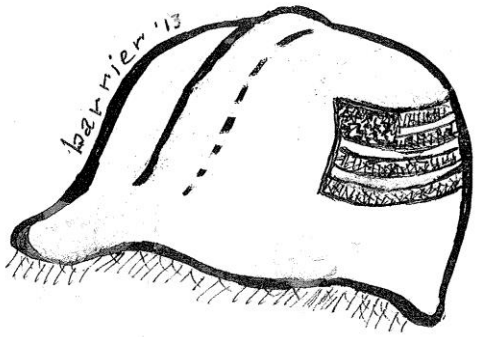
Dirt Law at Ground Level



SLEEPLESS IN SUN VALLEY
By W. Christopher Barrier

It rains equally on the just and the unjust, according to Ecclesiastes (or maybe Ned Perme, I forget which). In particular, being rich and famous won't necessarily insulate you from the hassles which seem to be inevitable in high-end home construction.

Tom Hanks and his wife Rita Wilson contracted with a builder to construct a home for them near Sun Valley, Idaho (a cozy little cottage, no doubt). When construction was almost complete, disputes arose with the contractor, who demanded that his claims be submitted to arbitration. The Hanks/Wilsons counterclaimed alleging substandard and incorrect work. The form of contract itself called for resolution of such disputes by arbitration, unless both parties waived it, which was not the case here.

Band of Bobbles…

Apparently, their representative did no more than argue the supposed deficiencies, without producing actual *evidence* or expert *testimony*. The arbitrator dismissed their counterclaim, holding for the contractor.

After the job was completed, the Hanks/Wilsons found still more defects, notably with the plumbing, and this time they demanded arbitration, presumably being prepared to produce evidence and witnesses. The contractor invoked the rule of *res judicata*, which in simplest terms means you can't litigate or arbitrate the same claims or counterclaims twice with the same parties and elements, hoping for a better result.

Winning the res…

The arbitrator agreed that the second round of claims were barred by the doctrine, forcing the Hanks/Wilsons to take their demand to court. The Idaho supreme court ruled that the doctrine did not apply in this case, because the defects alleged had in fact not been adjudicated---that is, they represented defects not considered earlier and in fact some of the defective work may not have even been accomplished at the time the original claims were presented.

Again, using arbitration can free the parties to a dispute from the hazards of a judge's crowded docket and availability of his courtroom and in fact encourage resolutions while construction is still underway, rather than having to shut down a site, file a suit, be assigned to a judge, wait for trial dates, try the case and then face possible appeals.

Things to ponder…

The case is instructive for several reasons, some or all of which have been discussed before in this spot:

(1) binding arbitration provisions are in fact enforceable in Arkansas and if you don't want to give up your day in court, you better take out that provision; (2) while the evidentiary and procedural rules governing arbitration allow a little more leeway than a trial, those rules do not do away with the need to make your case, present evidence and expert witnesses; (3) there is essentially no appeal from the arbitrator's decision, one of the purposes of the process being to streamline dispute resolution, in part by encouraging compromise and settlement.

So, whether you are a builder, a lawyer or an owner, when you are drafting construction contracts, especially when using forms, you should check for such a clause and make a conscious decision as to whether the advantages that arbitration confers outweigh what you give up in the process, most notably the possibility of presenting the case to a jury and appealing a decision you don't agree with. Overlooking it can put you in situation as sticky as a movie theatre floor.

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