

## THE TAIL WAGGING THE DOG Strategies for Settling Attorneys Fees-driven Cases

How many times has a defense attorney declared litigation to be “unsettle able” because plaintiff attorney fees have far exceeded the value of the case? How many times has a plaintiff lawyer responded that the “defense tactics” were the cause? Using the context of a landlord-tenant “habitability” dispute, this article examines how statutes and behavior illustrate the problem, and suggests strategies for minimizing it.

In this economic climate people have lost their homes to foreclosure. Families are renting, squeezed into smaller, unfamiliar quarters. In an apartment, children have reduced place to play. Wear and tear increases. Tenants complain about broken screen doors, malfunctioning appliances, insufficient heat or hot water, roof or plumbing leaks. They may claim that a child’s asthma has been exacerbated by toxic mold. Landlords’ and management companies’ responses are perceived as untimely or inadequate. Frustrated tenants with limited resources, unfamiliar with their right to “repair and deduct”, or not fluent enough in English to properly document their complaints stop paying rent. Landlords institute unlawful detainers. Courts evict tenants finding their “non-habitability” defense unpersuasive.

Landlords and property managers companies are then sued for violations of habitability and retaliation under Section 1941 et seq. of the Civil Code. Management companies tender their defense to landlords whose insurer reluctantly defends both of them.

Lawyers and insurers need to recognize some fundamental truths about such cases. First, they are emotionally charged. Second, they become attorney-fee driven, especially when discovery battles ensue with defense counsel objecting to plaintiff’s perceived “fishing expeditions” for documents relating to other tenants or to the landlord’s other rental properties. Discovery motions and countless hours of depositions are typical.

If a rental agreement provides for attorney fees to the prevailing party in an action on the contract, and the tenant sues for breach of the express or implied warranty of habitability, attorney fees are governed by Civil Code, Section 1717. Even where the clause appears to benefit only the landlord, Section 1717 will make it bilateral. However, because these cases usually rely on “public policy” statutes, the prevailing plaintiff, but not the prevailing defendant is entitled to recover fees under Section 1174.21 of the Code of Civil Procedure, which provides that a tenant prevailing in a Section 1942 claim “shall” be entitled to attorney fees. Counsel must be familiar with these fee-shifting statutes because even where liability may be reasonably clear but damages are minimal, plaintiff counsel’s fees may soon exceed the real value of the case. *Harman v City & County of San Francisco* (2008) 158 Cal. App. 4<sup>th</sup>, 407, 427 states that “[a trial court] does not under California law abuse its discretion simply by awarding fees in an amount higher, *even very much higher*, than the damages awarded, where successful litigation causes ‘conduct which the [fee-shifting statute] was enacted to deter [to be] exposed and corrected’” (emphasis added).

Since most tenants under the above scenario may be unable to afford legal representation, plaintiff counsel usually prosecute “habitability” cases on a contingency fee basis. Often less-experienced practitioners associate attorneys with specialized knowledge and a track record to co-counsel the case.

Regardless of whether the case is settled or tried, plaintiff counsel will demand full compensation for all their time, using the two-step “lodestar adjustment” method requiring a calculation of the “lodestar” figure--actual hours reasonably expended multiplied by reasonable hourly rates. They may also seek an “enhancement” or “multiplier”, arguing that the unadorned lodestar does not compensate for contingent risk, extraordinary skill and other fair market factors. Associating counsel may increase “fire-power” and also justify a lodestar enhancement. Further, fees incurred for fee motions are compensable to a prevailing plaintiff counsel. Fees in most “public policy” cases typically belong to the attorney. This adds incentive to both generate and fight for them. It seems like a no-win situation for defendants and their insurers.

One strategy for avoiding runaway fees is to explore early settlement with a mediator experienced in this field, who will hold pre-mediation meetings to arrange for informal exchange of information. This includes photographs, video or reports from contractors or code-compliance experts depicting or describing allegedly “untenantable” conditions. Consider *jointly* hiring a well-credentialed expert, neutral to the outcome, to inspect the premises and opine on whether the requirements of Civil Code Section 1941.1 are met and if not, how bad the conditions are and what evidence suggests they are of long duration. This might alter the landlord’s belief that the tenant couldn’t afford the rent and deliberately damaged the property in order to force a rent reduction or create a habitability claim. Disclose any tenant records evidencing writing to or telephoning the landlord or manager to complain. Any “me too” statements from other tenants which may bolster plaintiff’s position and will stand up to cross-examination, might influence the defendants or insurer to settle and should be offered, not hidden.

Tenants whose standard of living has been impacted by economic conditions may label landlords as “slumlords”, not appreciating that the same economy may have impacted the landlord’s ability to properly maintain the premises and also service the mortgage. Defense counsel may consider voluntarily providing records of responses to complaints, including work orders and payment confirmation. While they may confirm the poor condition and even an inadequate response, rather know that early. To a tenant who is still occupying, some rent reduction or free rent may afford an adequate remedy. An apology with reasonable compensation to a tenant who has been evicted or voluntarily vacated may still be possible before emotions get out of control. Such overtures may also diffuse “motivated reasoning”, (each side seeing the other’s, but not their own reasoning as nefariously motivated and therefore suspect). Engaging in a dialogue with a mediator willing to be “evaluative”, peeling back perceptions and emphasizing the need to not render the case unresolvable because of escalating fees may achieve a wider overlap of understanding. The object is to ferret out whether the case has real value and is being prosecuted on its merits or merely to run up fees on the notion that, “what we lose on the roundabouts, we shall make up on the swings”. If mediation does not settle the case, a Civil

Code, Section 998 offer, to include attorney fees and costs, may pave the way to successfully argue at the inevitable fee motion that the offer was reasonable and influence the court's approach to the lodestar or any enhancement analysis.

The settlement of "habitability" and other "public policy" cases is also impacted by insurance coverage. In California, insurers won't cover punitive damages and Insurance Code Section 533 provides that an insurer has no duty to indemnify a loss caused by the insured's willful act. Insurers also routinely balk at covering emotional distress damages where there is no evidence of "bodily injury". Reservations of rights letters typically address these two issues. Further complications arise when plaintiffs allege illness from exposure to "toxic mold" contamination without scientific proof of its existence and causation. Injury from "pathogenic organisms" is usually excluded from coverage. Before filing pleadings counsel should obtain expert confirmation of toxic mold contamination and a medical opinion that it is the cause of asthma or other illness. Often, some black "stuff" on the grout of bathroom tiles or on windowsills is nothing more than mildew caused by inadequate cleaning or humidity build-up through lack of adequate ventilation. Insurers in habitability cases become skeptical of mold allegations and knowledgeable counsel will weigh the risk of pleading a plaintiff out of insurance coverage and the prospect of settlement.

There is also the risk that an insurer may reserve rights to seek reimbursement for all defense fees allocable to non-covered claims and to not pay the attorney fees portion of any judgment. See *State Farm General Insurance Company v. Mintarish* (2009). Landlords or property managers found liable under Section 1941 et seq., for non-covered injuries, or an intentional failure to maintain premises may find themselves funding not only their own defense, but also plaintiff's fees, not to mention un-insurable damages, including punitive damages.

The anticipated increase in landlord-tenant habitability litigation provides strategy lessons for both plaintiffs and defendants and their counsel. Engaging in early mediation or even paying more than the case may appear to be worth can avoid the risk of catastrophic and perhaps uninsured damages and fees.

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