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## PROVISIONS IN CC&R'S REQUIRING ARBITRATION OF CLAIMS AGAINST DEVELOPERS BY HOMEOWNERS ASSOCIATIONS OR OWNERS ARE NOT ENFORCEABLE

*Villa Vicenza Homeowners Ass'n v. Nobel Court Dev., LLC*, No. D054550 (4th Dist. Jan. 11, 2011)

*By Jessica A. Johnson*

In *Villa Vicenza Homeowners Ass'n v. Nobel Court Dev., LLC*, No. D054550 (4th Dist. Jan. 11, 2011, the Fourth District of the California Court of Appeal held that a provision in a declaration of covenants, conditions and restrictions (CC&R's) that required a homeowners association (HOA) and homeowners to arbitrate claims against the developer are not enforceable. The developer in *Villa Vicenza* drafted the CC&R's for its condominium project, including an arbitration provision, before the formation of the HOA. The CC&R's required that the HOA and homeowners arbitrate any claims they have against the developer. When the HOA and homeowners filed suit against the developer for defects in common areas and facilities, the developer filed a motion to compel arbitration under the provisions of the CC&R's.

The Court of Appeal recognized that both the Federal Arbitration Act and California Arbitration Act favor arbitration agreements. However, the enforceability of an arbitration agreement "is determined by reference to state-law principles governing the formation of contracts." On that basis, the court found that the CC&R's did not create an enforceable agreement to arbitrate. In reaching this conclusion, the court relied on its decision in *Treo @ Kettner Homeowner's Ass'n. v. Superior Court*, 166 Cal. App. 4th 1055 (2008) (hereinafter, Treo). In Treo, the court concluded that a provision in the CC&R's that waived an HOA's and homeowners' right to a jury trial in a dispute with the developer was not entered into with actual notice and meaningful consent. Since an HOA springs into existence after the creation and recording of the CC&R's, and since later purchasers of units receive only constructive notice of the CC&R's through their recording and effectively have no choice but to accept the CC&R's, the CC&R's cannot constitute a contract sufficient to waive the right to a trial by jury.

In applying *Treo* in *Villa Vicenza*, the court declined to follow that aspect of its previous decision in *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal. App. 4th 819 (2000) (hereinafter, *Villa Milano*) which found that CC&R's could be used to obtain agreements to arbitrate. Between *Villa Milano* and *Treo*, the court held in *Grafton Partners v. Superior Court*, 36 Cal. 4th 944 (2005) that the constitutional right to a jury trial is so fundamental that a waiver of that right must be entered into knowingly and voluntarily. In *Treo*, the court concluded that "the Legislature did not intend that CC&R's be sufficient to effectively and permanently waive the constitutional right to trial by jury." The *Villa Vicenza* court went further, stating that:

> a developer may not obtain any contractual rights, including the right to arbitration, by the simple expedient of recording the CC&R's. Neither the circumstances by which the CC&R's are recorded nor their controlling impact on disputes between those with an ownership interest in or responsibility for the operation of a common interest development give rise to any sort of binding agreement between developers

who have recorded the CC&R's and those who might in the future be burdened by them.

The court reasoned that "CC&R's are generally, as here, adhesive and unilateral and those bound by their terms may only have constructive notice of those terms and no contractual relationship with the developer who drafted the CC&R's."

This decision may be extended beyond arbitration provisions and give rise to arguments that other provisions of CC&R's are unenforceable where they purport to create contractual rights in the developer as against the HOA and homeowners.

The opinion discussed here was previously filed on May 27, 2010 and published at 185 Cal. App. 4th 23, but was ordered de-published upon granting of a rehearing. Upon affirmation of its previous decision, the court re-certified the opinion for publication on January 11, 2011. Similarly, another decision out of the Fourth District of the California Court of Appeal, *Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. LLC*, No. D055422 (July 30, 2010) (hereinafter, *Pinnacle*) held that a provision in the CC&R's requiring arbitration did not create an enforceable agreement by the homeowner association and its members. *Pinnacle* also held unenforceable a jury waiver provision in the purchase and sale agreements because it is unconscionable. *Pinnacle* also relied on *Treo* and declined to follow *Villa Milano*. For an analysis of *Pinnacle*, see our blog article. Review of the *Pinnacle* decision was granted by the California Supreme Court and is currently pending. As *Pinnacle* contains the same reasoning as *Villa Vicenza*, the outcome of the Court's review will affect the authority of the *Villa Vicenza* decision.

Authored By:

Jessica A. Johnson
(714) 424-8230
JJohnson@sheppardmullin.com