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PARK WATCH ™ LEGAL DEVELOPMENTS NEWSLETTER

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California Says "Watch the Kids"; HUD Says "No You Don't": A Park Owner's Alternatives

- Does The Building Code Go Too Far, Is it Preempted by the Federal Fair Housing Amendments Act?

By: Terry R. Dowdall., Esq.

Creative Solutions, Efficient, Practical Representation, Profitable Parks

Dowdall Law Offices A.P.C.

In this Issue:

Proudly Representing Mobilehome Park Owners since 1978

We recommend:
FEDERAL ARBITRATION CLAUSES;
MANDATORY MEDIATION;
BROAD 'FACILITIES RELEASES'

UPSHOT:

September 1, 2012: The California Code of Regulations is supplemented with new Building Code Requirements for mandatory new pool signs.[1] Some of the new signs, for the first time, *require* adult-supervision of children (in "all-age" parks). While perhaps welcomed at first, it puts the "all-age" park owner upon the horns of a dilemma. Follow the State law and post "supervision-required" signs which offend federal law? Or follow federal law and honor federal "familial status" rights (ignoring California law)? Or just wait for more definitive resolution? Let's explore your options.

BACKGROUND AND THE PROBLEM:

In the heat of litigation in *United States v Plaza Mobile Estates*[2], the United States challenged rules and regulations which, among other things, required adult supervision of children in park swimming pools. I had offered up, as a defense, state regulations which recommended adult supervision. If a legislative body had already determined the wisdom of a restriction, it could not be deemed a discriminatory act of a landlord to merely comply with it. One would think. However, the regulations formerly read, and *only* read, that a sign must be posted which states that: "Children Under the Age of 14 *Should Not Use* Pool Without an Adult in Attendance." [3] Since that rule was advisory, not mandatory, it was not deemed to violate fair housing law. Ever since, it has seemed legally sound to advise "all-age" owners of the power to admonish parents that they "should" accompany their children in the pool. Ultimately, it is the parents that are responsible for their children in common facilities, not the management.

It has also been well-understood for years, that an "all-age" park owner[4] may not set up any rule which treats children differently than adults (usually seen in terms of improper accompaniment rules, separate hours for children, or absolute bars from access to some facilities).[5] Any transgression, *i.e.*, differential treatment of children, and a *prima facie* violation of a fair housing law could be made out. Such

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[1] California Code of Regulations for Public Swimming Pools. While not a "public accommodation" for ADA purposes, park pools are "public" for purposes of construction and operation. §65501("Swimming Pool" or " Pool" means . . . (§65503., *Scope*) Auto and trailer park pools... (16) Mobile home park pools").

[2] *United States v Plaza Mobile Estates*, United States District Court, C.D. California, 273 F.Supp.2d 1084 (2003), see *http://www.dowdalllaw.com/plaza-published-opinion-re-all-age-discrimination-1-19.pdf*

[3] See Title 22, Public Swimming Pools, §65539. Lifesaving, First Aid and Control of Bathers.

[4] Remember, familial status rights are not applicable in an "older persons" (55+) park. Posting of the new signs (see below), pose no issue of fair housing discrimination for "older persons" park owners and management.

[5] HUD suggests that in testing a rule, instead of "child," insert another protected class, and see if it discriminates. Of course, it does in every imaginable situation (*e.g.*, "females" not allowed in the pool with adult supervision?). Children are just "small adults" to HUD when familial status rights are scrutinized. Thus, age regulations for pools and other facilities are not allowed. Period. The Court in *Plaza* suggested that "proficiency tests" be administered so park owners could adjudge safe usage of pools on a case-by-case basis. Because this suggestion is practically unworkable,

claims were not covered by ordinary insurance. And since a prevailing defendant is not entitled to attorney's fees here in the 9th circuit, to even suffer a claim is to lose in a very real sense (victory is hollow without reimbursement of attorney's fees).

As we will see, the new Building Code requirements mandate signs which violate federal fair housing law as now interpreted in the courts. Park owners often incorporate posted signs into the rules and regulations. Do we implicitly violate federal law with the posting of the new signs? Do we not post the signs? Let's explore your solution.

THE REGULATIONS AND NEW SIGN REQUIREMENT:

California Code of Regulations, Chapter 31B ". . . apply to the construction, installation, alteration, addition, relocation, replacement or use of any public swimming pool . . . Examples of public pools include those located in a: (5) auto and trailer park, . . . (7) mobilehome park." [6] The effective date is typically six months after the publication date of the supplement. At this writing, it is not know when the regulations were actually published or their effective date. We know the supplement bears the release date of September 12, 2012. I would treat them as effective now and set about compliance.

The "SUPPLEMENT" bears a reference date of September 1, 2012, CHAPTER 31B, SECTION 3101B, et seq. The new sign regulations require the following:

3120B.3 No diving sign. Signs shall be posted in conspicuous places and shall state, "NO DIVING" at pools with a maximum water depth of 6 feet or less.

*3120B.4 No lifeguard sign. Where no lifeguard service is provided, a warning sign shall be posted stating, "WARNING: NO LIFEGUARD ON DUTY." The sign also shall state in letters at least 1 inch (25 mm) high, "**Children under the age of 14 shall not use pool without a parent or adult guardian in attendance**."* (* prohibited by U.S. v. Plaza)*

3120B.5 Artificial respiration and CPR sign. An illustrated diagram with text at least 1/4 inch (6 mm) high of artificial respiration and CPR procedures shall be posted.

3120B.6 Emergency sign. The emergency telephone number 911, the number of the nearest emergency services and the name and street address of the pool facility shall be posted.

3120B.7 Warning sign for a spa pool. A warning sign for spa pools shall be posted stating, "CAUTION" and shall include the following language in letters at least 1 inch (25 mm) high:

1. Elderly persons, pregnant women, infants and those with health conditions requiring medical care should consult with a physician before entering the spa.
*2. **Unsupervised use by children under the age of 14 is prohibited**.*
3. Hot water immersion while under the influence of alcohol, narcotics, drugs or medicines may lead to serious consequences and is not recommended.
4. Do not use alone.
5. Long exposure may result in hyperthermia, nausea, dizziness or fainting.

3120B.8 Emergency shut off. In letters at least one inch (25 mm) high a sign shall be posted at the spa emergency shut off switch stating, "EMERGENCY SHUT OFF SWITCH."

3120B.9 No use after dark. Where pools were constructed for which lighting was not required, a sign shall be posted at each pool entrance on the outside of the gate(s) stating, "NO USE OF POOL ALLOWED AFTER DARK."

3120B.10 Keep closed. A sign shall be posted on the exterior side of gates and doors leading into the pool enclosure area stating, "KEEP CLOSED."

3120B.11 Diarrhea. A sign in letters at least 1 inch (25 mm) high and in a language or diagram that is clearly stated shall be posted at the entrance area of a public pool which states that persons having currently active diarrhea or who have had active diarrhea within the previous 14 days shall not be allowed to enter the pool water.

ANALYSIS OF FEDERAL LAW PREEMPTION OF STATE BUILDING CODE:

The case of *United States v Plaza Mobile Estates*, United States District Court, C.D. California, 273 F.Supp.2d 1084 (2003), see *http://www.dowdalllaw.com/plaza-published-opinion-re-all-age-discrimination-1-19.pdf* remains in effect today and has not been disapproved or ever judicially criticized. Indeed, the trial judge referred to it as a change in the *"landscape"* of federal housing law across the country. Assuming it remains an valid expression of rights of all *familial status* homeowners and their families, the following rules are a violation of federal fair housing law:

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the only legally defensible position is to eliminate all age restrictions for common facilities and ensure that the parents and guardians are aware that supervision and other access decisions are for the parents and guardians to make.

[6] SECTION 3101B, SCOPE, **"The provisions of this chapter shall apply** to the construction, installation, renovation, alteration, addition, relocation, replacement or use of **any public pool** and to its ancillary facilities, mechanical equipment and related piping. **Public pools include** those located in or designated as the following: commercial building, hotel, motel, resort, **recreational vehicle or mobile home park**,. . . "

"Use of the pool by children fourteen (14) years old and under required accompaniment by a resident," *id.*, at 1088;
"Parent of resident child or resident host must accompany children at all times in the pool or pool area," *id.*, at 1088;
"Parent or responsible adult must accompany all children under fourteen (14) years old at all times [in the swimming pool and/or pool area]," *id.*, at 1089;
"All children must be accompanied by an adult to use the pool," *id.*, at 1090.

The Court held that rules that imposed adult supervision requirements for use of mobile home parks' common areas and facilities, such as recreational facilities and swimming pools, were not the least restrictive means for achieving stated health and safety objectives, and thus violated Fair Housing Act; rather, such concerns would be better addressed through rules or proficiency requirements:

> *"Some of the parks have had rules requiring adult residents to accompany all guests using recreational facilities, swimming pool or sun deck, or walking or riding bicycles. If such rules are enforced as to all guests, regardless of age, there is no discrimination. However, if such rules are only enforced against guests under the age of 18 years old, they, as with the other adult supervision requirements, are not the least restrictive means to achieve any health and safety objective."*

The state laws and federal laws now conflict. How does a park owner deal with issues that the state and federal government cannot resolve? Since a park owner is caught between potential liability for choosing one path or another, the best approach is not to focus on which uncertain answer is likely to be right, eventually. You can be "dead right." Obviously, the best path of action is to determine management's policy while the *"holding pattern"* continues, so as to minimize the risk of claims, loss and expense.

Compliance with federal law (no restrictions), plus failure to comply with the state rule (posting), followed by a terrible accident to a child, would likely result in a suit against the landlord for "negligence *per ser*," *to wit*, negligence based on the violation of a statute designed for the safety of the very person injured. So how should a landlord resolve a conflict which both the state and federal governments cannot work out for themselves? [7]

ISSUES FOR DISCUSSION:

Your policy should be adopted after consulting with a trusted advisor capable of advising how to minimize your cost in operations, avoiding needless claims, challenges and legal entanglements. This is a fortunate time for the release of these sign requirements, as many park pools are now closed until spring, and there may still be time before local government commence enforcement of the new requirements. Since there is no profit incentive to defend fair housing claims, the priority for most owners will be to determine a reasonable, flexible policy to accommodate your lessees without becoming a "test case." First: Many park owners are exposed to claims of fair housing violations because of a tip, a tell-tale sign or evidence discovered externally by testers and investigators. Before all else, inventory your residency documents, advertising practices, office policies, postings, and management decorum. Ensure that there is no policy or practice that might as much as invite further scrutiny from a tester, an investigator, realtor or homeowner. Entry and qualification criteria, the handling of purchaser and tenancy inquiries, and residency documents are common sources of fair housing claims.

Many park owners would like to be able to require parental supervision in the pool area. Everyone would like clarity even more. As between the two risks, where is the greatest potential for loss and damage? The strain is between: (1) a class action challenging the rules for all families in the park, which is a claim not likely insurable, not at least without a discrimination endorsement to the community CGL insurance policy, vs. (2) a wrongful death claim from a drowning based on the theory that management did not require adult supervision and if it had, the child would still be alive. Still, the latter proposition keeps parental duties in play as a substantial cause of the harm, and the issue of parental neglect. Typical accidents are also insured.

If we assume that the rules and regulations state that all signs posted in the common areas are incorporated into the rules and regulations by reference, the new posting will be too; however, as the new postings will then constitute rules and regulations *mandated by law*, it is possible to incorporate them into the rules and make them effective on 60 days's notice, by notification directly without the need "to meet and confer." And this is where individualized counseling for sake of the park owner is prudent.[8] Some owners may welcome the opportunity to "meet and confer" to understand the views of the homeowners. Or, the "all-age" park owner might contemplate a notification to all homeowners that the management will, or will not, enforce the state policy due to the conflict with the federal fair housing act. Discussions with counsel may include possibilities of an interim centrist position, perhaps to the effect that:

(1) "Federal" fair housing law and equal housing opportunity is the policy of the management;
(2) New posted signs are required to be *posted* by state law, with a paraphrased summary of the text;
(3) The new pool sign requirements, as mandated by law, are duties owed by pool users and their guests to governmental authorities requiring them, not as tenancy requirements;
(4) Children under 14 years of age will not be ejected from a pool unless management wishes to take on a new responsibility, also desired by a parent or guardian, to eject certain children from the pool (based on written consent). Keeping track of who management may eject seems too cumbersome and also fraught with peril; what if a child management should eject is harmed

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[7] This is not the first time that park owners have faced conflict between state and federal law (which our large, unwieldy governments have not even identified or recognized). For example, this Hobson's Choice is similar to the continuing marijuana debate. California allows marijuana, the federal government does not. I have proposed rules to work with that conflict. This case is different, because the risk is posed by injured third party children. It is unlikely the federal government will swoop down upon a park owner because of suspect signage in a pool area. But parents of an injured child will certainly sue and point a finger to deflect blame for their own poor parenting skills.

[8] It is a proposition well-understood in the law, that action upon legal advice sap wrongdoing of malice. In other words, the acts based on attorney advice are not malicious so as to warrant imposition of punitive damages.

because management was absent at time of injury?

(5) The signs posted, as required by law, are only posted as required, to reflect government policy regarding reporting and enforcement of child neglect and endangerment laws.

CONCLUSION

Whatever the policy adopted by the park owner, it is also a good time to seek arbitration of all fair housing disputes, so as to minimize the expense to the management which may result in rising operating expenses and rent hikes for all the park homeowners. Since the DFEH no longer offers administrative dispute resolution, the state may refer fair housing cases to litigation after mediation, with the result that attorney's fees and demands for attorney's fees in settlement negotiations will be higher than ever. Remember, under new law effective 2013, government may obtain attorney's fees and costs as a prevailing party in enforcing fair housing laws; and, the park owner cannot do so as a prevailing defendant.

How To Amend Rules and Regulations Properly: A Few Important Rules and Sample Forms

By: Terry R. Dowdall, Esq.

Upshot:

Effective amendment of Rules and Regulations Requires Three Discrete, Carefully Scheduled and Documented Steps. While often disregarded or given more than indifference and half-hearted effort, later enforcement of purportedly adopted rules and regulations can prove embarrassing and very costly. Laws and judicial decisions have allowed park management to allocate many burdens and risks to the homeowner. There are both new rights to assert and liabilities to better avoid if management judiciously stays abreast of change. Doing so has saved some park owners virtually millions of dollars. But none of the work to prepare, discuss and implement new rules is effective without satisfying the required procedure. All may be lost if basic procedure is not followed as a California park owner recently experienced in a courtroom defeat. Lets' follow this real life hypothetical about an owner seeking to impose a rent control exemption on a second residence of Melanie Felony, the homeowner-and think what you would do.

Facts:

Is there an applicable rent control exemption (a second residence under Civil Code §798.21)? The mobilehome parks in the City are subject to a mobilehome park rent control ordinance. Rancho Loco (Loco MHP) leases to tenant Melanie Felony. The mobilehome is a second residence. But the lease and the park rules expressly prohibit subletting. The 798.21 exemption requires that the rules and regulations *allow* subleasing (but that the mobilehome not actually be subleased or listed for sale).

Will the ability to sublease mean the space is exempted from rent controls? Loco MHP gives notice stating that all homeowners were sent a copy of *new* rules and regulations, and further, advises of a meeting with homeowners regarding the new amendments. One such amendment would allow for subletting with prior management consent. The subletting rule requires a manifold series of steps for management consent, including a credit report for the sublessee (similar to the state law for medical hardship subleasing). But are the controls and restrictions on subleasing a disqualification from rent control exemptions (this question is not addressed in the opinion of the court)?

Melanie did not attend the meeting and did not sign the new rule amendments. As a result of the "meet and consult" meeting, some of the proposed rules were modified. *But not the proposed new rule allowing subleasing*. *And Loco MHP did not send Melanie notice that any of the proposed rules had been adopted.* Still, Loco MHP notified Melanie that her space was exempt from rent control because it was not her principal residence. As the space was claimed to be exempt, management imposed a large rent increase (from $610 to $910 per month).

Is the listing of the mobilehome for sale a disqualification of the space from a rent control exemption? Generally, yes. Melanie also decided to *list her mobilehome for sale*. Listing a mobilehome for sale disqualifies the space from a rent control exemption. Management was advised of this development *by Melanie's attorney*. Loco MHP acknowledged this by placing a notification of the *"for sale"* status on a map in the park office (it was later deleted). Melanie fielded at least 35 telephone calls from interested people.

Melanie refused to pay the $300 rent increase and received a three-notice to pay rent or quit; she decided to pay the $910 rent, under protest, and hire a lawyer, who advised Melanie sue for relief. After trial, the judge held that the space was not exempt from rent controls and ordered Loco MHP to pay damages. The park owner *appealed.*

Applicable Law:

The "second home rent control exemption" law states that:

[¶] "This section does not apply under any of the following conditions:

[¶] (1) The homeowner is unable to rent or lease the mobilehome because the owner or management of the mobilehome park in which the mobilehome is located does not permit, or the rental agreement limits or prohibits, the assignment of the mobilehome or the subletting of the park space.

[¶] (2) The mobilehome is being actively held available for sale by the homeowner. (*Civil Code* §798.21 (f)(1),(2)).

In other words, no rent control exemption is allowed if subleasing is limited or prohibited under Civil Code §798.21. *So did Loco MHP properly amend the rules to allow for subleasing??* The court stated:

[Melanie's] original lease prohibits subletting without exception. The new rule allows subletting with the prior written consent of the landlord. But because park management *failed to give the required notice*, *the new rule does not apply...*

The appellate court noted *Civil Code* §798.25, subd. (b):

"'[F]ollowing the meeting and consultation with the homeowners, the noticed amendment to the park's rules and regulations may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent upon written notice of not less than six months . . . .' Here it is undisputed [Melanie] did not consent to the new rules, and [Loco MHP] did not give her written notice under subdivision (b)."

Issue Resolution:

If Melanie did not receive the amended rules which allow subleasing, the rules were not amended as to her.

If subleasing remained prohibited, the space could not be exempt.

The court said nothing about the "limitation" of approving the proposed sublessee and obtaining a credit report, leaving the implied finding that such routine requirements for subleasing were not "limitations" for purposes of the statute.

If subleasing were not allowed, the space was not exempt from rent control.

If the mobilehome were listed for sale, the space was also not exempt.

If Loco MHP had increased rent a nominal amount at first, it is possible Melanie would not have retained counsel, who would not have sued (the court said: "[T]here is nothing more likely to lead to an actual or constructive eviction than an increase in rent").

Loco MHP argued that allowing subleasing *expanded* Melanie's rights, and could not have threatened eviction. The court responded: *"The ability of [Loco MHP] to raise the rent can hardly be described as an expansion of [Melanie's] rights that will not place her in danger of eviction."* [9]

Melanie listed her home for sale after she received notice of exemption and rent increase. Is this a proper way to cut off the claim of rent control exemption? Yes. The mobilehome must be actively marketed "in order to remain exempt pursuant to this subdivision." The court held that it would violate the purpose of the law to require the homeowner to list prior to the notice. The court held that indeed "[I]t is that notice that in many instances will cause the homeowner to market the mobilehome for sale." If the Legislature had intended otherwise, it would have said so. The law does not require the marketing to begin prior to notice that the mobilehome is not a principal residence, or at any other particular time.

The Three Step Process For Amendment of the Rules And Regulations:

●First: Notice of a meeting to discuss proposed rules and regulations. The operative language is this.[10]

●Second: Conduct the meeting. Or schedule a series of several smaller meetings to receive more personalized input and ensure all residents have an opportunity to be heard.

●Third: Serve the final notice and rules and regulations. The operative language is this.[11] Then wait for six months (60 days as to recreational facilities) or upon return of the executed amended rules by the homeowner.

Explanation:

The "meet and consult" requirement contemplates that the proposed rules *might* change, not that they *necessarily* will. Many times the homeowners will raise a point which causes management to re-think an amendment and withdraw or further amend it. The last notice after the "meeting and consultation" notifies the homeowners of what rules *are in fact implemented*. It begins the six-month period running for those homeowners who do not consent to the new rules. Not surprisingly, the failure to give the second notice was held a failure to comply with the rule amendment statute (". . . as a matter of law not substantial compliance with the statute").

Melanie received the notice of rent increase, thereafter placed a for sale sign in the window of her mobile home; fielded at least 35 telephone calls from interested people; she received an offer with a deposit; and five real estate agents, who specialize in mobile homes, walked through her property. This was enough to prove Melanie satisfied the conditions for marketing making the rent control exemption inapplicable.

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[9] When you argue a weak point, it may have the unintended consequence of diluting your good ones.

[10] "Dear Resident: ¶This letter serves to provide notice of the intention to update (amend) the rules and regulations of the park. Please find attached to this notice the new, proposed rules. . . A lot of time and effort has been invested into the new rules and *your thoughts are welcomed*. A meeting has been scheduled to take any input you may have about the amendments; other comments are welcome at any other time as well. ¶ Management will conduct a meeting in the clubhouse to discuss the proposed rules and regulations on _____, 2012 at :00 .m. You are also free to provide written comments at any time, before and after the meeting. If the date or time set forth is inconvenient and you desire to meet at a different time, please advise so we may try to accommodate you. ¶After the scheduled meeting, we will provide the final rules and regulations to you. We request that you sign an acknowledgment of receipt of the rules and regulations for our records . . . the requested "acknowledgment of receipt" is not an agreement to the new rules. . . You are free to agree to the new rules, . . . If you do not consent to them, the law provides that they are effective six months after service . . . "

[11] "Dear Resident(s): ¶ Recently, all residents were advised of a scheduled meeting to discuss the proposed rules and regulations for the community. All residents were provided the opportunity to comment on the proposed change to the rules and regulations. After further consideration, management has determined that the proposed amended rules and regulations will be instituted as proposed . . . We want to thank you for your input and comments. ¶Therefore, this letter introduces the final rules and regulations of the community in accordance with the requirements of the Mobilehome Residency Law. The new and final rules are attached. . . "

Comment:

Once upon a time, there was a mobilehome park known as Treasure Island, in Laguna Beach, California. One of the tenants had acquired nearly a dozen mobilehomes, and leased to sublessees and tourists. The profit was brisk. The owners were miffed. So, we amended the rules and regulations to prohibit subleasing. After six months, warning letters and then notices were written to the sublessor-tenant, demanding he cease and desist from subleasing. He protested, claiming he never received notice of the amended rules. On close review, it was determined that there were some triable issues of fact about the case, and a trial could be avoided with some proactive management actions (such as re-serving a notice). Since the weight of the evidence was equal on both sides, stacking the facts on our side seemed inexpensive and wise. We decided to re-group and battle at a later time. When we brought the case (6 months later), now stronger with our counseling, the sublessor-tenant 'buckled' and ceased subleasing without a fight. The litigation settled right after filing, without the cost of trial or appeal. In another case in Ventura County, the park owner had followed the advice of an attorney and imposed a rent control exempt increase with no due diligence about the qualification of the residents. Under local rent controls, even the demand for the rent increase violated the rent law. So though withdrawn, the tenant's lawsuit prevailed. And finally, a carefully planned rent increase under the 798.21 exemption in the City of Oceanside went very smoothly for an owner for carefully, thoughtfully considered not just the law, but the human dynamics of business relations

> . . . sound legal theory is no substitute for good advice.

Mentor

It is often not enough to know the law. Circumspection about cause and effect is essential. *What of the reactions of others, the practical meaning of actions which may be lawfully sustainable, the nuances and consequences of an act?* Sensitivity to the human experience, when stressed with actions perceived as adverse, is as important as the law. A plan without weighing the reactions, consideration of alternatives of possible adversaries, and then counter-options, is no plan at all. *Whether a business plan succeeds or explodes depends on the "human factor." So, exposition of sound legal theory is no substitute for good advice.*

In today's environment, it may not be possible to amend the rules and regulations to prohibit subleasing if subleasing was allowed at the inception of a tenancy, where the tenant relied on the ability to sublease, and if the tenant does not agree to the amendment later. The converse is not true. Especially in "older persons" parks, subleasing has not caused the issues which are feared to often occur.

Where there is a real need to sublease, it is an opportune time to deal with the added risks by long term leasing. And in a rent controlled area, long term leasing is a fair way to have reasonable rent adjustments and have both sides avoid thousands of needless dollars fighting in agency proceedings and the courts.

Fair Housing Laws Amended to Require Mediation, Courts, Attorney's Fees and Costs

By: Terry R. Dowdall, Esq.

Upshot:

It is time to pay attention to fair housing laws. Effective January 1, 2013, the DFEH, which now will convene a "Council" and disband the previous "Commission," may bring actions directly in the courts, and unlike before, recover attorney's fees when it prevails against a landlord (park owner) for discrimination claims. There will be no administrative prosecutions of fair housing cases–all cases will be brought in court, and now, government may recover their attorney's fees.

In other words, it is important, like never before, to comply with fair housing laws, institute procedures to ensure consistency and concern. Finally, it is important to seek to have discrimination claims heard with speed and convenience to all parties, by use of arbitration. A sample form, for discussion purposes, is included below.

Background:

The Governor's 2012-2013 Proposed Budget originally proposed the elimination of the Fair Employment and Housing Commission (FEHC), the administrative adjudicatory agency created under the FEHA.

Gov. Brown has signed the "budget trailer bill," Senate Bill 1038, effective January 1, 2013. Effecting these changes:

* Eliminates the Fair Employment and Housing Commission effective January 1, 2013;

* Creates the "Fair Employment and Housing Council," with seven members to be appointed by the governor, confirmed by the Senate, staffed and funded by the DFEH, to promulgate regulations. The DFEH Director will serve as a nonvoting ex officio member of the council;

* Allows DFEH to file cases directly in court.

* Before a court filing, DFEH requires all parties to undergo mandatory dispute resolution in the department's internal dispute resolution division, free of charge to the parties;

*Authorizes courts to award DFEH reasonable attorney fees and costs, including expert witness fees if the department is successful in its litigation.

Our industry had no ability to seek to impact this law; it was adopted in the proverbial dark of night. It, for example, creates a special fund for the deposit of awarded attorney fees and litigation costs, to be appropriated by the Legislature to offset the costs of the department. The FEHA permits complainants to opt out of the administrative process and file civil suits after exhausting their administrative remedies with the DFEH. When the department asks for emotional distress damages or administrative fines, employers can also elect to leave the commission and defend their cases in court. Half of all administrative complainants today elect to file suit in court. This assures the litigant the right to a jury trial to avoid the captive handling of agency litigated claims, and seemingly (arguably) biased administrative law judges used by the department previously in administrative adjudications.

THE BOTTOM LINE:

Based on the more recent of the housing discrimination cases which have been filed, it appears that the housing industry as a group, is doing a better job of compliance with fair housing laws than ever before. This observation especially applies to mobilehome park owners in California. *But when a housing complaint does arise, mandatory mediation should be vigorously pursued*. It is an opportunity to gauge the risk-benefit of settling or proceeding into a court battle. While the pressures to settle are now enhanced by the risk of reimbursement of attorney's fees to the prevailing party, including the Department, the mediation process also avails the housing provider of the chance to explain the defense of a case. This opportunity may well go toward educating the decision-makers so that meritless cases are not filed and prosecuted.

Legislation to Blunt 'Concepcion' Is Killed in State Assembly

- Landlords Should Take Advantage of Arbitration.

By: Terry R. Dowdall, Esq.

Noreen Evans

Upshot:

A trial lawyer-backed bill that sought to reassert class action rights in the wake of the U.S. Supreme Court's 2011 ruling in *AT&T Mobility v. Concepcion* died in legislative committee this session.

In *Concepcion*, the Supreme Court upheld contract provisions requiring consumers to arbitrate their disputes individually rather than as a class. The ruling, which struck down a California rule frowning on class arbitration bans, marked a victory for business groups. Consumer advocates argued that the decision would make it economically unfeasible for lawyers to take individual cases seeking small amounts of economic damages. SB 491 (Evans) would have outlawed contracts that bar the class pursuit of claims. The Bill was doomed from inception. Some "believed this would be a litigation trap and a mess that would be pre-empted by the United States Supreme Court — again," said Katherine Pettibone, legislative director for the Civil Justice Association of California.

Arbitration is very sensible for park owners and residents alike. Arbitration can resolve and settle neighbor to neighbor disputes, disputes between homeowners and their management, even disputes with guests, family members and heirs. The subject matter can include disputes about park maintenance and operation, rent adjustments, and injury and damage. The savings can be considerable, because the dispute is heard fast and with finality. It avoids the mounting costs which hit all the other homeowners in the form of non-discretionary cost and rent adjustments.

Why Arbitration is Wise for Both Sides:

Mentor

This case signals a golden opportunity for park owners to implement arbitration clauses: just a mere few paragraphs, that actually work.

Such protection will reduce the costs for lawyers for both sides, speed up dispute resolution, and reduce costs which drive up rents for all homeowners. The few disgruntled residents in our parks should not hold other residents hostage with rising costs of litigation for their own avariciousness purposes. And arbitration is a fair and neutral way to resolve all claims that arise in the mobilehome tenancy context whether between homeowners who cannot get along, and between homeowners and management.

Please feel free to contact Terry R. Dowdall, Esq. for further information and questions.