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COMMENTS: CAPGH believes that one of the most serious problems with the homeowner association model/theory of governing planned community's lies in the interpretation by the courts that the CC&Rs/Declaration is a binding contract between the homeowner and the HOA. It's this opinion that the CC&Rs are a private contract that allows for abuse by rogue boards and the denial of civil liberties by all HOAs. This opinion permits them to be viewed as renegade communities in the sense that they are allowed to operate and are protected by the state, while the state chooses not to enforce any of its laws for the homeowners.

CAPGH further believes that this opinion of CC&Rs as a contract needs to be revisited and this contract declared null and void. There are 2 principle factors for this view:

1. The sale of HOAs are the result of questionable marketing techniques whereby the complete truth concerning the effect on a homeowner's fundamental rights are deliberately hidden from the purchaser, thereby violating the "meeting of the minds" condition for a bona fide contract, and
2. The opinion by the courts that not only are CC&Rs a contract, it is an adhesion contract whereby the buyer has no say in the terms and conditions of the operation of the HOA. (Since it is a mandatory contract between an individual homeowner and the HOA, any requirements for the approval by other HOA members in order to modify this contract creates an illusory contract). Some have argued that this interpretation of an adhesion contract is unconscionable and against good public policy.

This report deals with item (2) and consists of a condensation of a California State Appeals decision that identifies these terms as well as the application of these terms. The appellate opinions have broad and widespread application to many areas of the commonly used CC&Rs provisions. While the contract does not involve the CID as a party, the claims by the homeowners can be used against repressive CC&Rs and abusive boards of directors. The Agreement being discussed in the case is the purchase contract for the homes.

This report is provided by CAPGH to help other homeowners and homeowner rights advocates better understand what can be accomplished in the courts, because CAI, the CID/HOA and the state government will not tell you these important aspects of how to stand up for your rights.

George K. Staropoli
Founder, CAPGH

CAPGH AND GEORGE K. STAROPOLI ARE NOT GIVING LEGAL ADVICE NOR ARE THEY ATTORNEYS.

[EXCERPTS FROM]

**COURT OF APPEAL - FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA**

PARDEE CONSTRUCTION COMPANY,
Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent;

D039273
(San Diego County
Super. Ct. No. GIC769966)

IVAN ERNESTO RODRIGUEZ et al.,
Real Parties in Interest.

In June 2001 plaintiffs filed a class action suit against Pardee for construction defects in the homes and underlying lots. In November 2001 Pardee appeared specially to seek a stay of the proceedings and appointment of a judicial referee under the terms of the parties' agreements. In opposing Pardee's motion, plaintiffs claimed the parties' agreements, including their judicial reference provisions, were contracts of adhesion, unconscionable and against public policy. After hearing, the superior court denied Pardee's motion.

In denying Pardee's motion, the superior court concluded the parties' agreements were contracts of adhesion; the agreements' provisions requiring submission to judicial reference were unconscionable; the agreements' provisions effecting waiver of the right to recover punitive damages were contrary to public policy (Civ. Code, § 1668); and the agreements in their entirety were contrary to the public policy against compelling homeowners to submit construction defect claims to alternative dispute resolution (cf. Code Civ. Proc., § 1298.7).

Our analysis is narrowly tailored to this record, in particular to the parties' agreements. We do not decide any issue as a matter of law. Instead, on this record we simply conclude the parties' agreements were adhesive contracts fatally infected with procedural and substantive unconscionability.

The Purchase Agreements Were Adhesion Contracts

The superior court concluded the parties' agreements were contracts of adhesion because plaintiffs were presented with "standardized" contracts "drafted" by Pardee "and imposed on plaintiffs who could only accept or reject" them.

"The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113 (Armendariz); Villa Milano Homeowners Assn. v. Il Davorge (2000) 84 Cal.App.4th 819, 826; Izzi v. Mesquite Country Club (1986) 186 Cal.App.3d 1309, 1318.) "If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules — legislative or judicial — operate to render it [unenforceable].' [Citation.] 'Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [Citations.]

The second — a principle of equity applicable to all contracts generally — is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable." Subsequent cases have referred to both the 'reasonable expectations' and the 'oppressive' limitations as being aspects of unconscionability." (Armendariz, supra, at p. 113.)

As stated by the superior court at the hearing on Pardee's motion, the situation presented each buyer with "a take-it-or-leave-it proposition"; and since each buyer was "buying a house," not "a piece of sporting equipment" or some other "regular type of product," factors such as "location," "view," and "set-back" made it "a pretty unique purchase," one that "for most people" is "the biggest purchase they will ever make in their life." The court also stated that "as a practical matter," Pardee's argument that plaintiffs "can go elsewhere if they don't like it" flies "in the face" of "the uniqueness of a home."

"Unconscionability is ultimately a question of law for the court." (American Software, Inc. v. Ali (1996) 46 Cal.App.4th 1386, 1391.) Unconscionability "'has both a "procedural" and a "substantive" element,' the former focusing on "'oppression'" or "'surprise'" due to unequal bargaining power, the latter on "'overly harsh'" or "'one-sided'" results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.'

Issue of Procedural Unconscionability

"Procedural unconscionability' concerns the manner in which the contract was negotiated and the circumstances of the parties at that time." (Kinney, supra, 70 Cal.App.4th at p. 1329; American Software, Inc. v. Ali, supra, 46 Cal.App.4th at p. 1390.) Procedural unconscionability "focuses on factors of oppression and surprise. [Citation.] The oppression component arises from

an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party." (Kinney, at p. 1329.) "The second component of procedural unconscionability encompasses an aspect of surprise, with the terms to which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce them."

Issue of Substantive Unconscionability

"Substantive unconscionability focuses on the actual terms of the agreement" (American Software, Inc. v. Ali, supra, 46 Cal.App.4th at p. 1390.) "While courts have defined the substantive element in various ways, it traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (24 Hour Fitness, Inc. v. Superior Court, supra, 66 Cal.App.4th at p. 1213; accord Villa Milano Homeowners Assn. v. Il Davorge, supra, 84 Cal.App.4th at p. 829.) Oppression is present when an agreement includes terms serving to limit the obligations or liability of the stronger party. (Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 713.) Thus, in essence, "[s]ubstantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to 'shock the conscience.'"" (Kinney, supra, 70 Cal.App.4th at p. 1330; American Software, Inc., at p.1391.)

Further, although plaintiffs may "certainly" waive their constitutional right to a jury trial, "the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived." (Villa Milano Homeowners Assn. v. Il Davorge, supra, 84 Cal.App.4th at p. 829; Marsch v. Williams (1994) 23 Cal.App.4th 250, 254.) Hence, before upholding the provisions of the parties' agreements purporting to effect a waiver of plaintiffs' constitutional right to trial by jury, we must closely scrutinize the impact of the waiver on the parties.

Moreover, nothing in the record suggests that buyers otherwise gained anything from waiving their substantial constitutional right to a jury trial. (Villa Milano Homeowners Assn. v. Il Davorge, supra, 84 Cal.App.4th at p. 829; Marsch v. Williams, supra, 23 Cal.App.4th at p. 254.) Thus, as giving buyers nothing in return for such waiver, the judicial reference provisions of the parties' agreements were so one-sided as to be substantively unconscionable.

In its minute order denying Pardee's motion for judicial reference, the superior court concluded the parties' agreements "as a whole" were "contrary to the public policy against compelling homeowners to submit their construction defect claims to alternative dispute resolution. (See . . . § 1298.7.)"