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## Arbitration Agreement Between Homeowners and Builder Does Not Bind Homeowner Association

A homeowner association is not bound by an arbitration agreement between the developer and individual homeowners where the association asserts claims on its own behalf. In *Greenbriar Oceanaire Community Assoc., Inc. v. U.S. Home Corp. d/b/a Lennar, et al.*, the homeowner association (Association) brought an action against the defendant-developer alleging injuries to both the Association and the homeowners. The contracts between the developer and the individual homeowners contained an arbitration agreement. There was no arbitration agreement, however, between the Association and the developer. The motion judge had ruled that all claims were to be arbitrated.

The Appellate Division agreed that any claims brought on behalf of the individual homeowners must be arbitrated, per their agreement. Any claims brought by the Association on its own behalf, however, were not subject to arbitration, since the Association had never consented to arbitrate its claims. The court, however, was faced with pleadings that alleged damages on behalf of both the Association and its members (*i.e.*, individual homeowners) without any clear indication of which claims were solely those of the homeowners and which were those of the Association. The court noted that its decision was not limited to whether to compel all claims or compel no claims to arbitration. Rather, the court remanded to the motion judge so that the Association could file an amended complaint separating the Association's claims from those of the individual homeowners.

In so doing, the court noted that the motion judge could consider whether the claims alleged to be brought by the Association on its own behalf should actually be construed as being brought on behalf of the homeowners. This could have a significant impact on common interest community law. In addition, the court noted that if the motion judge determines that there are both arbitrable and nonarbitrable claims, then he should also determine whether both should proceed simultaneously in separate forums or one should precede the other. Developers then, in order to avoid having to defend matters in two different forums, either simultaneously or consecutively, should ensure that documents memorializing the developer's conveyance to the association contain a provision parallel to that in the contracts memorializing the conveyances to individual homeowners with respect to the arbitration of claims.

Perhaps even more significant, however, will be the motion judge's ultimate determination as to which claims alleged to be brought by the Association on its own behalf (and therefore not subject to arbitration) should actually be construed as being brought on behalf of the homeowners (and therefore subject to arbitration). In this case, the remaining causes of action were alleged violations of the developer's fiduciary duty and various alleged violations of the Planned Real Estate Development Full Disclosure Act (PREDFDA), *N.J.S.A. 45:22A-21 to 56*, and its underlying regulations.

Generally, an association has exclusive standing to bring claims related to the common elements. An individual unit owner may bring a claim, however, if the association fails to do so. In addition, individual owners may bring a claim against the developer during the period when the developer controls the board. A unit owner also has the right to bring against a developer an action related to his or her individual unit.

Suits by "purchasers" against developers are permitted for violations of PREDFDA related to untrue or omitted material facts, and a prevailing "purchaser" is entitled to the recovery of double damages and attorney's fees in such cases. PREDFDA defines a "purchaser" as "any person or persons who acquires a legal or equitable interest in a unit, lot or parcel in a planned real estate development." Therefore, PREDFDA claims brought by the Association on its own behalf might be precluded. If the motion judge finds that the Association is bringing such claims on behalf of the homeowners, arbitration of these claims would be required. In addition, PREDFDA permits an association to bring tort claims concerning common elements "as if the claims were asserted directly by the unit owners individually," which again may be interpreted as allowing the Association to proceed only as a representative of the homeowners rather than on its own behalf, and again would compel arbitration.

Depending on the specific claims asserted then, the determination of the motion judge as to which claims brought by the Association should actually be construed as being brought on behalf of the homeowners could also potentially impact the issue of who has standing to bring a claim under PREDFDA as well as determine the applicability of the arbitration clause at issue.

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