

Appeal Court Victory: Arbitration Clause in CC&Rs Unenforceable by Developer

In a published, unanimous decision issued by the Fourth District Court of Appeal, Division One, on January 11, 2011, a homeowners association's Constitutional right to litigate a construction defect action against a developer -- in court before a judge and jury -- was once again vindicated by the attorneys at Epsten Grinnell & Howell APC. In *Villa Vicenza Homeowners Association v. Nobel Court Development LLC*, the Court of Appeal held that an arbitration clause included by a developer in a homeowner association's CC&Rs did not constitute an enforceable agreement to arbitrate a dispute between the homeowners association and developer. A motion to compel arbitration requires an *arbitration agreement* between two parties. The Court reasoned the CC&Rs (unilaterally drafted and recorded by the developer before creation of the Association) was not an agreement between the homeowners association and developer under California law. An agreement requires the consent of both or all parties to the agreement when it is made and this requirement cannot be met in through the CC&Rs because they are drafted before the association comes into existence. The Court further reasoned that the CC&Rs could not be enforced as an equitable servitude by a developer after it no longer owns any interest in the community. The CC&Rs are enforceable as equitable servitudes by the Association, and among the owners, and traditionally relate to the use and maintenance of the property. The arbitration provision asserted by the developer did not relate to the use or maintenance of the property. This decision is published which means it can be cited as binding authority on behalf of other associations, facing similar challenges to the right to a jury trial in a construction defect action. If you have any questions regarding an Association's right to litigate a construction defect claim in the traditional forum before a judge and jury, please contact attorneys Jon Epsten, Doug Grinnell, or Anne Rauch, who handled the appellate proceedings for the Association in *Villa Vicenza*.

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