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Nevada Supreme Court Affirms that Arbitration Agreements in CC&Rs are Binding and Enforceable

SUMMARY

In a win for residential developers seeking an alternative forum to resolve construction-defect claims, the Nevada Supreme Court rules that arbitration agreements in CC&Rs are enforceable. Based on the following, the court struck down any notion that these arbitration provisions are not enforceable:

1. The Federal Arbitration Act applies to CC&Rs, meaning that federal policy displaces any state law or practice that disfavors arbitration.
2. It is well settled that homeowners are bound by CC&Rs. A homeowner manifests acceptance of the CC&Rs by purchasing the home.
3. Arbitration provisions must be enforced on equal footing with other contractual provisions. Indeed, the court overruled its prior holdings in *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004) and *Gonski v. Second Judicial Dist. Court*, 245 P.3d 1164 (Nev. 2010) to the extent they violate the FAA by disfavoring arbitration or holding arbitration provisions to a higher standard.

Given this milestone decision by the Nevada Supreme Court, residential developers should not hesitate to include binding arbitration agreements in CC&Rs. Nor should there be any reluctance to enforce arbitration as an alternative to traditional, lengthy, and costly construction-defect litigation.

IN-DEPTH CASE SUMMARY

The Nevada Supreme Court ruled today that arbitration agreements in CC&Rs are enforceable pursuant to the Federal Arbitration Act (“FAA”). The owners of 12 homes located in a common-interest community filed a construction-defect action against the developer, U.S. Home. The CC&Rs contain an arbitration provision requiring that all disputes between U.S. Home and homeowners must be resolved through binding arbitration.

U.S. Home moved the district court to compel arbitration pursuant to the FAA, but the district denied the motion. The district court accepted the homeowners' argument that an arbitration provision in CC&Rs does not involve or affect interstate commerce because the sale of land is generally a local concern. Thus, because CC&Rs do not involve or affect interstate commerce, the FAA neither applies nor compels arbitration. The homeowners also argued that (1) arbitration provisions in CC&Rs cannot bind homeowners because arbitration is a matter of contract law, and CC&Rs are not signed contracts, and (2) the arbitration provision is unconscionable because it is not more conspicuous than other provisions in the CC&Rs and because arbitration violates procedural rights by requiring an expedited timeline and procedure for resolving disputes.

The Nevada Supreme Court reversed the district court's decision on all issues. First, the court noted that the law does not require a signed contract to enforce an arbitration agreement. It is well settled that a homeowner is bound by CC&Rs when the homeowner manifests acceptance by purchasing the home. Further, the court found that homeowners are protected against unknowingly entering into arbitration agreements by the strict notice requirements respecting CC&Rs and by Nevada's statutory 5-day right to cancel purchases.

Second, the court reasoned that CC&Rs evidence the development of a community and the construction and sale of homes, not just the simple sale of unimproved land. Thus, CC&Rs affect interstate commerce, meaning that the FAA controls and displaces any state law or practice that disfavors arbitration.

Finally, the court rejected the unconscionability argument. Requiring that arbitration provisions in CC&Rs be more conspicuous than other provisions is exactly the type of hostility towards arbitration that the FAA is meant to prohibit. Arbitration provisions must be enforced on equal footing, not held to a higher standard. Nor is there any basis for invalidating an arbitration agreement simply because arbitration involves an expedited timeline and procedure for resolving disputes. Indeed, a streamlined dispute-resolution process is the very nature of, and primary characteristic of, arbitration. It is the reason that the FAA and public policy favor arbitration.

Additional Resources

[Listen to Greg King's Oral Argument](#)

Oral Argument in *U.S. Home Corporation vs. The Michael Ballesteros Trust* (mp3 format) from July 17, 2017.