



Keeping Your Litigation Costs Down By Arbitrating

BY Dan Rudderow

An unpleasant fact of life for any Community owner is that someday, somehow the Community may be the subject of a lawsuit. Whether the suit concerns a breach of contract claim, personal injury claim, rent control issue (the list goes on and on), the lawsuit is likely to require the Community owner to spend significant time, energy and resources (including attorneys' fees and costs) to resolve. Even with liability insurance to cover legal expenses (assuming it is a "covered" claim), the Community business is still affected by the inevitable "down time" in having its executives and employees speak to lawyers, search and collect documents and other evidence, appear for depositions and attend hearings in court (which always seem to last longer than expected).

One way to help control and reduce the tangible and intangible costs associated with litigation is to have lawsuits resolved outside the court system through the process known as arbitration. The U. S. Supreme Court itself has noted the many advantages to arbitration, including that:

- it is usually cheaper and faster than litigation;
- it can have simpler procedural and evidentiary rules;
- it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; and
- it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.

(*Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U. S. 265, 280.)

So how do Community owners get their cases

into arbitration? Here are a few tips:

Plan Ahead!

The first step is to plan ahead and incorporate the arbitration process into one's contracts and residency documents. Whether it is a rental agreement, purchase and sale contract or other type of agreement, the Community owner (and his attorney drafting the document) should make sure that the wording of any arbitration provision in a contract is sufficiently broad to cover "any and all disputes" to ensure, to the extent possible, that most, if not all, of the many expected and unexpected business disputes that arise will be covered by the parties' agreement to arbitrate.

In addition, the attorney drafting the agreement should specify the type of law (i. e. , federal, state, local, etc.) that should govern enforcement of the arbitration provision should the provision be contested by a party resisting arbitration. Often times, attorneys consider federal law to be more "pro-arbitration," and therefore state that interpretation and enforcement of the arbitration provision is to be governed solely by the Federal Arbitration Act ("FAA"). However, for the FAA to apply, the contract itself must involve "interstate or foreign commerce" (FAA, 9 U. S. C. §§ 1, 2). Accordingly, thought must go into analyzing how federal law might apply to the contract in order to make the arbitration provision enforceable under the FAA. This should be discussed thoroughly with your legal counsel. Whatever the strategy, careful planning should involve identifying the appropriate law governing the enforcement of arbitration and then making sure that intention is made clear in the

contract.

Don't Wait Too Long!

Often times, in spite of the work done to make sure one's contract includes a legally valid and enforceable arbitration provision (or a separate arbitration agreement if required by your State's laws), one's opponent (i. e. , the guy who signed the contract with you but now says he doesn't want to arbitrate per the contract's terms) will attempt to bypass the arbitration process by going ahead and filing a lawsuit in court. When this happens, it is often necessary for the Community owner to file a motion with the court asking the judge to issue an order to "compel" the other party to go to arbitration.

Once again, the likely success the Community owner will have in "compelling arbitration" will in large part depend upon the enforceability of the arbitration provision in the contract. Assuming the provision is drafted properly and clearly, the trial court should grant the motion. However, it is important not to wait too long before seeking such an order. If the owner waits too long to file the motion, or, worse yet, participates in any significant way in the court case, then the judge may deem the owner's contractual right to compel arbitration has been "waived" even if the parties had a fully enforceable arbitration provision agreement. So acting promptly to enforce one's rights to arbitrate is essential!

Keep the Case in Arbitration!

The arbitration process is intended to serve as a comprehensive alternative means of resolving disputes. The parties go through the "arbitration process" which normally culminates in an arbitration hearing and an arbitration award.

The arbitration award may then be converted into an actual court judgment so as to be enforceable. Up until the judgment is issued, however, most of the arbitration is controlled and directed by an arbitrator who is often times affiliated with an arbitration company, such as the American Arbitration Association.¹

Often times, while in arbitration, a party will receive some unfavorable ruling from the arbitrator and, being dissatisfied, will attempt to "go back to court" to have the court judge overrule the arbitrator's decision. Such "appeals" back to the trial court are almost always procedurally improper and should be fully resisted. Indeed, just recently in November, the U. S. Supreme Court "scolded" the Oklahoma Supreme Court for improperly assuming an arbitrator's role in determining whether a non-competition agreement was legally valid, holding that it was for the arbitrator, not the state supreme court, to decide such issues. (*Nitro-Lift Techs. v. Howard* (2012) 133 S. Ct. 500, 503-504.)

The bottom line is that although arbitration often times takes some planning and enforcement, the benefit to the Community owner is that the arbitration process is usually cheaper and faster than litigation, saving the business both time and money while the dispute gets resolved.



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¹ Arbitration also means that your case is not decided by a jury. Community owners often times fair worse before juries, and an arbitration provision may deter suits as plaintiffs' attorneys specializing in suing Community owners might see the case less desirable to litigate without a jury.

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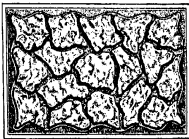
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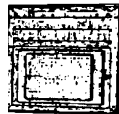
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