California Supreme Court Accepts Case to Decide Whether Developers Can Enforce Arbitration Provisions in CC&Rs Against Homeowners Associations

By Kathleen F. Carpenter

On November 11, 2010, the California Supreme Court granted review in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*. We reported on the *Pinnacle* Court of Appeal decision last August. The Court of Appeal, Fourth Appellate District, held that CC&Rs are not a binding agreement between the homeowners association and the developer. As a result of the grant of review, the Court of Appeal opinion cannot be cited as precedent in California courts.

The California Supreme Court will probably issue its decision in *Pinnacle* between 12 and 24 months from now. The parties and *amici curiae* will file a new round of briefs on the merits. The first sign that the case is ready for decision will be the court's notice setting argument.

Meanwhile, the Fourth Appellate District still has the same issue before it in another case. As we reported in June, that was the first case in which the court held that developers cannot enforce arbitration agreements in CC&Rs against associations. But the court granted our petition for rehearing. A new decision in that case is due by late January.

If other courts issue decisions on the enforceability of CC&Rs between developers and associations, the California Supreme Court is likely to grant review and stay proceedings in those cases until it decides *Pinnacle*.

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Courts Continue to Struggle With Enforcing Arbitration Provisions in CC&Rs Against Homeowners Associations
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Court of Appeal Withdraws Ruling That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association
June 28, 2010 > The complete article follows this e-Update.

Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association
June 2, 2010 > The complete article follows this e-Update.

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Please contact a member of Luce Forward's Common Interest Development group if you would like to discuss the impact of this decision on current arbitration provisions utilized in CC&Rs or to discuss strategies for the continued use of arbitration provisions new project documents.

Courts Continue to Struggle With Enforcing Arbitration Provisions in CC&Rs Against Homeowners Associations

By Kathleen F. Carpenter

In a published opinion dated July 30, 2010, the California Fourth District Court of Appeal summarily invalidated an arbitration agreement between a developer and a homeowners association. In the case of *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US) LLC (July 30, 2010, D055422) ___ Cal.App.4th ___ [2010 DJDAR 11868], the Court of Appeal found that an arbitration provision in the CC&Rs did **not** constitute an "agreement" with the association and was therefore insufficient to waive the constitutional right to jury trial for construction defect claims brought by the homeowners association. The Court also found the jury waiver provision in the purchase and sale agreements was not enforceable because it was found to be "unconscionable."

In our e-Update of July 28, 2010 (see next page), we reported that on June 25, 2010, the Court of Appeal granted rehearing in the case of *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC* ("*Villa Vicenza*") and directed further briefing. We also noted that a somewhat different panel of the same court had under submission another case (Pinnacle) which also had before it the issue of whether an arbitration provision contained in CC&Rs binds a homeowners association.

The Court in Pinnacle gave little credence to the long-standing approval of arbitration provisions by The California Department of Real Estate. It also misinterpreted and summarily dismissed the legislative intent behind SB800, known as California's "Right to Repair Law." The express legislative intent of SB800 was to create sweeping reform to promote the fair and prompt resolution of construction defect claims, which, prior to SB800, generally meandered through the complex litigation departments of superior courts for years before being resolved through settlement. In his concise dissent in Pinnacle, Justice O'Rourke stated he did not find the arbitration provision at issue to be unconscionable, and stated that he would have followed the conflicting opinion of *Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 824-825.

To be continued…

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Court of Appeal *Withdraws Ruling* That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

In an e-Update of June 2, 2010 (see next page), we reported a decision of the Court of Appeal, Fourth Appellate District, that an arbitration provision contained in CC&Rs did not bind a homeowners association in a construction defect case against the developer. The case is *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC* ("*Villa Vicenza*").

On June 25, 2010, the same panel of the Court of Appeal granted our petition for rehearing in *Villa Vicenza*. The effect of the order is to withdraw the opinion of May 27, 2010. That opinion is no longer binding between the parties or as precedent. The appellate panel directed the parties to submit supplemental briefs by July 26, 2010. After that, the panel will take the case under submission again. The court is free to decide the case in any way it chooses, on any ground it chooses, and in either a published or non-published opinion. A somewhat different panel of the same court has under submission another case that concerns whether an arbitration provision contained in CC&Rs binds a homeowners association: *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (US) LLC, No. D055422. That case may be decided by August 2, 2010. The outcome of future appellate decisions evaluating the enforceability of arbitration provisions in CC&Rs is not predictable.

For now, the only authoritative precedent concerning arbitration provisions in CC&Rs is *Villa Milano Homeowners Assn. v. Il Davorge*, which holds a provision enforceable, at least when the association is acting as a representative for owners.

Resource.

Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association
June 2, 2010 > The complete article follows this e-Update.

Contact Us.

Please contact a member of Luce Forward's Common Interest Development group if you would like to discuss the impact of this decision on arbitration provisions in CC&Rs.

Court of Appeal Rules That Arbitration Provisions in CC&Rs Are Not Enforceable Against a Homeowners Association

An arbitration provision contained in CC&Rs did not bind a homeowners association in a construction defect case against the developer, according to a recent California appellate court decision. In *Villa Vicenza Homeowners Association v. Nobel Court Development, LLC*, issued May 27, 2010, the Fourth District Court of Appeal concluded that because CC&Rs are not a contract between the developer and the homeowners association, the arbitration provision contained in the CC&Rs was not enforceable against the association. The CC&Rs in question were created in typical fashion, that is, the developer drafted and put them in place before the association was formed, and then formed the association and sold homes subject to the already existing CC&Rs. The court referred to CC&Rs as being adhesive in nature, unilaterally written by developers, and not subject to modification by the association. The court noted that an arbitration provision necessarily involves the waiver of the right to trial by jury, which the court determined was too important a right to waive, absent an express, voluntary agreement.

The Court acknowledged that another California appellate court, in *Villa Milano Homeowners Assn. v. Il Davorge*, previously reached a contrary conclusion, deciding that CC&Rs could be used to obtain an agreement to arbitrate. For now, there is an apparent conflict between the conclusions reached in the *Villa Vicenza* and *Villa Milano* decisions.

Should the Fourth District's decision remain in force, arbitration provisions included in developer-drafted CC&Rs may be unenforceable against homeowners associations. Once this decision becomes final in the Court of Appeal (on June 26, 2010) and if the time for petition for review in the Supreme Court elapses (July 6, 2010), arbitration provisions in CC&Rs should be reviewed in light of this decision.

Please contact a member of Luce Forward's Common Interest Development group if you would like to discuss the impact of this decision on arbitration provisions in CC&Rs.