JANUARY 2012

PARK WATCH™

A LEGAL DEVELOPMENTS NEWSLETTER

DOWDALL LAW OFFICES, A.P.C., Attorneys at Law

SOUTHERN CALIFORNIA: 284 NORTH GLASSELL STREET, FIRST FLOOR, ORANGE, CALIFORNIA 92866 (714) 532.2222, FAX 532.3238, 532.5381
NORTHERN CALIFORNIA: 980 NINTH STREET, 16TH FLOOR, SACRAMENTO, CALIFORNIA 95814, (916) 444.0777, FAX 444.2983

A COURTESY FOR OUR FRIENDS AND CLIENTS **E-MAIL**: trd@dowdalllaw.net

RISK TOLERANCE:
–NEW STRATEGIES IN 2012

REMEMBER!
CIVIL CODES NOT REQUIRED TO BE OFFERED FOR 2012:

In this issue . . .

By: Terry R. Dowdall, Esq.

● ***UPSHOT:***

Every business decision involves some level of "risk tolerance." Mobilehome park investment and operation is no different. Many owners started with nearly nothing in developing today's sound investments. Our friends personally pulled the permits, built the walls, slurried the streets in boots with brooms, dug their trenches, ran the laterals. The meaning of hard work, risk and stress is not lost on them. The success of these hardy souls has rightly changed focus over time to a paramount interest of protecting the investment. This "risk aversion" reflects the need for a strong defense and decision-making which avoids unacceptable and usually needless risk. As 2012 is deigned to remain a time of economic stagnation, focus should also include *preventive* measures and techniques to preserve and protect. We will be focusing on preventive actions to minimize loss and expense from a legal viewpoint in this new year.

State and federal governments continue to add to the body of new regulations. However, two Court developments offer a means by which to significantly reduce risk of expense and costly claims.

please visit *dowdalllaw.com* on the world wide web for: current news, updates, alerts

FULL RELEASES OF LIABILITY UPHELD FOR RECREATIONAL FACILITIES
- Lewis Operating Corp. v. Sup. Court

By Terry R. Dowdall, Esq.

Decided November 10, 2011, this case calls for complete reevaluation of releases and indemnification clauses used in all mobilehome residency rental agreements. Releases are intended to provide protection against claims where management is not at fault.

The common release clause specifies that management's release of liability extends to all claims except resulting from management's negligence or willful misconduct (many outdated documents refer to inclusion of "willful acts." But a "willful act" includes *reading this newsletter*–it is "willful misconduct" that cannot be released in respect to core functions of tenancy).

This case upheld a *full* release of liability in respect to *common area exercise equipment*. The logical extension of this holding may apply to all but essential "habitability" duties.

Every failure to maintain case involves some claim that the common area facilities are defective, and thereby caused injury, damage or other actionable harm. Until now, it was commonly believed that a release clause was ineffectual in the procurement of release of liability for such claims.

Lewis Operating Corporation v. Superior Court[1] may provide a way and means to impose limitations on liabilities for claims involving *common areas*. Every rental agreement should be evaluated and updated to include a broad form exculpation of liability in light of this case.

▲ FACTS

An allegedly negligent landlord may enforce a release of liability in respect to a private "health club," a facility outside the "core function" of the apartment complex.

Tenant was injured while using a *treadmill* at the apartment complex. Tenant was using the treadmill when he was thrown off by reason of conduct of a management employee interfering with the equipment (somehow, a medicine ball was involved). Tenant sued for negligence. Landlord invoked a rental agreement waiver of negligence claims arising out of use of the exercise facility. The tenant then responded with *Civil Code* §1953(a)(5), which invalidates waivers of "His right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law." The court rejected that argument, holding that the Legislature did not intend the statute to apply to "amenities."

▲ APPELLATE COURT UPHOLDS RELEASE

On appeal, **reversed**! The court held:

Where a landlord chooses to enhance its offering by providing an on-site health club or exercise facility that goes beyond bare habitability, there is no reason whey the landlord may not protect itself by requiring the tenant, as a condition of use of the amenity, to execute the same waiver or release of liability that could lawfully be required by the operator of a separate, stand-alone health club or exercise facility.

Every release should be changed to provide this broad form of release. The rental agreement between Landlord and Tenant provides that Tenant assumes all risk of harm resulting from use of the health and recreation facilities. Tenant agreed to waive all of his claims against Landlord that arise from or are related to the use of the facilities or the participation in activities and programs by Tenant and his guests, even if the claims are caused by Landlord's negligence or gross negligence.

The general law states that a provision of a rental agreement is void if it waives a landlord's duty of care to prevent personal injury or property damage. But what of ancillary facilities and services, which range far beyond bare or essential necessities of life protected by the duty of habitability? ("non-core functions").

The Court noted that a landlord may be liable for negligence even if a dangerous condition does not exist in a tenant's dwelling and does not affect the "habitability or tenantability" of the leased premises. Such a situation could arise from a tenant's use of common areas such as walkways, corridors, or parking areas. However, the court concluded that a landlord's duty to maintain areas of the apartment complex that can be described as "amenities" does not necessarily trigger the rule found in section 1953 or case law related to landlords and exculpatory clauses that affect public interests.

The Court found that Landlord's provision of an on-site exercise facility or health club was outside "the basic, heavily regulated offering of a residential dwelling."[2] Also, the law has consistently enforced waivers, releases, and exculpatory clauses in the context of recreational activities, including use of a health club. The Court held that where a landlord chooses to offer its tenants an on-site exercise facility or health club, there is no reason the landlord may not protect itself by requiring the tenant to agree to waive or release liability as a condition of using the facility or club, just as an operator of a stand-alone facility could lawfully protect itself through a waiver or release of liability.

"We conclude that where a landlord chooses to enhance its offering by providing an on-site health club or exercise facility that goes well beyond bare habitability, there is no reason why the landlord may not protect itself by requiring the tenant,

---

[1] *Lewis Operating Corporation v. Superior Court of Riverside County*, 200 Cal.App.4th 940, 132 Cal.Rptr.3d 849, Cal.App. 4 Dist. (2011).

[2] ". . . where the waiver in question relates to the landlord's operation of a . . . health club or exercise facility, we conclude that the waiver violates no statute or public policy. Accordingly, the waiver is enforceable and bars real party in interest's suit."

as a condition of use of the amenity, to execute the same waiver or release of liability that could lawfully be required by the operator of a separate, stand-alone health club or exercise facility."
"Civil Code section 1953 is designed to protect a tenant's basic, essential need for shelter. Real party's recreational use of the fitness facility and equipment was in no way critical to this need."

● ***Conclusion***

This ruling is authority for updated release provisions in rental agreements, which would limit and minimize liability for injuries and damage in areas outside the scope of habitability and other core functions. It may well come to pass that insurers may insist on such provisions in writing policies for park owners.

The clarification of the right to impose release clauses in rental agreements may affect liability exculpation in matters of common concern to the park owner. "Failure to Maintain" actions, recreational facilities, exercise facilities, wood working shops, and other common facilities may fall within the ability for a broad form release.

AT&T Mobility v. Concepcion: FAA Trumps Cal. Law -*BARRING CLASS ACTIONS ALLOWED!*

By Terry R. Dowdall, Esq.

● ***Snapshot:*** *Amid cases striking down arbitration and reference clauses, the U.S. Supreme Court holds, 5-4, that an arbitration clause barring class action proceedings is enforceable and must be honored to uphold Congressional intent favoring arbitration. All state laws which interfere with the federal policy favoring arbitration are preempted and hence trumped. This would include the Mobilehome Residency Law, which treats arbitration clauses differently than other contract terms. All residency documents should be updated to provide for arbitration under federal law.*

● ***Facts:*** *AT&T Mobility v. Concepcion,* was filed as a class action based on a claim that a "free" cell phone was not free, as the customer had to pay a $30.00 tax. Vincent and Liza Concepcion claimed fraud due to the sales tax. The contracts provided for arbitration, which barred any class proceeding. The complaint was consolidated with a class action in federal district court. AT&T sought arbitration on an individual basis. The 9th Circuit Court of Appeals affirmed the trial court's denial of arbitration.

● ***Ruling:*** The Supreme Court held that the Federal Arbitration Act preempts California law, which snubs class arbitration waivers. The Court held that California law "interferes with arbitration" as provided by federal law. This decision comes a year after *Stolt-Neilsen v. Animalfeeds International*,[3] which held that if parties to an arbitration agreement did not intend to allow class claims, arbitrators have no power to impose class-wide arbitrations under agreements "silent" on the issue. Says opinion-author Justice Scalia:

"requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

This overturns California law. The majority held that rules dictating the procedures for arbitration may vitiate the expectancies of informality in arbitration so much as to essentially nix the possibility of arbitration. For example, rules which arise from the effort to avoid a finding of unconscionability (as often so held in California) could actually thwart the federal policy favoring arbitration. Examples stated are the Federal Rules of Evidence to apply, or judicially-supervised discovery. These might unacceptably frustrate the intended expediency that arbitration is supposed to provide. Justice Thomas wrote separately that California may only strike arbitration clauses on grounds such as fraud or duress where contract formation is challenged.

So the majority held that *laws requiring such procedural rules in arbitration are barred by the FAA, whether or not stemming from a generally applicable rule of contract law such as unconscionability doctrine*. This throws much of California law on arbitration into doubt and warrants careful review and thought.

Here, the Court struck down former opinions because they were "inconsistent" with federal law, unduly interfering with arbitration by requiring the availability of class proceedings in arbitration. Put differently, requiring class proceedings in arbitration would end the availability of arbitration for any dispute due to the risks to AT&T from a proceeding of that nature. Class proceedings are dangerous due to the multiplier effect, elimination of confidentiality, and issues concerning binding absent parties. In light of such large amounts at stake, the absence of appeal is also a reason why AT&T would not offer arbitration for class proceedings. Since such class arbitrations are irrational, it is not unreasonable to exclude them from

[3] 130 S. Ct. 1758 (2010)

arbitration.

This means that pursuant to federal law, an arbitration clause may not be required to be specially conspicuous or conditioned on any other provision of state law which does not likewise apply to other language in the rental agreement. It can be added and treated as the case with any other contract language. The opportunity for park owners to resolve disputes quickly, efficiently, and without the delays and cost for jury trial are made clear under this ruling. The decision virtually eviscerates state decisions which have eroded the right to arbitrate failure to maintain cases over the past several years.

Indeed, the progenitors of this opinion, in all fairness, reflect that the federal courts are on a wrong-headed path in this decision. That said, it is nearly legend for the court to reach out in jurisprudentially contorted ways to impact the law. Even Justice Scalia has stated he would overturn the line of cases if a majority would join him; until then, he will no longer dissent. In the meantime, there are efforts in Congress to change the result of this decision. We are informed that the legislation is stalled without real hope for movement.

● ***Off the Radar:*** In sum, the best medicine to avoid the regrettable position of testing these nice legal theories and claims, is to avoid "failure to maintain" claims altogether. The common thread to each and all, is *resident ill-will*. Conversely, the best preventive action is to generate positive or good-will with the residents. *In short, residents will not sue owners they like, or at least respect.* A good job of infrastructure management, recognition of residents, the occasional gratuities, and positive attitudes all reflect good service and good relations.

So, in the meantime, try to persuade residents to sign arbitration agreements. Amend clauses to refer to AT&T holdings. In light of this precedent, it would be terribly frustrating to use an outdated form; a good time to review your clause, obtain a separate agreement ("stand alone"), and offer it to your residents with incentives for mutual agreement.

ADA Compliance Is Your Choice

-WAITING TO BE SUED: A STRATEGY THAT TRIPLES THE COST OF AN ADA DISPUTE

By Terry R. Dowdall, Esq.

● ***Snapshot:*** *Many property owners do nothing about the ADA until served with a lawsuit. Then a cure is effected, the case settled, the attorneys fees paid. This is not a wise practice.*

A common thorn in management's rose is the ADA claim, from residents and the general public alike, that the park does not comply with ADA accessibility requirements. Unless a park owner willingly converts the park facilities to public accommodations, the park is not subject to the ADA except in *very limited respects*.

The park office, the parking lot in front of the office and the path of travel from the parking lot to the park office must be ADA compliant (unobstructed path of travel plus proper signage and access).

In California, a property owner covered by the ADA may obtain an inspection before suit. A Certified Access Specialist Program consultant ("CASP") can inspect and insulate you from claims while guiding you to ADA compliance. As a practical matter, ADA claimants do not pursue CASP inspected properties. If a CASP report has been done, you may immediately stop a lawsuit, and schedule an early evaluation conference. This may bring about immediate settlement. The savings is considerable compared to the usual litigation defense procedure. And since prevailing defendants are not entitled to attorney's fees as a general rule, money spent litigating a defense is very wasteful–better to invest in the cure to the problem.

Your CASP inspector may be hired by counsel so that the report is arguably retained in attorney client privilege. When contracting for ADA compliance, it is wise to have knowledgeable counsel check the plans. California has more stringent requirements for ADA compliance than the federal regulations. Only the California regulations should be used in complying with ADA. These requirements are contained in the latest version of Title 24. Title 24 is available for purchase from several sources, and our office makes it available on line for our clients at no charge.

● ***Conclusion***

It is less expensive to retain a CASP consultant, conduct an inspection, remedy any deficiencies and then post the CASP

inspection notice to show the world that the park complies. This is a virtual guarantee against ADA claims in your park.

The other and common approach is to do nothing, wait for a claim to be filed, retain counsel for a defense, determine that you are out of compliance, then settle the case. If you do not also remedy the offensive conditions, you will await the next claimant in line. To avoid copy cat claims, the remedy must also be undertaken.

HUD Census a Requirement for Qualification of Older Persons Housing Exemption to the FHAA
- *BALVAGE V. RYDERWOOD IMPROVEMENT*

By: Terry R. Dowdall, Esq.

● ***Snapshot:***

"Older Persons Housing" (55+) requires at least 80% of spaces to be occupied by one person 55 years of age or older. The law further requires that the management have "intent" to operate the older persons housing, and reflect that intent with written rules and application procedures. This new federal trial court decision also requires that the two year census be taken for the exemption from FHAA to apply.

The census was held to be a requirement for older persons housing. *But the community could later re-qualify, though still remain liable for non- conformance during the applicable time periods when no proper census was conducted.*

The lesson for park owners today? Make sure to conduct the two year census.

● ***Facts:***

Ryderwood is a residential community in Washington. It consists of 270 homes. It was established as a community for the benefit of pension recipients. Ryderwood adopted bylaws limiting ownership to persons age 55 or older. Plaintiffs are residents alleging that the age restrictions violate the FHA and that the housing never satisfied requirements for older persons housing. In fact, *the association never conducted required survey from 2000 to 2006;* and then did so after 2007, 2 years before suit was brought in 2009. *Could the park re-qualify??* The association claimed it comply between 2000 to 2006:

> *Every home in Ryderwood is subject to the bylaws and deed conditions that require all owners to abide by the 55 and over provision. RISA requires every homeowner to join RISA, and to confirm his or [her] age upon joining. RISA regularly updates its rolodex of all families and its annual neighborhood phone book. This multi-faceted process of verification complemented the covenants and bylaws [that restrict Ryderwood to persons 55 or older].*

Plaintiffs asserted this practice constituted a failure to comply with the HUD regulations for the required census and therefore disqualified the community from ever complying with the older persons regulation.

And, Plaintiffs challenged the adequacy of the 2007 census survey. They asserted a number of flaws, arguing that the survey therefore failed to satisfy the legal requirements. The association argued that it has satisfied the requirement for verifying occupancy "by reliable surveys and affidavits." They contended that it completed a survey of all residents in 2007. The survey entailed "a request for each resident to show they met the 55+ condition by providing a drivers license, birth certificate, passport, and/or a state identification card."

● ***Older Persons Housing Background:***

In April, 1999, HUD promulgated regulations to implement the Housing for Older Persons Act of 1995. Those regulations require the park owner to re-certify the "older persons" status of a community every two years.

We all know that 80% or more of community homesites must be occupied by at least one 55+ person, and, that documented proof of age ("POA") must be consistently enforced, in order to comply with the "intent" requirement for "55+" communities.

> *"...(b) A facility or community shall, within 180 days of the effective date of this rule, develop procedures for routinely determining the occupancy of each unit, including the identification of whether at least one occupant of each*

unit is 55 years of age or older. Such procedures may be part of a normal leasing or purchasing arrangement."

However, the Regs also require survey "updates" at least once every 2 years:

"...The procedures described in paragraph (b) of this section must provide for regular updates, through surveys or other means, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years..."

Specifically, the regulation requires communities to conduct surveys of residents at least once every two years to verify that at least 80 percent of its occupied units are occupied by at least one person 55 years of age or older. §100.307(a), (c). The surveys must verify the ages of residents by using reliable documents or affidavits. § 100.307(d), (e), (g). Summaries of the surveys must be made available to the public upon request. § 100.307(I). And the surveys themselves must be maintained and produced in any administrative or judicial proceeding in which the community asserts the 55 or older exemption as a defense to a charge of discrimination. § 100.307(a), (h).

● ***Holding***

For 2000 to 2006, the association stated it had complied with the survey requirements but the court disagreed.

"These verification efforts fall short of the statutory requirements. To satisfy HOPA's verification requirement, a community must verify the age of its residents at least once every two years; the verification must cover all housing units in the community; residents' ages must be verified using reliable documents; a record of the verification, including copies of the relevant documentation, must be maintained in the community's files; and the community must be able to produce that record in response to a complaint of discrimination. . . Whether considered individually or collectively, the verification efforts described . . .—the rolodex cards and RISA membership forms — do not satisfy these criteria."

The Court further held that "verifications," which must take place at least once every two years, occur at fixed points in time. Rule: To satisfy the requirement, a community must do more than collect some data over some period of time. It must collect complete data for all residences. The data must be current (as of the time of the verification). And the community must compile the data: the community must show that it actually used the data to verify that the community in fact satisfied HOPA's 80 percent occupancy requirement at the time of the verification.

"Here, we have no basis to conclude that the membership forms covered all residences or that they provided current information at any time between 2000 and 2006."

The lower court held that, even assuming a valid verification survey in 2007, the community could not qualify for the HOPA exemption because it neither achieved full compliance with HOPA's requirements during the transition period nor properly "converted" to exempt status after the transition period ended by achieving full compliance without discriminating against families with children. *However, the appellate court allowed for reinstatement or new assertion of the exemption once the community was in compliance.*

. . . the district court erred. The HUD Secretary's amicus brief explains that a community like Ryderwood, which has continuously operated as a retirement community for persons age 55 or older, can qualify for the HOPA defense after May 3, 2000 (the end of the regulatory transition period) . . . by establishing that it currently satisfies the three statutory and regulatory criteria, even if it did not satisfy HOPA's age verification requirement before the transition ended.

Current compliance with the verification requirement, in other words, will not shield the community from liability for discrimination occurring before compliance was achieved. And any person aggrieved by that pre-compliance discrimination has two years in which to bring suit.

● ***Comment:*** A park owner must therefore prepare a census each two years since April, 1999. If management has not conducted a survey within the past two years, it is urged that such action be taken **now**.

A word about our firm. . . .

As we speed into 2012, a few thoughts are in order for our clients and our continuing pledge to you.

We feel that a breathtaking office view does not improve the quality of legal services . . .

In our firm, the concern for increasing costs for legal services has institutionalized a philosophy of economy and vigilance

for efficiency. It is a fundamental precept of our practice. We believe we deliver competent legal services at reasonable cost. No other firm offers the expertise, experience and practical judgment we do at our rates. We have a sense of ethics which puts *client first*. We reject strategies, tactics and practices which only serve to drive-up costs or prolong disputes. We take great pride in the sensible, fast and least expensive solutions to problems. And at rates much less than the large firm, often impersonal or uncaring, from whom business clients in this fledgling economy have fled for sake of boutique specialty practices like ours. Our depth of concentrated knowledge, experience and industry involvement is unmatched.

Bilingual Staff: Many firms employ paralegals. We employ bilingual paralegals who can actually *talk to opposing tenants who do not speak English*. We can settle many cases other firms cannot, because they do not speak the language.

This capability greatly facilitates communication with adverse parties enabling efficiency in settling disputes quickly and efficiently. Without this support, the law firm must prolong disputes with court appearances because as a practical matter, it is impossible for them to communicate with many residents: so there are needless court appearances, confusion and frustration.

Paralegals Save Money; Paralegals Billed at Paralegal Rates: Our services include separate charges for paralegal work, because they can efficiently perform many functions.

* You will note that charges for paralegals are made for actual time they spend–you will never have an attorney billing for time for paralegal work; or see a bill for paralegal hours switched to attorney rates. We feel such practices are not honest or ethical, yet not unheard of in the representation of mobilehome park owners.

* Nor are there any charges for "phantom" billers—time billed to a client attributed to a non-existent "phantom" employee. In a boutique firm like ours, each employee is individually accountable for time spent, with identification to your attorney and paralegal.

* Nor are there document preparation charges based on a fixed percentage of the amount of a bill or other indicia. All bills are keyed to the personnel in our firm who performed the work. We bill for the actual work performed.

* No Add-ons: In our firm, we continue to avoid charges, add-ons, incidental fees and expenses which most attorneys separately charge, such as copy charges, faxing (sending or receiving), secretarial and staff services, postage (except federal express, overnight or certified mail, personal delivery or title checks), long distance travel, telephone charges, out of town meals, lodging, or status updates. When we do separately charge it is at cost without mark-up.

A review of rates for attorneys in the manufactured housing industry reflect that fees for comparable services to this firm range from $385.00 to $750.00 per hour for services. Based on our efficiencies of scale, owning our office, and overhead controls, we can retain a competitive advantage in our hourly rates over firms with large reception areas and terrific views.

We have found that a great office view does not improve the quality of your legal services or lower costs.

I look forward to many more years of service to the industry and to my clients and to having you as one of the select group of owners we represent. Thank you for your kind attention to the foregoing.

Sincerely,
Terry R. Dowdall
For DOWDALL LAW OFFICES, A.P.C.

* * *

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