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A LEGAL DEVELOPMENTS NEWSLETTER

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

AT&T Mobility v. Concepcion: Supreme Court Holds California Cannot Require Class Proceedings to Be Available in Arbitration

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By: Terry R. Dowdall, Esq.

● **Snapshot:** A “shot in the arm” for arbitration clauses. Amid state and federal 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. What else may pose repugnant interference with the right to arbitrate? The MRL itself?

● **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*,¹ 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.”

The majority held that rules dictating the procedures for

In this issue . . .

- Supreme Court: Fed. Arbitration Act Supports a Bar Against Class Actions in AT&T Arbitration Clause
- Fountain Valley Estates Sells for \$33,375,000.00
- Dodd Frank and AB 376 on the Horizon
- Senior Parks: Court Dicta says Census Critical to Compliance with Older Persons Housing Exemption
- Reminder: FHAA Bars Parental Supervision Rules

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

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¹ 130 S. Ct. 1758 (2010)

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 arbitration.

Justice Scalia wrote that the “*dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system, . . . [b]ut states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.*” This suggests that the amount at stake is not a basis for the striking of the arbitration clause; nor that hardships imposed by arbitration are reasons to refuse to enforce such clauses. It is suggested that excluding incongruous forms of claims (like class actions), and perhaps providing procedures to facilitate arbitration (requiring individualized procedures), will be upheld and invulnerable from challenge under federal arbitration laws.

Justice Breyer dissented, and was joined by Justices Ginsburg, Sotomayor, and Kagan. He chided the majority, stating that the decision forces federal substantive law on the states, which overreaches the authority of the Court. He wrote: “*What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim? Why is this kind of decision - weighing the pros and cons of all class proceedings alike - not California's to make?*”

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.

Justice Breyer notes that federal law allows the states to regulate and review arbitration clauses “*upon such grounds as exist at law or in equity for the revocation of any contract.*”

● **Impact:** According to the Court, any state case law or statute that stands in the way of arbitration is invalid. Recently, the California Courts have refused to enforce even valid reference and arbitration clauses in “failure to maintain” actions; holding that such procedures would result in a duplication of effort, inconsistent rulings, wasted court time, or that such agreements were not enforceable due to the claims excluded or included, costs, or procedural impediments to a fair hearing for the residents. Now, *arbitration* is back; *reference* is out.

Re-examination of procedural obstacles to arbitration, whatever the holdings in past state court decisions, can now be made to determine the extent to which arbitration clauses can be drawn to effectively achieve justice without the expense and protracted delays in litigation. under AT&T. It might be that the MRL itself should be carefully scrutinized for impediments to arbitration offensive to federal law. All previous state precedents are at risk. If class actions can be excluded, can the tables be turned? Can we now force individualized arbitration of failure to maintain claims?

● **Off the Radar:** In sum, the best medicine to avoid the regrettable position of testing these nice legal theories and claims, it 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.

Fountain Valley Estates Acquired by Kort and Scott Affiliate for \$33,375,000.00

● Long Held Family Ownership Transitions to Experienced Owners

Fountain Valley Estates, a beautiful manufactured housing community of 193 spaces located in the upscale community of Fountain Valley, California, has been acquired by an affiliate of Kort and Scott Financial Group.

The acquisition closed on time and within 60 days, at a price of **\$33,375,000.00**. Express Escrow of Huntington Beach facilitated the closing.

Terry R. Dowdall, Esq., privately introduced the parties, structured the peer-to-peer acquisition and provided legal representation from beginning of negotiations, through due diligence, and to close of the escrow. The purchase and sale transaction proceeded smoothly and on time. New ownership took possession on closing of the escrow which occurred on June 2, 2011.

Sierra Corporate Management, Inc., will manage the park. The resident announcement states that:

“Sierra's team is committed to responsive service and you may rest assured that the door is always open, and that your concerns ill be heard. Sierra will work hard to earn your trust and confidence . . . You may look forward to an enthusiastic and smooth transition in ownership and management.”

Congratulations to the parties and participants!

Latest on the Impact of the Dodd-Frank Act and Status of the SAFE Act; Meanwhile, SB 376 Passes Assembly Committee

By: Diane Wilkens Medina, Esq.

● **Snapshot:**

Federal regulations abound. The SAFE Act and Dodd-Frank continue the long and winding road for promulgation of implementing regulations. Senate Bill 376 (Fuller), WMA's real estate broker bill, passes the Assembly Business, Professions and Consumer Protection Committee on is on the move. We expect regulations which eventually will require that park owners with POA's obtain their MLO license, or arrange to utilize the attorney-exemption for the origination of mobilehome loans.

For industry members attending the Manufactured Housing Industry 2011 National Congress and Expo in Las Vegas last month, there was no good news concerning the Dodd-Frank Act and the S.A.F.E. Act.

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203; *Dodd-Frank*), widely considered the most sweeping and comprehensive rewrite of rules governing financial regulation. Intended to "fix" the financial system and prevent future economic collapses, Dodd-Frank overhauls existing government agencies regulating the financial industry, implementing significant changes that affect the oversight and supervision of financial institutions and reform the securitization market, corporate governance and executive compensation packages at public companies, regulation of credit rating agencies, proprietary trading, and consumer finance laws.

While intended to "fix" the financial system and prevent future economic collapses, the legislation lacks clarity and consistency and conflicts with pre-existing law, including the already confusing S.A.F.E. Act.

Dodd-Frank also establishes the *Bureau of Consumer Financial Protection* (CFPB), a new executive agency which assumes control on July 21, 2011. The CFPB has a substantial budget and very broad powers under federal consumer financial law, along with primary enforcement. Provided with an unprecedented level of authority, the CFPB is able to autonomously develop and rewrite rules and regulations governing all financial institutions (banks and nonbanks) offering consumer financial services or products, including banks and credit unions with assets over \$10 billion, all mortgage-related businesses (lenders, servicers, mortgage brokers), credit reporting agencies, debt collectors, payday lenders and private student lenders.

While *Dodd-Frank's* scope is broad and far-reaching, the narrowed focus of this article will be its impact on the manufactured housing industry.

● **How does Dodd-Frank impact the manufactured housing industry?**

Dodd-Frank makes significant revisions to mortgage finance and anti-predatory lending laws. It amends the Truth in Lending Act and other consumer protection laws by adding new requirements on residential mortgage loans that will make it more difficult for homeowners to obtain affordable financing. Moreover, it imposes regulations on personal property lending which were designed for and previously applied only to residential mortgage lending:

▲ Manufactured housing has been arbitrarily swept up in *Dodd-Frank's* effort to cure abuses in the subprime mortgage market for real property secured loans and is now subject to new regulations that *do not consider the realities* of the manufactured housing market.

▲ Establishes a new mortgage originator definition that conflicts with the S.A.F.E. Act, broadening the definition to treat anyone assisting a customer in the finance application process as a mortgage originator.

▲ Significantly expands the range of loan products that can now be considered high-cost mortgages to include loans which were previously exempt, including purchase money loans, construction loans and open end loans that meet certain criteria.

▲ Lowers the interest rate, points and fees that define high cost loans, thereby triggering predatory compliance requirements. A mortgage loan will now be considered "high-cost" under the following circumstances:

- The APR exceeds the average prime offer by more than 6.5 percent;

- The APR exceeds the average prime offer by more than 8.5 percent for personal property transactions under \$50,000;

- The total points and fees exceed five percent for transactions of \$20,000 or more;

- The total points and fees exceed the lesser of eight percent or \$1,000 for transactions under \$20,000.

The appraisal requirement takes the real estate upon which the home is situated into consideration, which *does not properly account for manufactured housing titled as personal property.*

● **Comment:** These high cost mortgage standards ignore the realities of the manufactured housing market with respect to servicing smaller-sized loans that are already subject to significant consumer financial protection requirements. *Dodd-Frank* adversely affects these smaller balance loans, which will greatly impact low-to-moderate income families that rely on manufactured housing as an affordable housing option.

Manufactured housing lending options were already limited and are now further restricted by the new regulations, with unforeseen potential consequences of a reduced availability of financing, increased selling prices, and a decreased in the number of homes sold.

While loans that meet qualified mortgage status are provided "safe harbor" from certain of the more onerous provisions under *Dodd-Frank*, there is a lack of clarity defining the specific criteria of a qualified mortgage, which will essentially allow the CFPB to unilaterally edit and revise the standard.

The legislation calls for a number of studies to be conducted and requires significant rule making, however the CFPB is already up and running. In a clear indication of what the future holds, the new leader of nonbank supervision at the CFPB has stated:

"Many companies other than banks provide consumer financial products and services. Non-bank financial companies can have a huge impact on consumers but, unlike banks, they have not been subject to regular Federal reviews to make sure they play by the rules. My team is planning a new Federal supervision program to oversee these companies. When banks and nonbank companies are subject to similar Federal oversight, consumers across the entire marketplace will be better protected."

● **Status of the S.A.F.E. Act**

Enacted on July 30, 2008 with a compliance deadline of July 31, 2010, the S.A.F.E. Act mandates a nationwide licensing and registration system for mortgage loan originators. Under the S.A.F.E. Act, individuals are prohibited from engaging in the business of residential mortgage loan origination without first obtaining and then annually maintaining a State license or a Federal registration and unique identifier. The licensing requirement includes manufactured homes.

Through the efforts of Sheila Dey of WMA, in June 2010 HUD granted a temporary exemption from the S.A.F.E. Act implementation for park owners who "occasionally carry back paper on units in their parks that they sell to occupants." Some states, such as Texas, have implemented a "de minimis" exception to the S.A.F.E. Act for park owners who sell 5 or fewer manufactured homes per year.

In the meantime, AB 376, sponsored by the W.M.A., which would allow a California broker to handle such transactions, marches along with no opposition. However, whether or not federal law will preempt it, in the end, remains to be seen.

No Final Rule Yet! To date, no final rule has been issued specifically regarding whether all manufactured homes are dwellings under the S.A.F.E. Act or whether there will be permanent exemptions or *de minimis* standards in place.

Absent a permanent exemption through legislation or regulation, the S.A.F.E. Act will apply to park owners making the occasional loan on a home recovered through an eviction, foreclosure or abandonment.

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

MHI Warning: MHI warned that the industry should not count on exemptions or *de minimis* standards to continue in the future. HUD has opined that because Congress included language in the statute which specifically provided a *de minimis* exception for employees of depository institutions, it was their intention to limit such exceptions. At least one state, Indiana, has already specified that the S.A.F.E. Act does apply on transactions secured by manufactured homes because they meet the definition of dwellings and has begun issuing cease and desist orders.

Industry organizations including WMA and MHI are actively seeking regulatory clarity and consistency, as well as a reduction on the burdens the legislation places on the manufactured housing industry. However, given that the CFPB now has oversight and enforcement responsibility over the S.A.F.E. Act, the handwriting is on the wall.

"Powers once assumed are never relinquished, just as bureaucracies, once created, never die." Charley Reese.

If you are a park owner providing financing to prospective residents, we encourage you to become licensed under the S.A.F.E. Act.

● **More Information**

The latest is that OMB returned the regulations to HUD about two weeks ago. HUD staff is being transferred to the new CFPB by July 21.

Essentially, CFPB shall become live and active July 21. Interestingly, if the Department of Housing and Urban Development does not adopt the regulations July 21, the authority for the finalization and adoption of the regulations will fall within the jurisdiction of the CFPB.

No one knows what HUD is going to do.

● **And Still More Information**

Under current law, the Fair Credit Reporting Act requires management to provide rental applicants with an adverse action notice notifying them of their right to obtain a free copy of their consumer report if they are denied tenancy or conditionally accepted (subject to a guarantor or higher deposit) based on information in a consumer report. *Dodd-Frank* amended that requirement. Beginning on July 21, 2011, management must also provide applicants with their credit score, if their score was used in taking adverse action.

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 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."

● **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. Such a community is not barred now or in the future from asserting the HOPA defense, notwithstanding the fact that it may have engaged in familial status discrimination after the transition period and prior to establishing compliance with HOPA's age

verification requirement.

However, any person may make a proper claim of violation for the period the park was out of compliance. Assuming that the 2007 survey satisfies the verification requirement, the community became exempt, but cannot claim the exemption for any prior period. *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.

Pools and Summer: U.S. v Plaza Estates

By: Terry R. Dowdall, Esq.

● **UPSHOT:** *Summer is here again! And the kids have started their seasonal pilgrimage to the coolest place in the park. Each year, there is loss of life in private residential pools due to inattentive parents. Residing in a mobilehome park does not make parents any more careful. But it is the parents' responsibility, not management's, to decide proficiency and access privileges for their kids. Access, hours and supervision restrictions are illegal under the FHA (United States v. Plaza Mobile Estates). But parents must still adhere to the legal requirements for responsible parenting.*

● **A Reminder: Federal Requirements:**

Let's face it. Some parents are not responsible. And some of them live in mobilehome parks. According to the Centers for Disease Control and Prevention, of all children 1 to 4 years old who died from an unintentional injury, almost 30% died from drowning. Fatal drowning remains the second-leading cause of unintentional injury-related death for children ages 1 to 14 years.² The same report reveals that "[T]he fatal drowning rate of African American children ages 5 to 14 is 3.1 times that of white children in the same age range."

"Most young children who drowned in pools were last seen in the home, had been out of sight less than five minutes, and were in the care of one or both parents at the time. Barriers, such as pool fencing, can help prevent children from gaining access to the pool area without caregivers' awareness."

Park swimming pools are deemed 'public' and require fencing, postings and related equipment. In years long past, it was believed that park owners could require adult supervision in the swimming pool area. The common rule would provide

that anyone 14 years and under required adult supervision. Indeed, the sign still required by the State (at least 4 inches high), is as follows: "CHILDREN UNDER THE AGE OF 14 SHOULD NOT USE POOL WITHOUT AN ADULT IN ATTENDANCE."

But *requiring* adult supervision is NOT allowed. Certainly an adult supervision requirement should be reasonable,³ but is outlawed by *United States v. Plaza Mobile Estates*⁴: it is the parents, not management, who act as the "gatekeepers" of swimming pool access and usage (in "all age" communities). Requiring any form of child supervision constitutes a violation of the FHA.

● **The FHA**

Rules and regulations in "all age" communities may not discriminate against children. Various rules were cited by the court as illegally restricting access or denying the use of the communities' facilities and/or areas on the basis of age, included those set forth below.

● **Samples of Illegal Rules**

If your rules contain any of the following restrictions, or any rules similar to them, it is strongly advised that a legal advisor conversant with the FHA (and implementing regulations and judicial and administrative interpretations) be promptly consulted.

❑ "Residents and visitors under the age of eighteen (18) years old are not permitted to use the saunas . . . [or] . . . jet pool at any time;"

❑ "Residents and visitors under the age of fourteen (14) years old are not permitted to use the saunas or . . . jet pool (spa) at any time;"

❑ "Use of the spa is prohibited to children under eighteen (18) years old;"

❑ "Use of the pool by children fourteen (14) years old and under requires accompaniment by a resident;"

❑ "Parent of resident child or resident host must accompany children at all times in the pool or pool area;"

❑ "No one under the age of fourteen (14) years old is allowed to use the Jacuzzi;"

❑ "Guests and residents under the age of eighteen (18) years old are permitted to use the swimming pool and sun deck from the hours of 10:00 a.m. to 2:00 p.m. only and must be accompanied by an adult park resident;"

❑ "Parent or responsible adult must accompany all children under fourteen (14) years old at all times [in the swimming pool and/or pool area];"

❑ "Children under 18 years old must be accompanied by a parent when they are in the swimming pool;"

³ According to the United States Consumer Product Safety Commission, ". . . The main hazard from hot tubs and spas is the same as that from pools -- drowning. Since 1980, CPSC has reports of more than 700 deaths in spas and hot tubs. About one-third of those were drownings to children under age five. Consumers should keep a locked safety cover on the spa whenever it is not in use and keep children away unless there is constant adult supervision. ¶ Hot Tub Temperatures -- CPSC knows of several deaths from extremely hot water (approximately 110 degrees Fahrenheit) in a spa. High temperatures can cause drowsiness which may lead to unconsciousness, resulting in drowning. In addition, raised body temperature can lead to heat stroke and death. In 1987, CPSC helped develop requirements for temperature controls to make sure that spa water temperatures never exceed 104 degrees Fahrenheit. Pregnant women and young children should not use a spa before consulting with a physician..." CPSC Document #5112 "Spas, Hot Tubs, and Whirlpools Safety Alert"

⁴ A copy of the published court opinion in *United States v. Plaza Mobile Estates* can be found at www.dowdalllaw.net; click 'resources', then 'cases': the opinion is 14th down the list.

² <http://www.cdc.gov/HomeandRecreationalSafety/Water-Safety/water-injuries-factsheet.html>

- “Minors under 16 years old are not permitted in the therapeutic pool;”
- “At 2:00 p.m. children are to be out of the pool area;”
- “All children must be accompanied by an adult to use the pool;”

● **Rules Which Treat Kids Differently Constitute Illegal Discrimination**

The court held that these rules were not based on “compelling business necessity” and did not represent the “least restrictive intrusions” on familial status rights in promoting a health and safety interest.

The court stated that the age restrictive rules were “facially” discriminatory. These rules “. . . treat children, and thus, families with children, differently and less favorably than adults-only households.” In other words, no matter how administered, the rules were invalid as drafted. Even if never enforced, such rules may lead to a resident’s belief about allowable restrictions in use of the facilities.

● **Parental Responsibilities Under California Law**

In California, there are requirements for the protection of child welfare that come into play. Examples of such regulations are reflected in the neglect cases reported above.

Specifically, California law provides that parents and guardians are responsible to provide care and an environment which is reasonably safe to the children under their care. The law defines “severe” and “general” neglect.

“‘Neglect’ means the negligent treatment or the maltreatment of a child by a person responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s health or welfare. ¶(a) ‘Severe neglect’ means . . . where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered,. . . ‘General neglect’ means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.”

Further, Welfare and Institutions Code §300 states that the juvenile court has jurisdiction where:

“The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse.”

Without doubt, allowing a toddler unrestricted access to the swimming pool as mandated by *U.S. v. Plaza Estates* would not be a responsible parental act. *But management cannot interfere with that decision of the parent.*

● **What can management do?**

Here is some practical advice to consider this summer in dealing with the inattentive or neglectful parent:

1. **ALERT THE AUTHORITIES.** For example, the three-year-old sent to the clubhouse by the parent because “there are nice people there who will watch you” is still a concern of the park managers, even if we cannot legally exclude the toddler. If we assume that some parents will allow their toddlers to slip out and wander in the park, calling the authorities is the first step: Child protective services, then the police.

The sooner reports accumulate against irresponsible parents, the sooner serious intervention will save the child from exposure to danger and injury.

If you return the child to the parent yourself, you are only *enabling* and *reinforcing the negative behavior*; and legally, *lulling the parent* into believing management will care for the child. This is **not** the manager’s job.

2. **EDUCATE THE PARENTS.** Some parents may heed the caveats of the management’s newsletters and hand-outs. Perhaps a parental reminder to all parents about the risks of inadequate supervision will make them more attentive and caring.

Such information should include the admonition that the management is legally forbidden from intervening in parental choice about access and usage of facilities by children. Educating parents with comprehensive “eye-opening” memoranda (clear it with your attorney) is not discriminatory enforcement of rules based on age, and has worked well.

3. **OPTIONAL PARENTAL WRITTEN CONSENT FOR EJECTION.** Some managers may wish to volunteer to keep little children out of the pool. A parent may be occasionally inattentive and unaware that one of her four kids is missing. In these instances, the parent can, if they desire to do so, provide willing management with written authority to exclude.

For example, “Mrs. Wildman” may not want her three-year-old in the pool alone. She can give consent –in writing– to willing management to exclude the child from the pool area.

Caveat: volunteering to provide safety services has the potential for generating liability. If we volunteer to keep a child out of the pool and happen to be absent when the child is later injured, a claim may result. So, such authorizations need to be *narrowly drawn, limited in time, and reflect appropriate releases.*

4. **CHECK THE RULES AND REGULATIONS.** Owners may also consider rule amendments which reference the laws and regulations pertaining to child welfare statutes; however, there has been controversy over curfew rules and such regulations must be very carefully drawn. But even your existing rules probably provide that residents are required to *comply with law*; and such a rule may be used to argue that applicable laws are *already incorporated* by reference.

Please feel free to contact our offices for further information and questions.

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