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PARK WATCH ® A LEGAL DEVELOPMENTS NEWSLETTER

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THIS NEWSLETTER CONVEYS GENERAL INFORMATION, NOT LEGAL ADVICE: CONSULT AN ATTORNEY BEFORE RELYING HEREON

ARBITRATION AND REFERENCE CLAUSES DOOMED TO TRIAL JUDGE DISCRETION, RULES CALIFORNIA SUPREME COURT

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- Arbitration and Reference Clauses Rejected in FTM
- Reference Clauses Should Still be Offered
- FTM Avoidance: Good Will, Good Management

● ***UPSHOT:***

Avoidance of jury trial is commonly believed advantageous to the park owner. Trial by jury is, after all, seldom a trial by the peers of a manufactured housing community owner. So alternate dispute resolution (ADR) clauses are often used, where mutually agreed by the parties, to have arbiters ("arbitration") or referees (a "reference") hear and decide disputes instead of the jury or the court. Such clauses may well serve to reduce cost, inconvenience and delays as well. So, the use of arbitration or reference clauses is pervasive: in residency documents, agreements and contracts of many sorts. Can a "failure to maintain" case be ordered to arbitration or reference when dozens, or hundreds of tenants are named in the suit? It may depend on near unanimity of resident agreement to the ADR clause. Where ADR may result in a parallel set of proceedings and inconsistent rulings among the plaintiffs, the trial judge will have discretion to refuse enforcement of the ADR clause.

▲ *RULING:*

On February 10, 2011, in *Tarrant Bell Property, LLC v. Superior Court of Alameda County,* the California Supreme Court ruled that a "failure to maintain" ("FTM") case may not be ordered to a referee (so as to avoid a jury trial) when a significant number of the plaintiffs had not consented to a reference clause in their lease agreements.

▲ *FACTS:*

120 park residents in Alameda County sued for FTM, claiming, as is common to such lawsuits, that the management failed to maintain the park's common areas and facilities and for otherwise allegedly subjecting park residents to "substandard living conditions."

The leases of about 100 of the residents provided that arbitration will be used to resolve disputes in lieu of jury trial, for such matters as claims regarding maintenance, condition, nature, or extent of the facilities, improvements, services, and utilities provided. The clauses further stated that "[i]f these arbitration provisions are held unenforceable for any reason . . . all arbitrable issues in any judicial proceeding will be subject to and referred on motion by any party or the court for hearing and decision by a referee (a retired judge or other person appointed by the court) as provided by California law.

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After the FTM case was filed, the park owners moved the court for an order requiring arbitration of the lawsuit, or in the alternative for hearing by referee. The residents opposed, arguing that the arbitration provision was unenforceable but moreover, because arbitration would run the risk of conflicting rulings on "common issues of law and fact" between the two groups of residents (those who agreed to arbitration and those who declined it). The trial court, appellate

court and now the California Supreme Court, agreed with the residents.

▲ *WHY ARBITRATION WAS REFUSED:*

The court held that there was a possibility of "inconsistent judgments" if it ordered ADR. The trial judge had relied on the court's *discretion*, holding:

> "[I]n this case the purposes of [reference] would not be promoted by [such procedure for] some claims and not others. . . Ordering two groups of real parties in interest to try their cases in separate but parallel proceedings would not reduce the burdens on this court or the parties, result in any cost savings, streamline the proceedings, or achieve efficiencies of any kind. The parties would be required to conduct the same discovery, litigate, and ultimately try the same issues in separate but parallel forums. A general reference would thus result in a duplication of effort, increased costs, and potentially, delays in resolution. Moreover, it would not reduce any burden on this Court, which would almost certainly have to hear, and decide, all of the same issues."

▲ *WHY THE SUPREME COURT AFFIRMED - COURTS HAVE DISCRETION TO ORDER ADR:*

The Supreme Court analyzed the legislative history of the reference statutes and concluded that the California trial courts have the "discretion" not to enforce *valid reference agreements.*

> "This legislative history shows that the Legislature,. . ., consciously rejected language that would have imposed on courts a mandatory duty to enforce pre-dispute reference agreements, and instead consciously chose permissive language — which is, in relevant part, substantively identical to the language of the current statute — that would give courts discretion to refuse to enforce such agreements. It therefore confirms the conclusion the statutory language suggests: section 638 does not require a court to appoint a referee simply because the parties have entered into an otherwise valid pre-dispute reference agreement."

There has always been a recognized risk in seeking the enforcement of arbitration and reference clauses in leasing documents. Many court decisions have rejected ADR clauses for various reasons, from unreasonable burdens to outright unconscionability. This case makes it quite clear that a large FTM case, in which less than all the plaintiff residents have agreed to a reference of their claims, stands little chance in avoiding a jury trial.

That said, use of ADR in leasing agreements is useful, where both parties mutually agree, for purposes of minimizing costs to the parties, delays and the inconveniences of court scheduling which burdens all sides. Because the referee or arbitrator is typically a retired judge, many reasonably believe that the referee or arbitrator is in a position to decide a dispute even more fairly than a judge, based on that experience, absence of the pressures of a heavy caseload, and costs for formal trial preparation by all attorneys.

But use of ADR in a FTM case is now subject to grave doubt where less than unanimity of agreement pertains. The best solution to this recent setback (the opinion disapproves earlier precedent on this issue), remains preventive. As set forth below, the common thread in all FTM actions is ill-will against management. Building good-will is FTM insurance.

▲ *THE NEED FOR CURBS AGAINST ABUSIVE LITIGATION*

Decades ago, the law of habitability was extended in California to allow tenants to sue when the landlord failed to provide basic requirements of a habitable premises: not just amenities, but basic necessities such as heat and electricity. When the serious defect affected all tenants (such as lack of heat for an entire building), courts allowed class actions for such claims. A tenant representative can testify about his injury, his damage, and the resulting judgment is multiplied by the number of other tenants and persons identified as class members. It is no surprise that a "slumlord" is (and should be) vigorously pursued for exploiting needy tenants with no alternatives to basic, decent housing.

A park owner does not provide a habitable residential unit, only real property on which the tenant may install the tenant's mobilehome. The quality of the housing is a decision of the mobilehome tenant.

Many FTM cases ironically reflect that the resident's homes are in far greater disrepair than any common facilities. *Can tenants really complain about dust in the clubhouse, when they are dissembling a chevy V8 engine on their living room carpet?* Yet the park owner does provide common areas, utilities and amenities. When tenants are physically injured or property is damaged, such an individual claim is cognizable and proper.

Our system is abused when tenants can merely sign up as a plaintiff at the behest and badgering of a slick organizer, list a few vague complaints about the community and seek damages. This is not the injury or damage which the law should contemplate or allow. Yet, attorneys in the field tout that fact that they have earned hundreds of millions of dollars for their clients through the years.

▲ *PREVENTION OF CLAIMS IS THE BEST DEFENSE*

I am a big fan of preventive thinking: maximizing revenue, avoiding needless risk, making well-considered cost-benefit decisions in management.

Plainly, squelching avoidable litigation is wise. Ask any lawyer who owns a park. For example, management's decision-making concerning defects and needed repairs or

sewage spills is not a question of balancing "aggressive management" or "expense control," against being too "risk adverse." It is much simpler, and, it is not merely the correct "legal answer."

Basically, the proposition to consider is this. Can your bottom line benefit more from: (1) the cost of remediation, reinforcing resident perceptions of professional management and good will, justifying fair rent adjustments among other things, or (2) the expense and uncertainty of legal liability, potential penalties for willful code violations or punitive damages (which are not insured and not tax deductible), insurance coverage disputes, loss of good will, stress on your employees, your lost time and sleep and non-productive damage-control efforts?

I also suggest that you investigate permanent cures, rather than periodic cleanups. Isolate and permanently stop tree roots where feasible, rather than periodically clean out. This may entail removal of trees as authorized by the Mobilehome Residency Law guided by counsel's advice. If there is a possible tenant-caused problem, consider making the repair, then once resident-causation is determined, consider charging the resident, making a claim against the homeowner's policy, seeking legal relief. Me? I conclude that a repair invoice makes a much better court exhibit than a code citation. Don't you?

▲ *FTM PREVENTION = GOOD WILL*

The risk of the FTM case can be neutralized. This is the experience, recently, in a case in which this office coordinated with the owner in a pro-active effort to sway the reasonable resident to the *negative* aspects of maintaining a FTM action against the owners.

TENANT RELATIONS. *How are your tenant relations?*
* Do you have a monthly newsletter or other ways of regularly communicating with your tenants in a positive way?
* Are your employees in the park, being seen doing work, available to the residents, meeting individual needs, responding appropriately, professionally, and timely?

I once called a park office to gather information for defense of a claim: the phone rang eight times, and was abrasively answered with a loud gruff "yeah?" I was hoping for a prompt answer, followed by a pleasant *"Good Morning, Rancho Loco Mobilehome Estates, Mary speaking, may I help you?"* If this characterized the management mood, I would be concerned that feelings for others--that intangible factor that separates good management from bad--would not be a management priority. Yet, the intangible "good will factor" is the key to avoiding FTM lawsuits.

FTM cases reflect, always, poor resident relations: a healthy dislike, hatred, resentment against the owners. This issues needs to be evaluated and addressed in every park: that goal, in whatever way accomplished, is probably more important than the issue of maintenance itself. Insurers, too, are concerned about how parks are operated and tenant relations.

In some cases, rent policies trigger tenant lawsuits. The lawsuit is not about a rent increase, but because of the collateral disputes rents engender. A tenant thinks, *"well, higher rent, yet the park looks exactly the same. I am being overcharged."* The result? 120 rent control laws in the state, and FTM cases often in areas without rent controls. So, how high are rents compared to market? How often are rents raised and by how much? Are rent increases staggered so all tenants aren't increased on the same date?

IS THE PARK INVOLVED IN SELLING MOBILEHOMES? Some carriers believe that if the park owner or manager is involved in selling mobilehomes, there may be a greater risk of tenant unhappiness and lawsuits. Dealing exclusively with a dealer may be a very unwise, indeed unlawful practice.

DOES THE PARK PLAN TO REDUCE SERVICES OR GO OUT OF BUSINESS? Major reductions in services or going out of business to convert to another use is another common cause of tenant lawsuits.

MAINTENANCE AND REPAIR. Doing a good job maintaining and repairing your park is essential. Some carriers ask about two common causes for lawsuits: Do you have sewer back-ups or spills? Are your trash bin areas clean or is trash scattered about?

HAVE YOU BEEN SUED BY YOUR TENANTS? Once sued, a park owner is all the more vulnerable. Such "copy cat" cases appear to be more and more common, as residents take a second "bite of the apple" every decade or so if things do not materially change.

THE G'S: Good tenant relations; Good maintenance; Good management. All these are your cheapest and best insurance. Put differently, belligerence, confrontation, pugnacity? *The manager who engenders ill-will is taking the owner by the short route to the courthouse.*

So, it's no longer "just enough" to do a good job maintaining parks. Even the best maintained park may be sued if mediocre management practices result in poor tenant relations.

The means by which to prevent the FTM case *lies in the powers and discretion of every park owner.*

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