been sued by your residents? Although my experience is that once sued you're usually not sued again, this is an issue that with passage of time is becoming a concern. Ending a prior case in a truly dispositive and final fashion may be very important later, and it is a step which should be carefully reviewed. In the El Cajon case, that effort resulted in the rejection of dozens of resident complaints barred by prior litigation which was comprehensively settled. The FTM is handled by insurance counsel. We have some fine attorneys in the field today who handle this work adeptly, expertly. Working with your attorney to assist in *monitoring* a case (strategy and technical input) is all that is required in such cases. Seeking to have the insurance company pay for "monitor" counsel or campaign for *Cumis* standing (defending potentially uncovered claims) may have its place: ordinarily, though, that effort will only sour relations, perhaps divert resources better used for settlement, and create yet other issues a community owner ordinarily seeks to avoid where the standard form FTM complaint is used.

Practice the five G's: *Good* maintenance; *Good* management; *Good* resident relations; *Good* residency documents; and some say, a *Good* experienced legal advisor, meaning, someone experienced in dealing with prevention, attenuating problems when they surface. All these are your cheapest and best insurance against a FTM.

So, it's no longer enough to do a good job maintaining our communities. Even the best maintained community may be sued if management practices result in poor resident relations. Then, well-written residency documents can do more than any other preventive measure to ensure reasonable rents and conditions, promote liability limitation, minimize liability generating policies and practices, and finally include damage control strategies to deal with baseless FTM claims sparked by unscrupulous community organizers.