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Real Estate Tip

Errors in arbitration clause expose developer to significant costs: Fourth District refuses to enforce arbitration clause in construction defect action

The Fourth District of the California Court of Appeal (Riverside Division) recently issued an opinion in *Bruni v. Didion*, Case No. E040946, and *Alvarado v. Didion, et al.*, Case No. E041120, in which it refused to enforce a home developer's arbitration clauses. The court found that enforcement would be unfair to the homebuyers based on the presentation and content of the clauses.

Arbitration is a favored method of resolving disputes, but in *Bruni*, the developer made errors that prevented it from reaping the benefits of arbitration, and may expose the developer to significant costs, fees, and additional damages from a jury trial that could have been avoided.

Arbitration clause Do's and Don'ts

Following these guidelines will increase the possibility that an arbitration clause will be enforced, especially in a consumer lawsuit or similar litigation against a less sophisticated party. Although the *Bruni* case involved a developer and homebuyers, the same principles apply to any case involving a more sophisticated party, such as a landlord or seller, seeking to enforce an arbitration clause against a less sophisticated party, such as a tenant or consumer.

DO

- **Have the arbitration clause separately initialed by both parties.** This prevents any argument that the other party was unaware of the clause or that the seller attempted to hide it from the buyer. A separately signed arbitration addendum to the contract containing all of the arbitration provisions also may be appropriate. In *Bruni*, the developer did not require the buyers to initial the arbitration clause.
- **Print the arbitration provisions in noticeable type.** Boldface type and/or larger font size for an arbitration clause will increase visibility and help defeat a claim that the buyer was unaware of the clause. In *Bruni*, the developer made little effort to distinguish the clause.
- **Avoid presenting the agreement in a "take it or leave it" manner.** Even if the contract is standardized, outright or implied refusal to discuss or negotiate an arbitration provision weighs against enforcement. Provide the buyer sufficient time

to review the contract and the arbitration provisions. In *Bruni*, the buyers were requested to review and sign "voluminous" agreements in only a 30-45 minute time period.

- **Invoke the Federal Arbitration Act.** The parties' arbitration agreement should state that it is governed by the Federal Arbitration Act. Otherwise, arbitration of construction defect claims may be barred under California Code of Civil Procedure section 1298.7.

DON'T

- **Gloss over the arbitration clauses or downplay their importance.** Direct the buyer's attention to any arbitration clause when signing or initialing. Explain the import of such clauses, including the jury waiver. Be willing to answer questions regarding the clauses if asked.
- **Attempt to overreach.** While arbitration clauses can be phrased broadly and will be interpreted broadly in their scope, all arbitration provisions and procedures should be mutual. Neither party should be granted greater rights in the arbitration proceeding.

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