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# Condominium Litigation

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*The authors examine the growth and development of condominium law through an analysis of recent decisions and legislation. Several aspects of substantive law which are unique to the area of condominium law are identified.*



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## I. INTRODUCTION

The dominant role played by the condominium in Florida housing can be measured by the growth and development of condominium litigation as a separate area of substantive law. While the laws that bear on other real property and commercial transactions contribute to the resolution of condominium disputes, the legal relationships that are unique to the condominium merit separate consideration. The conflicts among unit owners, associations and developers embrace a myriad of issues and disputes and have demanded much effort and attention from the judicial, legislative and executive branches of state and federal government.

The purpose of this article is to examine the recent judicial and legislative developments that have contributed significantly to the body of Florida condominium law. Since this is the first survey article on condominium litigation, decisions prior to the survey period will occasionally be discussed. Where appropriate, a general discussion of an area, in addition to the case survey, will be provided to offer a more complete understanding than that which would be supplied by a recent case survey alone.

## II. CONDOMINIUM ASSOCIATION STANDING AND CLASS ACTIONS

### A. *Introduction*

The condominium form of ownership is a system of property ownership through which all unit owners receive fee simple title to their unit and an undivided interest in the common areas of the building and grounds.[1] Unit owners assume common obligations[2] and respond collectively to the needs of the condominium and its owners.[3] The condominium association is the entity through which this community of interest is expressed and protected. The condominium association is responsible for the administration and operation of the condominium property[4] and the maintenance, repair and

1. FLA. STAT. § 718.106 (1977) provides for the passage of an undivided share in the common elements with each unit.

2. The responsibility for expenses and assessments properly incurred by a residential condominium association is shared by unit owners in the same proportion or percentage as their ownership of common elements. *Id.* § 718.115(2).

3. The administration of the condominium is the responsibility of the association, of which each unit owner is a shareholder or member. *Id.* § 718.111(1). The form of administration of the association is set forth in the bylaws which are supplemented by the provisions of § 718.112. The provisions of §§ 718.112(2)(a)-(g) are mandatory while those of §§ 718.112(3)(a)-(d) are optional. These sections provide, in part, for unit owner voting, open board of directors meetings, notice of meetings and budget adoption procedures.

4. *Id.* § 718.111(2).

replacement of the common elements.[5] Essentially, the association provides a system of self-government in which the rights of individual owners are preserved through a form of participatory democracy. The nature of the ownership form and the role assumed by the condominium association logically demand that the association be permitted to sue and to defend in a representative capacity, on the common claims and obligations of its unit owner members.

Only recently, however, has the extent of an association's ability to maintain litigation in a representative capacity been legislatively and judicially defined so as to permit an association controlled by unit owners to institute, to maintain or to settle actions with regard to matters of common interest. The legislative development of the association's capacity first utilized existing class action principles and later included the concept of a representative form of action. Subsequently, the legislative concepts were sanctioned and adopted by the Supreme Court of Florida.

### B. *Legislative Authority*

By amending the Condominium Act[6] in 1974, the legislature sanctioned an association's right to maintain, on behalf of its unit-owner members, a class action with regard to matters of common interest. The legislative grant of authority or standing was incorporated within section 711.12(2) of the Florida Statutes (Supp. 1974), in the following form:

> When the board of administration is not controlled by the developer, the association shall have authority and the power to maintain a class action and to settle a cause of action on behalf of unit owners of a condominium with reference to matters of common interest, including, but not limited to, the common elements, the roof and structural components of a building or other improvement, and mechanical, electrical, and plumbing elements serving an improvement or a building, as distinguished from mechanical elements serving only a unit. In any case in which the association has the authority and the power to maintain a class action, the association may be joined in an action as representatives of that same class with reference to litigation and disputes involving the matters for which the association could bring a class action.

The legislature apparently concluded that the condominium association, as the entity responsible for the administration and

5. *Id.* § 718.113(1).

6. Condominium Act, 1963 Fla. Laws, ch. 63-35, §§ 1-25 (current version at FLA. STAT. §§ 718.101-.508 (1977)).

maintenance of the condominium property, was the logical entity through which common claims and rights could be represented and resolved. The procedural vehicle chosen by the legislature as the means of fulfilling this purpose was the class action. Although the scope of the association's right to maintain a class action on behalf of its members was limited to matters of common interest, the legislature did not define common interest beyond using the common elements and common mechanical examples. It is arguable that the legislature's common interest standard is consistent with existing standards of Florida Rule of Civil Procedure 1.220[7] and that the statute's impact is directed to the capacity of the condominium association to maintain the claim. The underlying common interest test basic to class action maintenance may in fact have been preserved in the context of an association's representative capacity.

Section 711.12(2) first received judicial consideration in *Wittington Condominium Apartments, Inc. v. Braemar Corp.*[8] The District Court of Appeal, Fourth District, cited the statute in support of its conclusion that the association was capable of stating a cause of action in its individual capacity with regard to claims of breach of contract and negligent construction.[9] The validity or effect of the statute was not the central issue on appeal;[10] therefore, the *Wittington Condominium* decision did not provide a particularly significant analysis of section 711.12(2). Nevertheless, the Fourth District commented that section 711.12(2) had, in all likelihood, removed an association's prior disabilities to proceed as a class representative.[11]

This statutory grant of class action authority was fully examined in *Imperial Towers Condominium, Inc. v. Brown.*[12] Confronted directly with the issue of the effect of section 711.12(2), the District Court of Appeal, Fourth District, held that section 711.12(2) established a class action as a matter of law with regard to an association's right to represent unit owners on matters relating to the common elements.[13] After a preliminary hearing on the propriety of the

7. FLA. R. CIV. P. 1.220 provides: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

8. 313 So. 2d 463 (Fla. 4th Dist. 1975).

9. *Id.* at 468.

10. The issue on appeal to the Fourth District was the propriety of the trial court's final judgment on the pleadings in favor of the defendant developers. The trial court was found to have erroneously determined that the pleadings failed to demonstrate the capacity or standing of the association. *Id.*

11. *Id.* at 469 (Downey, J., concurring).

12. 338 So. 2d 1081 (Fla. 4th Dist. 1976).

13. *Id.* at 1084-85.

class action, the trial court had determined that the association could not represent its unit-owner members with regard to claims sounding in breach of contract, breach of implied warranty, declaratory judgment and equitable relief from unconscionable documents.[14] The trial court found that the purported class of unit owners was comprised of members occupying diverse positions with regard to the claims against the developer-lessor.[15]

In reviewing the trial court's orders, the Fourth District gave complete deference to the legislative grant of authority. It concluded that the class action condoned by the legislature would not only be consistent with the form of action permitted under Rule 1.220, but also that it existed as a matter of law, independent of the class action permitted under Rule 1.220.[16] In allowing the association to maintain the action on behalf of all present owners, the Fourth District recognized that differences among the rights of individual owners may require subclasses for the purpose of determining damages.[17] Yet, it did not permit variances among unit-owner positions to defeat the association's right to proceed on behalf of the whole, where the claims were limited to common elements and other common claims.

The association was thereby permitted to maintain, individually, and on behalf of its unit-owner members, claims for damages with regard to the construction of the common elements and equitable claims for relief from both a recreation lease and a pledge agreement to which essentially all unit owners were bound. With the enactment of section 711.12(2), it appeared that a condominium association would be able to raise matters of common interest to unit owners without regard to whether the association could raise the claim in its individual capacity.

Section 711.12(2) was subsequently repealed and replaced by section 718.111(2) of the Florida Statutes.[18] The statute's import is

14. *Id.* at 1082.

15. *Id.* at 1083 n.4.

16. *Id.* at 1084.

17. *Id.*

18. FLA. STAT. § 718.111(2) (Supp. 1976)(amending FLA. STAT. § 711.12(2) (1975))(current version at FLA. STAT. § 718.111(2) (1977)). Section 718.111(2) provides, in pertinent part:

> After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities. If the association has

similarly directed to the association's standing or capacity to maintain claims with regard to matters of common interest. Noticeably, the legislature shifted the consideration from the association's right to maintain a class action to the association's standing or capacity as a representative of its unit-owner members.

### C. *Judicial Adoption of an Association's Ability to Maintain Litigation in a Representative Capacity*

Until recently, the issue of whether the legislature had impermissibly interfered with the Supreme Court of Florida's rule-making authority, under the Florida Constitution of 1968,[19] had never been addressed, although the constitutional argument was raised by the appellees in *Imperial Towers.*[20] The issue, however, was squarely confronted in *Avila South Condominium Association v. Kappa Corp.*,[21] in which the Supreme Court of Florida affirmed a trial court determination that sections 711.12(2) and 718.111(2) of the Florida Statutes represented an impermissible incursion by the legislature into the supreme court's authority to adopt rules of practice and procedure.[22] The supreme court preserved its rule-making power by holding the two statutory schemes unconstitutional. The court, however, recognized the need for defining the association's right to represent its members on common claims and took the occasion to exercise its rule-making authority by amending Rule 1.220 to incorporate the legislative concept as an addition to the existing class action rule.[23] This addition to the class action rule establishes the

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the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action.

19. FLA. CONST. art. V, § 2(a). The 1968 constitution restricts the power to adopt rules for the "practice and procedure in all courts" to the Supreme Court of Florida.

20. Brief for Appellees at 42.

21. 347 So. 2d 599 (Fla. 1977).

22. *Id.* at 607-08.

23. *Id.* at 608. FLA. R. CIV. P. 1.220(b) provides as follows:

> **(b) Condominium Associations.** After control of a condominium association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common law right of any individual unit

right of a condominium association to maintain a cause of action as a representative plaintiff on behalf of its unit-owner members with regard to matters of common interest.[24]

It now appears that an association may utilize either the common law class action device or the representative form of action adopted by the supreme court as Florida Rule of Civil Procedure 1.220(b). Despite the procedural vehicle utilized, the scope of an association's right to proceed on behalf of its unit-owner members is restricted to "matters of common interest," the complete definition of which still remains a subject of judicial resolution. Recent decisions have provided some examples.

In *Avila,* the supreme court included the right to maintain a cause of action sounding in self-dealing and unconscionability within the scope of the association's capacity to represent its members. The Fourth District, in *Imperial Towers,* approved the association's standing with regard to claims of breach of contract, breach of implied warranty, declaratory judgment and unconscionability. The supreme court, however, determined in *Avila* that an association's capacity to maintain representative suits does not extend to claims based upon fraud or the homestead exemption. Representative claims sounding in fraud or requiring inquiry into each owner's

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owner or class of unit owners to bring any action which may otherwise be available.

24. Subsequent to its decision in *Avila,* the supreme court reaffirmed its amendment to Rule 1.220. The Florida Bar, through its Civil Procedure Rules Committee, had petitioned for leave to intervene on rehearing for the purpose of participating in the adoption of any amendments to the Florida Rules of Civil Procedure. The supreme court denied the petition for leave to intervene but entertained the application as an original petition to modify Rule 1.220(b). *In re* Rule 1.220(b), Florida Rules of Civil Procedure, 353 So. 2d 95 (Fla. 1977)(per curiam).

The Civil Procedure Rules Committee of the Florida Bar recommended that Rule 1.220(b) was unnecessary in view of the repeal, in 1976, of § 711.12(2) and the enactment of § 718.111(2). The committee also argued that the court's decision in *Avila* was an intrusion into the realm of the legislature, since "capacity" to sue is a substantive right which is the prerogative of the legislature, and § 718.111(2) merely created that capacity for condominium associations. Brief for Petitioner at 35.

The contrary position was assumed by the Consumer Protection Law Committee of the Florida Bar in a supplemental brief to the supreme court. While the Civil Procedure Rules Committee argued for retention of a single class action rule, the Consumer Protection Law Committee supported a separate class action rule directed to condominium litigation. The Consumer Protection Law Committee reasoned that the existing class action rule might minimize the effectiveness of an association's capacity by applying standards or principles that developed from factual circumstances dissimilar to the relationships unique to the condominium form of ownership. Brief for Petitioner at 6.

The supreme court denied the petition of the Civil Procedure Rules Committee and concluded that the peculiar features of the condominium form of ownership require a separate rule with regard to class action standing. The court held that, as to matters of common interest, a condominium association may represent the class composed of its members, and that nonconsenting unit owners may opt out of such class actions.

homestead status were found to be inherently diverse and, therefore, incapable of being raised by an association.[25] Additionally, standing to maintain an action to quiet title in the unit owners has consistently been restricted to unit owners.[26]

### D. *The Association as a Class Defendant*

The principles which support the association's right to maintain a cause of action bear significantly upon the ability of the association to be a defendant class representative in litigation brought against the association and its members. In *Paradise Shores Apartments, Inc. v. Practical Maintenance Co.*,[27] the plaintiff, a management company, sued the association, as a representative of a class consisting of the unit owners, for damages arising out of the association's alleged breach of contract and interference with a contractual relationship, and for equitable relief. The association had executed a management agreement with the plaintiff at a time when the association was under the control of the developer and prior to the creation of the condominium.[28] After control was turned over to the non-developer unit owners, the association terminated the contract upon a vote of seventy-five percent of its members. Unit-owner payments under the agreement ceased.[29]

Upon review of the trial court's denial of a challenge to maintenance of the suit as a class action, the District Court of Appeal, Second District, determined that the record supported the maintenance of the defendant class action on the breach of contract count.[30] The case, however, was remanded to the trial court for a

25. 347 So. 2d at 608-09. In refusing to permit the maintenance of a class action with regard to claims sounding in fraud and deceit, the supreme court followed the rule established by the district courts of appeal. *See* Breslerman v. Dorten, Inc., 320 So. 2d 442 (Fla. 3d Dist. 1975); Rosenwasser v. Frager, 307 So. 2d 865 (Fla. 3d Dist. 1975); Hendler v. Rogers House Condominium, Inc., 234 So. 2d 128 (Fla. 4th Dist. 1970). *But see* Davidson v. Lely Estates, Inc., 330 So. 2d 528 (Fla. 2d Dist. 1976)(subdivision lot owners and a community association were permitted to maintain a class action to impose a constructive trust, the basis for which was grounded in fraud and misrepresentation).

26. Royal Bahamian Ass'n v. Morgan, 338 So. 2d 876 (Fla. 3d Dist. 1976); Reibel v. Rolling Green Condominium A, Inc., 311 So. 2d 156 (Fla. 3d Dist. 1975); Commodore Plaza at Century 21 Condominium Ass'n v. Saul J. Morgan Enterprises, Inc., 301 So. 2d 783 (Fla. 3d Dist. 1974); Hendler v. Rogers House Condominium, Inc., 234 So. 2d 128 (Fla. 4th Dist. 1970).

27. 344 So. 2d 299 (Fla. 2d Dist. 1977).

28. The declaration of condominium specifically referred to the agreement and further provided that each unit owner, his heirs, successors and assigns were to be bound by the agreement. Accordingly, the agreement was in force at a time prior to the creation of the condominium and at a time when the developer was in control of the association. *Id.* at 302.

29. *Id.* at 300.

30. *Id.* at 303.

determination of whether the class could be defined with some degree of certainty; whether the named representatives were adequate representatives of the class; and whether a sufficient community of interest existed.[31] The Second District's concern was for those who did not vote in favor of breaking the management agreement and for those whose rights and obligations, with regard to the agreement, might differ from those which were alleged. The Second District adhered to the common law procedural requirement that the trial court make a determination early in the proceedings as to the propriety of the suit proceeding as a class action.[32] Despite the remand for further trial court inquiry, it appears that the identity between the association and its members may serve as a basis from which the association could be held accountable as a defendant class representative.[33]

### E. *Conclusion*

During the survey period, the right and ability of a condominium association to represent its unit-owner members in the resolution of common problems appears to have been firmly established. Control over the extent of this representative capacity has been assumed by the supreme court. Further litigation will clarify the scope of the association's capacity by defining those matters which fall within the term "common interest."

## III. LEASE LITIGATION

In 1965, the Condominium Act was amended to permit a condominium association to enter into a lease of recreation and other facilities.[34] The recreation or long-term lease typically involves the rental of improved real property to the condominium association, which becomes obligated for the rental payments. The lease obligation, by one of a variety of methods, is passed through the association to each unit owner in the condominium. This obligation becomes legally binding on all owners at the time of their unit purchase.

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31. *Id.* at 303-04.

32. *Id.* (citing Costin v. Hargraves, 283 So. 2d 375 (Fla. 1st Dist. 1973) and Federated Dep't Stores v. Pasco, 275 So. 2d 46 (Fla. 3d Dist. 1973)).

33. This identity was sufficient to undermine a cause of action for tortious interference with a contractual relationship. Having determined that the unit owner participation in the decision to break the contract was inseparable from the association's action, the Second District held that third party interference did not exist in support of the claim. 344 So. 2d at 301.

34. FLA. STAT. § 711.121 (1965)(current version at FLA. STAT. § 718.114 (1977)).

The lease obligation is usually assumed by the association at a time prior to the developer's conveyance of title to any of the units and when the association is under the developer's control. In most cases, the lease is a net-net lease whereby the lessee is responsible not only for the rental amount, but also for the expenses of maintenance, taxes, insurance and all other charges and obligations with regard to the property. Escalation clauses may operate to increase the rent at regular intervals in accordance with a formula based upon recognized commodity or consumer price indices.

Of all the disputes between condominium owners and developers, the controversy over recreation or long-term leases has been the most vociferous. Highly organized and publicized opposition to such leases has prompted substantial legislative, judicial and executive efforts toward regulation or invalidation of these leases.

### A. *Statutory Regulation of Agreements Entered into by the Association*

#### 1. ESCALATION CLAUSES

Escalation clauses in recreational facilities leases or condominium management contracts which are tied to commodity or consumer price indices were declared void on public policy grounds in section 711.231 of the Florida Statutes.[35] The legislative prohibition extended to both the inclusion and the enforcement of escalation clauses, and prompted a judicial determination of whether this amendment to the Condominium Act could be retroactively applied to leases and management contracts in existence prior to June 4, 1975, the effective date of the statute.

In *Fleeman v. Case*,[36] the Supreme Court of Florida held that

35. *Id.* § 711.231 (current version at FLA. STAT. §§ 718.302(3) & .401(8) (1977)). Section 711.231 provided as follows:

> It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in leases [for recreational facilities or other commonly used facilities serving condominiums] or management contracts for condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or management contract which provides that the rental under the lease or fee under the contract shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

In 1976, the Condominium Act was split into two chapters, one dealing with condominiums and the other with cooperative apartments. The sections were renumbered, resulting in management and recreational contracts being separated. Thus, § 711.231 became §§ 718.302(3) and 718.401(8). Since most of the subsequent case law discussed involves interpretations of the 1975 statute, the old numbering system will be retained in the text.

36. 342 So. 2d 815 (Fla. 1976). Three separate appeals were consolidated for argument before and disposition by the Supreme Court of Florida. Fleeman v. Case, Plaza Del Prado

section 711.231 could not be applied retroactively to prohibit the inclusion or enforcement of escalation clauses in leases and contracts executed prior to the effective date of the statute. In reaching this decision, the court limited its preliminary inquiry to whether the statute exhibited an express and unequivocal legislative intent that its provisions be applied to leases and management contracts predating its effective date. The court found no such intention.[37]

The supreme court could have limited its decision to a determination that the statute did not permit an interpretation that the legislature intended retroactive application. Instead, it proceeded to resolve the constitutional issue upon which the appeal was predicated. The court concluded that even if an intention to have the statute apply retroactively could be found, such an application would impair the obligation of contract and would thereby be prohibited by article I, section 10 of both the Constitution of the United States and the Constitution of Florida.[38]

While eliminating the use of section 711.231 as a basis for attacking escalation clauses in leases and management contracts entered into prior to its effective date, the supreme court cautioned that it was not precluding the viability of other theories upon which challenges to leases could be brought.[39] Furthermore, the court did not decide whether the prospective application of section 711.231 would be constitutionally permissible, since that issue was not raised on appeal.[40]

There has been one instance in which the escalation prohibition was applied to a lease predating its enactment. In *Kaufman v. Shere*,[41] the District Court of Appeal, Third District, affirmed a trial court determination that the Declaration of Condominium, the lease contract, had expressly provided for the adoption of future legislative enactments.[42] The determination was based upon an interpretation of the following provision:

> Except where variances permitted by law appear in this Declaration or in the annexed By-Laws or in the annexed Chapter of FIFTH MOORINGS CONDOMINIUM, INC., or in lawful amendments thereto, the provisions of the Condominium Act as

Condominium Ass'n v. Del Prado Corp. and Department of Business Regulation v. Johnson were all appealed directly to the supreme court, because in each instance the trial court had passed on the statute's constitutionality.

37. *Id.* at 817.

38. *Id.* at 818.

39. *Id.*

40. *Id.* at 817 n.4.

41. 347 So. 2d 627 (Fla. 3d Dist. 1977).

42. *Id.* at 628.

> presently existing or as it may be amended from time to time including the definitions therein contained are adopted and included herein by express reference.[43]

The court found section 711.231 to be incorporated within the lease so as to prohibit the enforcement of the escalation clause after the effective date of the statute.[44]

The prospective validity of section 711.231 was first tested in *Schlytter v. Baker,*[45] where it withstood a challenge brought under the fourteenth amendment of the Constitution of the United States. In *Schlytter,* plaintiffs, investors in Florida real estate, brought an action for declaratory judgment claiming that the prohibition against inclusion or enforcement of escalation clauses was invalid when measured against the contract and property rights guaranteed by the fourteenth amendment. While recognizing that such rights are subject to the state's police power to adopt reasonable restrictions to safeguard the health, safety and general welfare of its citizens, plaintiffs contended that the restriction against the inclusion or enforcement of escalation clauses was so unreasonable and irrational that it conflicted with the due process clause of the fourteenth amendment. Plaintiffs further contended that by singling out escalation clauses in recreation leases and management contracts, the legislature denied them equal protection under the law.

The substance of plaintiffs' due process argument was that the legislative purpose of curbing inflation[46] was not served by the statute since the escalation clause was not, in and of itself, inflationary.[47] Rather, it was a reflection of the inflationary trend in the economy. Furthermore, the effect of the statute was to penalize those benefiting from long term leases and management contracts. Since the value of an owner's condominium unit could be expected to keep pace with inflation, their investment would remain static.

The trial court found plaintiffs' contentions to be without merit, thereby preserving the state's right to impose economic regulations so long as such regulations do not conflict with specific fed-

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43. *Id.*

44. *Id.* Relying solely upon an interpreted express intention to incorporate all amendments to the Condominium Act, the Third District did not appear to consider the lease as an independent instrument embodying a contractual undertaking separate and distinct from the declaration. Furthermore, in determining the developer's intention, the court apparently failed to take into consideration the entire declaration and how the sum of its provisions affected the interpretation of this isolated provision. The court, however, did appear to consider the vested rights that were created by the declaration and the lease and whether such rights had any bearing on a reasonable interpretation of the provision.

45. No. 76-40 (N.D. Fla., Aug. 11, 1977).

46. *See* 1975 Fla. Laws, ch. 75-61.

47. Schlytter v. Baker, No. 76-40, slip op. at 5 (N.D. Fla., Aug. 11, 1977).

eral laws.[48] The court afforded wide latitude to the state legislature in determining the method and the manner by which business practices within the state are controlled. Since a major part of the equal protection argument was based upon similar contentions, the court deferred once again to the legislature's objectives and determined with equal facility that the classification could not be considered wholly arbitrary.[49]

### 2. FAIR AND REASONABLE TERMS

During the course of amending the Condominium Act in 1975, the legislature enacted section 711.66(5)(e) of the Florida Statutes (1975),[50] which provided in pertinent part: "Any grant or reservation made by a declaration or cooperative document, lease or other document, and any contract made by an association prior to assumption of control of the association by unit owners other than the developer shall be *fair and reasonable.*" The "fair and reasonable" standard was enacted in an apparent effort to apply a standard, however undefined, to those acts of a condominium association which served to bind the association and its members at a time when control of the association is vested with the developer.

Consistent with its reasoning in *Fleeman,* the Supreme Court of Florida in *Avila South Condominium Association v. Kappa Corp.*[51] could not find a legislative intent to have the statute apply retroactively. Since the statute did not expressly or impliedly command retroactive application, the supreme court affirmed the trial court dismissal of the count of the complaint seeking to hold a preexisting recreational lease to the "fair and reasonable" standard of section 711.66(5)(e).[52] The court made certain, however, that its ruling did not preclude plaintiffs from amending their claim on remand to assert a claim of unconscionability.[53]

During the pendency of *Avila,* the identical issue was presented to the District Court of Appeal, Third District, in *Point East One Condominium Corp. v. Point East Developers.*[54] Upon its issuance, the supreme court's *Avila* decision controlled the disposition of this question. Accordingly, the Third District affirmed the trial court's

48. *Id.*

49. *Id.* at 6.

50. 1975 Fla. Laws, ch. 75-224, § 11 (current version with some modifications at FLA. STAT. § 718.302 (1977)).

51. 347 So. 2d 599 (Fla. 1977).

52. *Id.* at 605.

53. *Id.*

54. 348 So. 2d 32 (Fla. 3d Dist. 1977).

dismissal of the cause of action that asserted the "fair and reasonable" standard.[55] It is interesting to note that the Third District, in much the same manner as did the supreme court in *Avila,* expressed concern that its decision not be construed as precluding plaintiffs from amending their complaint to state a cause of action of unconscionability, independent of the "fair and reasonable" standard of section 711.66(5)(e).[56]

## B. *Antitrust Implications of the Recreation Lease*

### 1. FEDERAL ANTITRUST LAW

#### a. Introduction

The theory that recreation leases run afoul of antitrust laws prohibiting unreasonable restraints of trade has been broadly embraced. During his campaign swing through South Florida in the summer of 1975, President Carter promised that, if elected, his administration would "vigorously enforce the federal antitrust laws against illegal recreation leases."[57] At the same time, Florida's congressional representatives urged the Federal Trade Commission to exercise its authority to enforce federal antitrust laws[58] by attacking recreation leases. As well, Florida legislators, under pressure from well-organized condominium unit-owner groups, urged the Attorney General of Florida to seek enforcement of both federal and state antitrust laws against recreation leases.[59]

Condominium owners, bound to recreation leases, were attracted to the antitrust laws because they provided an opportunity to obtain relief that included cancellation of the lease, treble damages and attorney's fees. Additionally, the antitrust laws provided access to the federal courts, a welcomed new forum to condominium owners who had fared poorly in the state courts for nearly a decade.[60]

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55. *Id.* at 35.

56. *Id.* at 36.

57. Mailgram from Jimmy Carter to Condo-Coop Executive Council (Feb. 26, 1976), *reprinted in* CONDO-COOP COURIER.

58. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), has jurisdiction to enforce all antitrust laws, including the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976). *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 235 (1972).

59. *See, e.g., Condominium Development and Sales Practices: Hearings Before the Subcomm. on General Oversight and Renegotiation of the House Comm. on Banking, Currency and Housing,* 94th Cong., 2d Sess. 310 (1976)(statement of David Osterer, President, Condominium Executive Council of Florida).

60. *See* Avila S. Condominium Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); Fleeman v. Case, 342 So. 2d 815 (Fla. 1977); Point E. Management Corp. v. Point E. One Condominium Corp., 282 So. 2d 628 (Fla. 1973), *cert. denied,* 415 U.S. 921 (1974); Breslerman

Thus, despite the setback handed to condominium owners by the Supreme Court of Florida's decision in *Fleeman,* the antitrust laws generated optimism that legal redress was still available.

This portion of the article will analyze the manner in which recreation leases are alleged to result in unreasonable restraints of trade in violation of antitrust laws. Following this analysis, the recent decisions construing the federal and state antitrust implications of recreation leases will be examined. Finally, the continuing viability of attacks against recreation leases predicated upon antitrust laws will be reviewed, with this author's analysis as to how the unresolved issues are likely to be decided.

### b. Tying Arrangements

Contractual arrangements and combinations which unreasonably restrain trade have long been prohibited by both federal and state law.[61] The manner in which condominium owners become obligated to make rental payments under a recreation lease as part of their purchase of a condominium parcel, and the effect thereof, may constitute a contractual arrangement which unreasonably restrains trade. The retraint is predicated upon the concept developed under the antitrust laws known as an illegal tying arrangement. A tying arrangement has been defined as an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different (the tied) product, or at least agree not to purchase that product from another supplier.[62] The tying arrangement precludes free competition in the market for the tied product because the violator utilizes his economic power to enhance his position in such a market.

The application of these principles to recreation leases begins with the assumption that the condominium housing unit offered by the developer and the recreational facilities provided under the lease constitute two separate and distinct products. The tying product is the condominium housing unit and the tied product is the recreation lease. Unquestionably, it has been a prevalent practice

v. Dorten, 320 So. 2d 442 (Fla. 3d Dist. 1975); Rosenwasser v. Frager, 307 So. 2d 865 (Fla. 3d Dist. 1975); Commodore Plaza at Century 21 Condominium Ass'n v. Saul J. Morgan Enterprises, 301 So. 2d 783 (Fla. 3d Dist. 1974), *appeal dismissed,* 308 So. 2d 538 (Fla. 1975); Plaza Del Prado Condominium Ass'n v. G.A.C. Properties, 295 So. 2d 718 (Fla. 3d Dist. 1974); Wechsler v. Goldman, 214 So. 2d 741 (Fla. 3d Dist. 1968); Fountainview Ass'n v. Bell, 203 So. 2d 657 (Fla. 3d Dist. 1967), *cert. discharged,* 214 So. 2d 609 (Fla. 1968).

61. At the federal level, the Sherman Antitrust Act was enacted in 1890. The Supreme Court of Florida subsequently declared contracts in restraint of trade to be void as contrary to public policy. Stewart v. Stearns & Culver Lumber Co., 56 Fla. 570, 48 So. 19 (1908).

62. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

among developers to package and market their product in a tie-in fashion.[63] In other words, each consumer desiring to purchase a condominium housing unit in a development that had a recreation lease was required, as a mandatory condition of purchasing that unit, to become simultaneously obligated to make rental payments under the recreation lease. Therefore, once it is assumed that the condominium housing unit and recreation lease constitute two separate products, it is apparent that the developer is agreeing to sell one product on the condition that the buyer also purchase a different, or tied, product.

The argument propounded by those claiming an antitrust violation against a developer who ties in a recreation lease to the purchase of a unit is that it results in a two-fold restraint of trade. First, the condominium owners who are obligated to make payments under the recreation lease, whether or not they use the recreational facilities, are deprived of their freedom to purchase recreational services from other sources which, because of their nature, quality or price, may be more desirable to that particular condominium owner. Second, other competitors engaged in the business of selling recreational facilities or services are deprived of a portion of the market which would otherwise be available to them. Such a tying arrangement is injurious to free competition because the condominium developer is able to sell his recreational facilities and services, not necessarily because they are of higher quality or better prices than those of other competitors in the recreational facilities business, but because the condominium developer requires the consumer to become obligated under the recreation lease in order to purchase the condominium housing unit. The applicability of an illegal tying arrangement to the manner in which recreation leases are marketed is best understood upon examination of the decisions in this area rendered by the federal and state courts.

### c. Federal Antitrust Implications

In an effort to preserve free and unfettered competition, the Sherman Antitrust Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[64] Of course, all contracts restrain trade to some extent, and thus the courts have construed the Sherman Antitrust Act as precluding only those contracts, combinations or conspiracies

63. *See* W. Bosher, Condominiums: Their Impact on the Southeast Florida Housing Market (1974)(unpublished Intergovernmental Affairs Fellowship Program report for Rod Tennyson, Assistant Attorney General, Department of Legal Affairs, State of Florida).

64. 15 U.S.C. § 1 (1976).

which "unreasonably" restrain competition.[65] The plaintiff's burden of demonstrating the "unreasonableness" of a particular contract, combination or conspiracy is responsible for the complex nature of most antitrust litigation. To determine the reasonableness of a particular business practice, the court must be presented with detailed factual information concerning the nature of the business. Through the years, however, the courts have determined that certain business arrangements are so totally devoid of any redeeming virtue that they are conclusively presumed to be unreasonable. These practices are classified as per se violations of the Sherman Act. When dealing with a per se violation, the necessity for a complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine whether a particular restraint is unreasonable, is avoided. This difficult burden is replaced with the much easier burden of demonstrating that the challenged practice meets the elements of a per se violation of the Sherman Act.[66]

In 1947, the Supreme Court of the United States held that a tying arrangement constitutes a per se violation of the Sherman Act.[67] To demonstrate an illegal tying arrangement, a plaintiff must prove that: (1) there are two separate and distinct products, the tying product and the tied product; (2) the defendant has sufficient "economic power" in the tying market to coerce purchase of the tied product; (3) a "not insubstantial" amount of interstate commerce is involved in the tied market; and (4) there are anti-competitive effects in the tied market.[68]

As applied to the recreation lease situation, condominium owners must prove that: (1) the condominium housing unit and recreation facilities lease constitute two products;[69] (2) the condominium developer has sufficient "economic power" in the condominium housing market to coerce acceptance of the recreation lease obligation; (3) a "not insubstantial" amount of interstate commerce in the recreational facilities market is involved; and (4) the arrangement has anti-competitive effects in the recreational facilities market.

Developers who are lessors of recreation leases often contend that: (1) the condominium apartments and appurtenant recreational facilities constitute a single product defined as a recreational-

65. Standard Oil Co. v. United States, 337 U.S. 293 (1949).

66. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

67. International Salt Co. v. United States, 332 U.S. 392 (1947).

68. Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).

69. A good discussion of the criteria relevant to a determination of the "single product" issue can be found in United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 559-60 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

residential community; (2) in light of the numerous condominium developments being constructed in Florida, no developer has sufficient economic power to coerce a purchaser to accept obligations under an unwanted recreational lease; (3) any effect on the recreational facilities market would, in any event, be entirely "local" in nature and thus would not involve interstate commerce in the recreational facilities market; and (4) the recreational facilities market has not suffered any anti-competitive effects as a result of the challenged tie-in.

In *United States Steel Corp. v. Fortner Enterprises, Inc.*[70] [hereinafter referred to as *Fortner II*], the Supreme Court recently considered the alleged illegality of a tying arrangement between the sale of prefabricated homes, the tied product, and credit financing, the tying product. In this case, the Court clarified its definition of "economic power" in the tying market which would be sufficient for the per se standard to apply.[71] A noncompetitive price for the tied-in good is insufficient to support a judgment that "economic power" exists.[72] In addition, a mere showing that the tying good is offered on unique terms from those available if the product were purchased singularly does "not give rise to any inference of economic power."[73] The crucial test of economic power "focus[es] attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely com-

70. 429 U.S. 610 (1977).

71. In the first two Supreme Court decisions on this issue, the Court equated economic power with "dominance" in the tying market which, in the first case, was predicated upon the defendant's patent rights to a particular product, International Salt Co. v. United States, 332 U.S. 392 (1947), and in the second, was predicated upon the defendant's monopolistic position in the tying market, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the first case in which land was asserted as the tying product, the Supreme Court found sufficient "economic power" by virtue of the defendant's extensive, strategically located and unique land holdings, despite the fact that the defendant clearly did not monopolize the land market. Subsequently, in United States v. Loew's, Inc., 371 U.S. 38 (1962), Justice Goldberg, writing for the Court, held that "even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." In Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969) [hereinafter referred to as *Fortner I*], the Supreme Court clarified its earlier holding that "uniqueness" may create sufficient "economic power" by noting that "only when other competitors are in some way prevented from offering the distinctive products themselves" can uniqueness confer sufficient economic power.

72. 429 U.S. at 618. The Court recognized that "[p]roof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price." *Id.* (footnote omitted).

73. *Id.* at 622.

petitive market."[74]

In order for the recreation lease to be an illegal tie-in under section 1 of the Sherman Act, the condominium market must be shown to be noncompetitive.[75] This noncompetitive market condition will be difficult to demonstrate in the sale of condominium units. Condominium owners charging developers with having committed an illegal tying arrangement seek to demonstrate the developer's economic power in the condominium housing market by asserting that the particular developer's condominiums are desirable to consumers and unique in their attributes because of their location, price and facilities. The condominium owners assert that competitors of the developer are precluded from offering the same distinctive product by arguing that every parcel of land is unique and, thus, ownership of the land prevents other competitors from offering the same product to the consumer.[76]

Whether the condominium units represent tying products which the Court will regard as "sufficiently unique to give rise to a presumption of economic power"[77] is unresolved because *Fortner II* did not deal with condominiums and mandatory recreation leases. *Fortner II,* however, is a strong indication that the present Supreme Court of the United States will not find "economic power" in the tying market.

The only federal court decisions concerning the application of the Sherman Act specifically to mandatory recreation leases have not dealt with the substantive elements of an illegal tying arrangement which were described above. The peripheral issues which have been ruled upon as of this date, and which will be discussed herein, involve the doctrine of abstention, subject-matter jurisdiction, the ability to state a cause of action under the Sherman Act, standing to assert the Sherman Act violation and the manner of applying the statute of limitations.

### (i). *Abstention*

The abstention doctrine is predicated upon the proposition that federal courts should abstain from entertaining certain controversies which are more appropriately resolved by the state court sys-

74. *Id.* at 620.

75. "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.*

76. *See also* Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974)(regarding the requirement that the plaintiff not only demonstrate that the defendant had sufficient "economic power" but that the defendant *used* that power to coerce the plaintiff into accepting the tied product).

77. 429 U.S. at 619.

tem. The argument that federal courts should abstain from ruling upon the antitrust implications of a mandatory recreation lease arises in two ways: first, when unit owners challenge the validity of a recreation lease simultaneously in the federal and state courts; and second, when condominium developers assert that Florida's comprehensive statutory regulation of the condominium industry bars federal antitrust jurisdiction. The first argument is based upon the doctrine of abstention as developed by the Supreme Court of the United States in *Younger v. Harris.*[78] The second is predicated upon the Supreme Court's antitrust rulings in *Parker v. Brown*[79] and its progeny.[80]

In *Miller v. Granados,*[81] the United States Court of Appeals for the Fifth Circuit was first confronted with the abstention issue as it relates to condominium antitrust litigation. In that case, condominium owners challenged a mandatory management agreement as an illegal tying arrangement. While the federal action was pending, the defendant-developer filed lien foreclosure actions in state court. The liens arose from the unit owners' failure to pay the fees required under the management agreement. The unit owners moved for a preliminary injunction and stay order to enjoin the developer from prosecuting the state foreclosure actions.

Following a hearing on those motions, the federal district court dismissed the complaint in its entirety, relying upon the abstention doctrine enunciated in *Younger.*[82] The district court stated that the issues raised by the plaintiffs in the federal court action could be raised and decided in the pending state court suits. The court opined that in the event federal questions of constitutional dimension were raised in the state court proceedings and state remedies had been fully exhausted, a federal action might then be proper. Since no federal questions of constitutional dimension appeared to exist at that point, the trial court dismissed the action.[83]

On appeal, the Fifth Circuit reversed and held that abstention would be improper under either the *Younger* or *Parker* doctrines.[84] The court noted that neither the general jurisdictional statute, conferring jurisdiction on federal courts over acts of Congress which regulate commerce or protect trade and commerce against restraints

78. 401 U.S. 37 (1971).

79. 317 U.S. 341 (1943).

80. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

81. 529 F.2d 393 (5th Cir. 1976).

82. *Id.* at 395.

83. *Id.*

84. *Id.*

and monopolies, nor the specific jurisdictional statute, upon which the Sherman Act claim was based, were predicated upon the existence of constitutional questions.[85] Moreover, the court noted that the jurisdiction conferred by Congress on federal courts under the Sherman Act is exclusive. Finally, the court noted that the relief sought in the federal action—treble damages and injunctive relief—could not be obtained in a state court proceeding in view of the jurisdictional exclusiveness of the Sherman Act. Consequently, abstention under *Younger* would not be proper.

The Fifth Circuit also refused to accept the contention that state action in the realm of condominium regulation bars federal antitrust jurisdiction. In reaching this conclusion, the court noted that the threshold inquiry, in determining whether anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe, is determined by an examination of whether the particular activity is compelled by the state acting as a sovereign or is merely permitted by that state.[86] A review of the Florida Condominium Act reveals that mandatory management agreements are not required by that Act, although they are permitted. Consequently, state regulatory action does not preclude applicability of federal antitrust laws. Since mandatory recreation leases are likewise permitted, but not required, by Florida's Condominium Act,[87] it can be safely assumed that the court's decision in *Miller* would also apply to the recreation lease situation. It is now clear that the federal courts in Florida will not abstain from the consideration of Sherman Act challenges to mandatory recreation leases.

### (ii). *Setting Forth a Cause of Action*

*Miller* also involved the question of whether the allegations contained in the complaint sufficiently stated a cause of action under the Sherman Act. The plaintiffs alleged that the defendants had conspired, and were continuing to conspire in direct restraint of trade in the management services market, by requiring the condominium owners to accept obligations under the management agreement as a mandatory condition of their condominium purchase.[88] The complaint further alleged that the sale of condominium units, in an amount exceeding forty million dollars, involved interstate commerce through the use of the United States Postal Service, news and advertising media operating in interstate commerce, sales

85. *Id.* at 396.
86. *Id. See also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975).
87. FLA. STAT. § 718.114 (1977).
88. 529 F.2d at 394-95.

and resales to out-of-state purchasers and the purchase of services, facilities and materials from out-of-state dealers.[89]

The defendants argued that plaintiffs failed to state a cause of action under the Sherman Act because the sale of only one product was involved. As with the recreation lease situation, the defendants took the position that these agreements were integral parts of the condominium regime.[90] The defendants further asserted that there were obvious justifications for utilizing mandatory management agreements in connection with the development and sale of a condominium.[91]

The Fifth Circuit rejected the defendants' arguments. As to the single product argument, the court noted that it was premature. In determining whether a proper cause of action had been stated, the court assumed the truth of all well pled facts. Consequently, the mere allegation by the condominium owners that the condominium housing unit and management contract were two separate and distinct products was sufficient to meet the first element of an illegal tying arrangement. Whether or not one or two products were involved must be determined at a subsequent stage of the proceedings.[92] As to the justification argument, the Fifth Circuit pointed out that this argument misconceived the nature of an antitrust violation, since once a tying arrangement had been found, its illegality is established without further inquiry into business excuses for its use.[93] The court noted further that tying arrangements serve no purpose beyond the suppression of competition because they deny competitors free access to the market for the tied product. Whether the party imposing the tying requirement has a better product or a lower price is not dispositive.[94] The critical factor is the ability of

89. *Id.* at 395. The allegations relating to sales and resales of condominium units in interstate commerce are not sufficient to confer subject-matter jurisdiction. These allegations relate to interstate commerce in the tying product, whereas the court's jurisdiction in a tie-in case requires an effect upon interstate commerce in the tied product. Consequently, the only allegation which properly related to the court's jurisdiction was the allegation regarding the purchase of services, facilities and materials from out-of-state dealers. Presumably, other management companies would have increased their interstate purchases since, absent the illegal tie-in, they would have been able to serve the condominium which had been tied to the management agreement. For a discussioon of subject-matter jurisdiction, see section V *infra*.

90. *Id.* at 396.

91. *Id.* The developer argued that it had a legitimate interest in assuring proper management and maintenance of the apartment complex during the active sales program, and that if each owner were allowed to choose his own managerial services chaos would result.

92. *See, e.g.*, United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

93. 529 F.2d at 396 (citing United States v. Loew's, Inc., 371 U.S. 38 (1962)).

94. 529 F.2d at 397.

the tying firm to retard competition in one market because of its power or leverage in another market.[95]

*Miller* could, therefore, be relied upon for the proposition that a complaint sufficiently states a cause of action under the Sherman Antitrust Act when it is alleged that condominium units and leased recreational facilities constitute two separate products, that the defendant utilized its economic power in the market for condominium units to coerce purchasers to accept obligations under the recreation lease, and that a "not insubstantial" effect on interstate commerce occurred in the recreational facilities market.

### (iii). *Statute of Limitations*

The statute of limitations applicable to causes of action predicated upon the Sherman Act is four years.[96] Since Florida's statutory prohibition against escalation clauses was enacted in 1975,[97] many of the recreation lease challenges, which are principally motivated by the effects of the escalation clause, involve leases entered into more than four years before the antitrust action was commenced. This fact gives rise to the issue of when a cause of action under the Sherman Act accrues. If it accrues only upon the original purchase of the condominium and simultaneous assumption of obligations under the long-term recreation lease, then actions filed more than four years after that date would be barred. On the other hand, if a new cause of action accrues each time the lessor of the recreation lease enforces the lease by collecting or escalating rents, a continuous cause of action exists for the entire term of the recreation lease and for four years thereafter.

This issue was resolved by the United States Court of Appeals for the Fifth Circuit in *Imperial Point Collonades Condominium v. Mangurian.*[98] In *Imperial Point,* the individual plaintiffs had each purchased their new condominiums and had become obligated under a ninety-nine year recreational lease more than four years prior to the date on which the action was filed. The district court, holding that the cause of action accrued when plaintiffs purchased the condominiums and joined the recreation lease, granted summary judgment to the defendants on the ground that the action was barred by the statute of limitations.[99]

95. *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977).

96. 15 U.S.C. § 15b (1976).

97. 1975 Fla. Laws, ch. 75-61 (codified at FLA. STAT. § 711.465 (1975))(current version at FLA. STAT. § 718.401 (1977)).

98. 549 F.2d 1029 (5th Cir.), *cert. denied,* 98 S. Ct. 185 (1977).

99. Imperial Point Collonades Condominium v. Mangurian, 407 F. Supp. 870 (S.D. Fla. 1976).

Following a lengthy analysis of prior decisions construing the statutes of limitations as applied to the Sherman Act, the Fifth Circuit reversed, holding that a new cause of action accrues each time the defendant seeks to enforce the recreation lease provisions.[100] The court noted, however, that only the damages suffered in the four years preceding the filing of the action could be recovered by plaintiffs.[101]

The Fifth Circuit's ruling was predicated upon the theory that a new cause of action arose each time the plaintiffs were injured by an "act" which is proscribed by the antitrust laws. The court rejected the defendants' arguments that the only "act" that could be challenged was the sale of condominium units with the mandatory recreation lease, which had occurred more than four years prior to the filing of the action. Additionally, the defendants argued that even if collection of rent and increasing the rent pursuant to the escalation clause constitute new "acts," any injury suffered by plaintiffs necessarily resulted from the initial prelimitations act of requiring the condominium purchasers to become obligated under the lease.[102] The court adopted the position that the defendants could cease causing the injury to the plaintiffs at any time simply by not enforcing or collecting benefits under the challenged contractual arrangements. The court further opined that it does not lie well in the mouth of a defendant to argue that he is immunized from suit for his recent acts simply because they were authorized by a prelimitations contract, alleged to be unlawful in itself or the product of an unlawful conspiracy, when the defendant must continue to commit these acts in order to continue reaping the fruits of the alleged unlawful contract or conspiracy.[103] Accordingly, the Fifth Circuit reversed the lower court's decision in *Imperial Point* and reopened the door to the federal courts to unit owners seeking to rid themselves of recreation lease obligations to which they had been bound for more than four years.

### (iv). *Standing*

The only remaining federal appellate decision with regard to the federal antitrust implications of mandatory recreation leases involved the issue of standing.[104] Most actions challenging the valid-

100. 549 F.2d at 1043-44.

101. *Id.* at 1044.

102. *Id.* at 1036, 1039.

103. *Id.* at 1043.

104. Buckley Towers Condominium v. Buchwald, 533 F.2d 934 (5th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

ity of recreation leases are brought by condominium associations. In some cases, these condominium associations are parties to the lease and in others they are charged with the responsibility of maintaining the recreational facilities and collecting the rents and maintenance fees under the recreation lease for the lessor of the facilities. Condominium associations generally become parties to the recreation lease in order to prevent the need for the lessor to enter into individual leases with each condominium owner. Therefore, a master lease is entered into between the lessor and the condominium association, and each purchaser of a condominium unit, by virtue of the condominium documents, obligates himself to contribute a portion of the rent due under the master lease.

In *Buckley Towers Condominium v. Buchwald,*[105] a condominium association brought suit against a lessor of a recreation lease on the ground that the mandatory lease constituted an illegal tying arrangement. The association asserted standing to bring the action under section 4 of the Clayton Act which creates a private cause of action for the recovery of treble damages by any person who can demonstrate that he was "injured in his business or property by reason of anything forbidden in the antitrust laws."[106] The Fifth Circuit affirmed the lower court's dismissal of the association as a party plaintiff on the ground that the association could not possibly be injured in its "business or property."[107] The court noted that the condominium association was a nonprofit organization formed solely to operate, to manage and to maintain the condominium, including the leased facilities, with all expenses being paid by the condominium unit owners.[108] In essence, the association acted merely as a conduit, collecting rent and maintenance fees from the unit owners and paying rent to the lessor of the recreation lease.

Since the Supreme Court had already construed the terms "business or property" as referring only to commercial interests or ventures,[109] the nonprofit association could not demonstrate any injury sufficient to confer standing under section 4. Moreover, the court rejected the association's argument that, even if precluded from recovering damages, it sufficiently met the standing requirements for injunctive relief set forth in section 16 of the Clayton

105. *Id.*

106. 15 U.S.C. § 15 (1970).

107. 533 F.2d at 938. For the district court's opinion see Buckley Towers Condominium v. Buchwald, 399 F. Supp. 38 (S.D. Fla. 1975).

108. 533 F.2d at 936-37, 937 n.2.

109. Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

Act.[110] The association correctly noted that the terms "business or property" were not contained in section 16, which broadly grants standing to seek injunctive relief to any person being injured by a violation of the antitrust laws.

In refusing to grant standing to the association to seek injunctive relief, the Fifth Circuit noted that irrespective of the "business or property" test, standing under either section 4 or section 16 requires an allegation that the alleged injury proximately resulted from an antitrust violation.[111] The court found the basis of the alleged illegal tying arrangement to be the requirement that in purchasing a condominium unit (the tying product), the purchaser was required as a condition of purchase to become obligated under the recreation lease (the tied product).[112] The condominium association, however, did not become a party to the recreation lease by virtue of the purchase of a condominium. The court observed that the complaint contained no allegation that the condominium association had purchased a condominium unit. Instead, the association became a party to the lease while controlled by the developer and as part of the developer's organization of the condominium regime. Consequently, any injury the association might be suffering by virtue of the recreation lease could not have been the proximate result of an antitrust violation. The court ruled that the condominium association lacked standing to assert that the recreation lease constituted an illegal tying arrangement under the Sherman Act.[113]

### (v). *Subject-Matter Jurisdiction*

The determination of a federal court's jurisdiction to entertain an action predicated upon a violation of the Sherman Act rests upon the question of whether the defendants' conduct, as alleged, has a sufficient relationship with interstate commerce so as to be a proper subject of federal regulation. This jurisdictional issue, although dif-

110. 15 U.S.C. § 26 (1970), *as amended by* Pub. L. No. 94-435, Title III, § 302(3), 90 Stat. 1396 (1976).

111. 533 F.2d at 938.

112. *Id.*

113. The court also rejected the association's argument that it could maintain the action in a representative capacity on behalf of the condominium owners, all of whom were members of the association. In so doing, the court concluded that the Supreme Court's decision in Warth v. Seldin, 422 U.S. 490 (1975), regarding the standing of certain organizations and associations to bring representative actions on behalf of their members, was inapposite. To bring an action, the association must show that the nature of the claim and the relief sought do not make the individual participation of each injured party indispensable to proper resolution of the dispute. 533 F.2d at 938 n.3. The court's comment in this regard raises a serious question as to whether an individual condominium owner could attack a recreation lease under the Sherman Act in a class action which meets the requirements of FED. R. CIV. P. 23.

ficult to distinguish, is different from the element of an illegal tying arrangement requiring a "not insubstantial" effect upon interstate commerce. The latter deals with the substantive issue of whether or not a Sherman Act violation has been proven,[114] whereas the former deals with the initial issue of whether the Congress has the power to grant the federal courts jurisdiction over the particular conduct being challenged.[115]

To establish jurisdiction under the Sherman Act, plaintiff must meet one of the two following tests: (1) that the activities in question occurred in the flow of interstate commerce; or (2) that the activities complained of, while wholly intrastate in character, have a direct and substantial effect upon interstate commerce.[116] Furthermore, the second test is not satisfied merely because the challenged acts affect a business engaged in interstate commerce. Instead, plaintiffs must allege and prove that the acts complained of affect the interstate part of such a business, and that the effect on interstate commerce is substantial in nature.[117]

The court decisions which dealt with the abstention doctrine, stating a cause of action, the statute of limitations and standing, were all decided on the basis of a complaint. Those issues did not require factual evidence adduced through affidavits, discovery or trial. On two occasions, however, federal district courts have gone beyond the allegations of the complaint to inquire into the question of subject-matter jurisdiction.[118] In both instances the district courts have dismissed Sherman Act cases attacking mandatory recreation leases on the ground of lack of subject-matter jurisdiction.

In *Burleigh House Condominium v. Burleigh House, Inc.*[119] and *Chatham Condominium Association v. Century Village, Inc.*,[120] the

114. *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) (*Fortner II*); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (*Fortner I*); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

115. *See, e.g.*, Ford Wholesale Co. v. Fiberboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal.), *aff'd*, 493 F.2d 1204 (9th Cir. 1972), *cert. denied*, 419 U.S. 876 (1974); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 889 (1954).

116. Mandeville Ireland Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 889 (1954).

117. Lieberthal v. North Country Homes, Inc., 332 F.2d 269 (2d Cir. 1964); Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453 (5th Cir. 1949), *cert. denied*, 339 U.S. 953 (1950); David Cabrera, Inc. v. Union de Choferes y Duenos, 256 F. Supp. 839 (D.P.R. 1966).

118. Chatham Condominium Ass'n v. Century Village, Inc., No. 75-WPB-166-Civ-WM (S.D. Fla. Aug. 9, 1976); Burleigh House Condominium, Inc. v. Burleigh House, Inc., No. 75-112-Civ-CA (S.D. Fla. Apr. 16, 1976).

119. No. 75-112-Civ-CA (S.D. Fla. Apr. 16, 1976).

120. No. 75-WPB-116-Civ-WM (S.D. Fla. Aug. 9, 1976).

federal district courts noted the above principles concerning the determination of subject-matter jurisdiction and, after applying those principles to the facts adduced, dismissed the actions for lack of such jurisdiction. The courts found that the alleged restraints of trade in the recreational facilities market, where plaintiffs were required to lease certain improved real estate in a given county in South Florida, were purely local in nature. Although the courts' orders do not fully recite the factual evidence presented, it appears that the courts will not find the requisite quantum of interstate commerce from the fact that the condominium housing units are sold through instrumentalities of interstate commerce to residents of various states. The focus of their review will be on the interstate aspects of the recreational facilities market allegedly being restrained.

It is obvious that the recreational facilities that condominium owners would patronize, if not bound to the recreation lease, would be limited to those facilities within a relatively small area surrounding the owners' residence. In other words, condominium owners in South Florida are not likely to become members of a recreational services establishment in another state regardless of whether they are obligated under a recreation lease. As noted earlier, the fact that a neighborhood recreational service competitor, such as a local health spa, may be part of an interstate business, is not sufficient to meet the jurisdictional test. Consequently, it would appear that in order to establish subject-matter jurisdiction, the condominium owners would have to establish that the restraint on interstate commerce results from the reduction in interstate purchases of equipment and supplies by local recreational service competitors, whose business activity is limited by the effects of mandatory recreation leases. As can be imagined, demonstration of such an impact on interstate commerce would be quite difficult and, in any event, the impact would most likely be so insignificant as to fail to meet jurisdictional requirements.[121]

Although the subject-matter jurisdiction test depends upon the factual evidence adduced in each particular case, affirmance by the United States Court of Appeals for the Fifth Circuit of either of the above decisions would present a formidable obstacle for other condominium owners to overcome. This is particularly so in light of the fact that the *Chatham Condominium Association* case involved the largest condominium development in Florida, thus presenting po-

121. Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); *cf.* Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961).

tentially the best available factual case. Accordingly, if these decisions are upheld, a severe blow will have been dealt to the condominium owners' ability to seek redress against mandatory recreation leases under the Sherman Act.

### 2. FLORIDA ANTITRUST LAW

The theory that mandatory recreation leases constitute unreasonable restraint of trade in violation of antitrust laws was also tested in Florida's state courts during the past year. Although the statutory basis for the state actions was different, the factual allegations giving rise to the alleged violations under Florida law were based upon the identical circumstances which were alleged to have given rise to an illegal tying arrangement under the Sherman Act. Condominium owners asserted that these illegal tying arrangements violated Florida's laws prohibiting combinations restricting trade or commerce[122] as well as the Florida Deceptive and Unfair Trade Practices Act.[123] Unlike the majority of federal courts, the Florida state courts dealt with the merits of the litigation and concluded that mandatory recreation leases do not constitute illegal restraints of trade under Florida law.

#### a. Chapter 542—Combinations Restricting Trade or Commerce

In *Avila South Condominium Association, Inc. v. Kappa Corp.*,[124] the condominium association and four individual unit owners suing on behalf of all other persons similarly situated sought, on several theories, to have a recreation lease declared void. The defendants included three corporations alleged to have been not only the owners and developers of the tract, building and appurtenances, but also the owners and lessors of the recreational facilities which were leased to the association. Additionally, two individuals who were alleged to have been the original incorporators and directors of the association at the time it entered into the recreation lease were named as defendants. One of the counts in the complaint was that the tie-in of condominium housing units and obligations under the recreation lease violated section 542.05 of the Florida Statutes (1975), because the defendants "preclude[d] competitors . . . from offering the same or similar [recreational] facilities."[125] The trial court dismissed the count, with prejudice, concluding that certain

122. FLA. STAT. §§ 542.01-.13 (1977).
123. *Id.* §§ 501.201-.213.
124. 347 So. 2d 599 (Fla. 1977).
125. *Id.* at 607.

provisions of the Condominium Act specifically control the general provisions of chapter 542 and that, accordingly, the count failed to state a cause of action.[126] In dismissing other causes of action involved in the *Avila* case, the trial court initially and directly passed on the validity of state statutes by construing provisions of the Florida Constitution. The plaintiffs were, therefore, able to take their appeal directly to the Supreme Court of Florida.

The supreme court affirmed the final dismissal of the count predicated upon chapter 542 of the Florida Statutes (1977). Without much discussion, the court cited the statutory provisions of the Condominium Act (which the lower court had found to preempt the general provisions of chapter 542) and concluded that "the trial court correctly held that tying recreational facilities to housing is at the heart of the condominium concept, a concept which has been repeatedly sanctioned both by the legislature and by the courts."[127]

### b. Chapter 501—Unfair Trade Practices

Although the *Avila* decision only construed section 542, its denunciation of the tie-in theory as applied to condominium recreation leases leaves little doubt that actions predicated upon an antitrust theory under Florida's Deceptive and Unfair Trade Practices Act will meet the same fate. Section 501.204 of the Florida Statutes (1975), provides that:

> (1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (2) It is the intent of the legislature that in construing subsection (1) of this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

Since the federal courts had already interpreted the Federal Trade Commission Act's prohibition against unfair methods of competition as embracing the activities proscribed by the Sherman Act,[128] recreation lease opponents asserted that unreasonable restraints of trade similarly constitute unfair methods of competition under Florida's Deceptive and Unfair Trade Practices Act, commonly known as Florida's Little FTC Act. Based upon this theory,

126. *Id.*
127. *Id.*
128. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

the Attorney General of Florida, as an enforcement authority of the Little FTC Act, commenced an administrative proceeding challenging a mandatory recreation lease as being in violation of the Little FTC Act.[129] The administrative complaint traced the allegations of an illegal tying arrangement under the Sherman Act to the conclusion that the same constituted prohibited activity under the Little FTC Act.

The developer, in lieu of defending the administrative action, sought a writ of prohibition in the District Court of Appeal, First District, to prohibit the Attorney General from continuing an administrative proceeding challenging the developer's recreation lease under the Little FTC Act.[130] The developer asserted that the Attorney General was clearly acting in excess of his jurisdiction by virtue of section 501.212 of the Florida Statutes (1975), which provides, in pertinent part: "This part does not apply to: (1) an act or practice required or specifically permitted by Federal or State law." The developer contended that Florida's Condominium Act specifically permits mandatory recreation leases and thus this practice was exempt from the coverage of the Little FTC Act. The First District agreed and, without a written decision, entered an order granting the writ of prohibition.[131] The Supreme Court of Florida dismissed the appeal on jurisdictional grounds.[132]

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129. Cenville Communities, Inc., No. 74-10094 Dep't of Legal Affairs, State of Fla.

130. Cenville Communities, Inc. v. Department of Legal Affairs, No. X-546 (Fla. 1st Dist. 1975).

131. *Id.*

132. Shevin v. Cenville Communities, Inc., 338 So. 2d 1281 (Fla. 1976). Justice England, however, noted in a concurring opinion that if the writ of prohibition had been addressed to an administrative rule promulgated by the cabinet, such as the rule-making authority under the Little FTC Act, jurisdiction may have existed. *Id.* at 1282.

Less than one month later, apparently in reliance on Justice England's concurring opinion, the Attorney General, acting pursuant to the Little FTC Act, commenced rule-making proceedings seeking adoption of proposed chapter 2-24 of the Florida Administrative Code by the cabinet. *See* Tie-In Sales in the Sale of Housing Units, Proposed Rule No. 2-24, Fla. Admin. Weekly, Nov. 5, 1976, at 2. Attempting to codify the elements of an illegal tying arrangement under the Sherman Act into a rule under the Little FTC Act, the operational portion of the rule provided that:

> It shall be an unfair method of competition and an unfair trade practice for any developer to directly or indirectly condition the sale of a housing unit upon the purchaser's acceptance of a recreational services contract under the following conditions:
>
> (1) The developer has economic leverage over the sale of housing units; and
>
> (2) A restraint of trade has occurred, is occurring, or is likely to occur.

*See* Proposed Rule 2-24.03, Dep't of Legal Affairs, State of Fla.

Pursuant to FLA. STAT. § 120.57 (1975), certain interested persons challenged the validity of the Attorney General's proposed tie-in rules. While this administrative challenge was still pending, the supreme court entered its decision in the *Avila* case, declaring that tying sales of housing units to recreational facilities was at the heart of the condominium concept and

Although Florida's Little FTC Act became effective on October 1, 1973, opponents of recreation leases argued that unreasonable restraints of trade had always been deemed illegal as violative of Florida's public policy; thus, they argued, challenges to recreation leases under the Little FTC Act could be made against leases existing prior to the effective date of that Act. It was reasoned that contracts resulting in unreasonable restraints of trade were always illegal, and the Little FTC Act merely provided a new remedy and did not unconstitutionally impair contractual obligations in violation of article I, section 10 of the Constitutions of Florida and the United States.

In *Point East One Condominium Association v. Point East Developers,*[133] the District Court of Appeal, Third District, was asked to review an order of the trial court dismissing a complaint predicated, in part, upon chapter 501 of the Florida Statutes (1977). The dismissal as to that count was based upon the lower court's conclusion that retrospective application of the Little FTC Act would infringe upon the constitutional prohibition against impairment of the obligation of contracts. The complaint traced the elements of an unlawful tying arrangement as described above. On appeal, the Third District affirmed the lower court, relying principally on the supreme court's earlier decision in *Fleeman v. Case,*[134] and ruled that chapter 501 could not operate retroactively to render the subject recreation lease void.[135]

Thus, the decision of the Supreme Court of Florida in the *Avila* case effectively terminated antitrust challenges to recreation leases under either chapter 542 or chapter 501 of the Florida Statutes. Although the supreme court did not elaborate upon its opinion that the Condominium Act justified tying recreation lease obligations to the sale of condominium units, it would seem that this holding is most closely analogous to the single product argument still pending in the federal courts. Since the condominium form of ownership is authorized and created solely pursuant to Florida's Condominium Act, the supreme court's statement that tying recreational facilities to the sale of condominium units "is at the the heart of the condominium concept" is, in effect, a statutory construction holding that

had been repeatedly sanctioned by both the legislature and courts of this state. In apparent acknowledgment that the supreme court's decision in *Avila* with regard to chapter 542 would be equally applicable to rules under the Little FTC Act, the Attorney General withdrew the proposed tie-in rules.

133. 348 So. 2d 32 (Fla. 3d Dist. 1977).

134. 342 So. 2d 815 (Fla. 1976).

135. 348 So. 2d at 35.

the condominium apartment and appurtenant recreation facilities are, in fact, a single product. Viewed as such, it is likely that the supreme court's interpretation may be heavily relied upon by federal courts in determining the single product question as it comes up in pending tie-in litigation involving recreation leases. Finally, the decision in the *Point East* case, although somewhat moot as to the state antitrust implications of mandatory recreation leases in light of the *Avila* decision, still stands, nevertheless, as important precedent construing Florida's Little FTC Act.

### c. Unconscionability

In determining that the Florida statute which prohibited escalation clauses in recreation leases[136] would have only prospective application, the supreme court in *Point East,* just prior to concluding its decision in *Fleeman v. Case,* noted:

> Given the narrow issue presented by these appeals we do not decide questions as to the validity of these leases on any other grounds. Thus, although there is reference to the possibility that in some instances lease arrangements for individual unit owners may be unconscionable, inequitable or contain other deficiencies recognized in the law as a basis for judicial invalidation, these matters are not considered or decided here.[137]

As further indication that the supreme court might be favorably disposed towards entertaining challenges to the validity of recreation leases on grounds of unconscionability, the court, in a footnote to the above quote,[138] made reference to the relevant section of Florida's Uniform Commercial Code.[139]

In *Avila,* the supreme court held that the provisions of the Florida Condominium Act, requiring contracts between condominium associations and developers to be fair and reasonable,[140] did not operate retroactively. This, however, did not bar redress upon a theory that the lease was unconscionable. In dicta it was suggested, "[i]n affirming the dismissal of the count alleging violations of section 711.66(5)(e), we do not preclude the plaintiffs on remand the possibility of stating an amended claim of unconscionability, independent of section 711.66(5)(e)."[141]

136. FLA. STAT. § 711.231 (1975)(current version at FLA. STAT. 718.403(8) (1977)).
137. 342 So. 2d 815, 818 (Fla. 1976).
138. *Id.* at 818 n.6.
139. FLA. STAT. § 672.302 (1975).
140. FLA. STAT. § 711.66(5)(e) (1975)(current version at FLA. STAT. § 718.302(2) (1977)).
141. Avila S. Condominium Ass'n v. Kappa Corp., 347 So. 2d 599, 605 (Fla. 1977).

Following these decisions, the Florida Senate enacted a bill which created a rebuttable presumption that a recreation lease which meets the nine criteria set forth in the statute is unconscionable and void.[142] Similarly, the Attorney General initiated rulemaking proceedings under the Little FTC Act.[143]

Unlike the antitrust actions, the concept of unconscionability opens a broader base of attack against recreation leases. Whereas antitrust challenges are limited to the manner in which the leases are packaged and sold to the unit owners, the unconscionability claims include, in addition to the foregoing, the fairness of the terms of the leases themselves. Thus, unconscionability embraces not only the commercial setting of the transaction at the time the contract was made, but also the terms of the recreation leases themselves, to determine whether they are so unconscionable as to be unenforceable.[144] Although this most recent theory for challenging recreation leases is in its incipient stages, two decisions, one administrative and the other at the circuit court level, have touched upon the matter.

In *Urbanek v. Kandell,*[145] condominium owners defended against an action to recover rents due under a recreation lease by asserting that the lease was unconscionable and, therefore, unenforceable. The condominium owners introduced evidence sufficient to prove the existence of the nine factors giving rise to a rebuttable presumption of unconscionability under section 718.122 of the Florida Statutes (1977). The lower court concluded, following the trial, that the recreation lease at issue was not unconscionable and that, even if the unit owners were entitled to the presumption created by section 718.122, the presumption had been rebutted in this particular case.[146] The court went on to note, however, that it was inclined to hold section 718.122 unconstitutional for the following reasons: first, by seeking to apply to recreation leases in existence prior to the effective date of the Act, the statute violated article I, section 10 of the Constitution of the United States which prohibits impairment of contractual obligations; second, the legislature's attempt to define unconscionability, a term which had been created by and based upon the inherent powers of courts of equity, constituted an

142. 1977 Fla. Laws, ch. 77-221, § 3 (codified at FLA. STAT. § 718.122 (1977)).

143. *See* Unconscionable Recreational Service Contracts, Rule No. 2-25, Fla. Admin. Weekly, May 27, 1977, at 2.

144. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Mobile American Corp. v. Howard, 307 So. 2d 507 (Fla. 2d Dist. 1975).

145. No. 75-542-CA (Martin Co., Fla. Cir. Ct. Aug. 26, 1977).

146. *Id.* slip op. at 4.

impermissible incursion into the domain of the judiciary in violation of the doctrine of separation of powers; third, the court considered the statute to be constitutionally deficient because of "over breadth and vagueness;" fourth, the statute runs afoul of the constitutional standards of substantive due process; and fifth, the statute may constitute the adoption of a prohibitive "rule of practice and procedure" in violation of the supreme court's powers under article V of the Florida Constitution of 1968.[147] In fact, the court's opinion criticized the legislature for attempting to force its political views upon the judiciary. Thus, while perhaps merely dicta, the only decision which has considered the applicability of section 718.122 has placed serious doubt upon the viability of that legislative enactment.

In seeking to promulgate administrative rules regarding unconscionable service contracts, the Attorney General and cabinet took a different approach than the legislature. The operative portion of proposed chapter 2-25 merely declares: "It shall be an unfair and deceptive act or practice for any person to collect or attempt to collect rental payments or portions thereof under a recreational services contract which is unconscionable at common law."[148] Although the proposed unconscionability rules also contain a section setting forth the factors which the rule-making power would consider sufficient to demonstrate the unconscionability of any particular recreation lease, the operative portion of the rule would permit a finding that a lease violates the Little FTC Act only if it is preceded by a finding that the recreation lease would be deemed unconscionable at common law. The importance of proceeding in this fashion, rather than setting forth specific criteria upon which a finding of unconscionability would be predicated, was to permit the unconscionability rules to be applied to leases in existence prior to the adoption of the rules.[149]

As with the Attorney General's previously proposed tie-in rules, administrative challenges were filed against the proposed unconscionability rules.[150] Under the Administrative Procedure Act, the rules, although already approved by the cabinet, may not become effective until the administrative proceeding is completed.[151] The unconscionability rules were challenged on several grounds in *Oriole Homes Corp. v. Department of Legal Affairs*,[152] including the follow-

147. *Id.* at 5.

148. *See* Proposed Rule 2-25.03, Dep't of Legal Affairs, State of Fla.

149. *See* Justification Statement in Support of Proposed Chapter 2-25, Dep't of Legal Affairs, State of Fla.

150. Oriole Homes Corp. v. Department of Legal Affairs, 42 FDOAH 36 (1977).

151. FLA. STAT. § 120.54(4) (1977).

152. 42 FDOAH at 40.

ing: that retroactive application of the rules would unconstitutionally impair the obligations of contract; that the acts and practices of persons engaged in the development and sale of real estate interests, such as condominium housing and appurtenant recreation leases, were exempt from the scope of the Little FTC Act; that the unconscionability rules violated the doctrine of separation of powers; that the rules sought to prohibit practices specifically permitted by the Condominium Act, and thus such practices were exempt from coverage of the Little FTC Act; and that the rules failed to comply with the rule-making requirements set forth in the Little FTC Act because they failed to set forth "with specificity" acts and practices prohibited by the Act.

On November 1, 1977, the Director of the Division of Administrative Hearings, sitting as hearing examiner in the proceeding to determine the validity of the proposed unconscionability rules, entered a partial final order. The Director, citing the *Point East* case,[153] concluded that the unconscionability rules, if eventually made effective, could apply only prospectively because retrospective application would violate the constitutional prohibition against impairment of the obligations of contract. If that decision is affirmed on appeal, the unconscionability rules would be rendered ineffectual. Although the partial final order would permit the rules to operate prospectively, condominium owners seeking to nullify recreation leases would probably resort to the prospective relief afforded by the Condominium Act's prohibition against contracts which are not "fair and reasonable," as this standard would appear to be easier to meet than the doctrine of unconscionability.

### d. Conclusion

As noted earlier, in light of the legislative enactments in Florida in 1975 amending the Condominium Act, post-1975 recreation leases are not likely to inspire a great deal of litigation. On the other hand, thousands of condominium owners remain bound to pre-1975 recreation leases under which the rental obligation continues to escalate. Thus, litigation addressed to reforming or nullifying these leases is likely to continue. Although the statute of limitations decision in the *Imperial Point* case permits challenges under the federal antitrust laws to pre-1975 recreation leases, it appears that the unit owners will have a difficult time demonstrating the involvement of sufficient interstate commerce to invoke federal court subject-matter jurisdiction. Additionally, it is the authors' opinion that if

153. 348 So. 2d 32 (Fla. 3d Dist. 1977).

decisions on the merits are reached, the federal courts are likely to conclude that condominium housing units and appurtenant recreational facilities constitute a single product and that, in any event, condominium developers did not have the quantum of economic power necessary to commit an illegal tying arrangement. *Fortner II* is a strong indication that economic power in the condominium sales market will not be found. Furthermore, in light of the *Buckley* decision denying standing to the condominium association to bring an antitrust action, condominium owners are faced with the difficult task of filing an action in which each condominium owner is a plaintiff or of convincing the court that class action treatment would be appropriate.

In the state courts, the *Avila* case clearly puts to rest the challenges to recreation leases predicated upon antitrust theories. Consequently, the unconscionability theory appears to present the only remaining viable approach for nullifying or reforming existing recreation leases. Although the *Urbanek* and *Oriole* decisions discussed above were not favorable to the interests of condominium unit owners, the unconscionability litigation is still in its formative stages and, if the Supreme Court of Florida's references to unconscionability claims were, in fact, hints that the court would look favorably toward this theory, the unconscionability theory may yet provide the relief which condominium owners bound to recreation leases have long sought.

### C. *Lien Rights*

The obligation for payments under a recreation or long term lease typically rests with each unit owner. Furthermore, the obligation of each owner for his share of the lease payments may be secured by a lien against his unit. The right to enforce these essentially contractual lien rights was recently examined in light of the homestead exemption of article X, section 4 of the Florida Constitution of 1968,[154] which protects the head of a household from having

154. FLA. CONST. art. X, § 4, provides in pertinent part:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:
>
> (1) a homestead . . . .

It is significant to note that the homestead protection afforded by the Florida Constitution does not affect the contractual obligation to pay the recreation lease fee, nor does it affect the validity of the lien as a lien on real property. *See* Point E. One Condominium v. Point E. Dev., 348 So. 2d 32 (Fla. 3d Dist. 1977).

his homestead sold at forced sale for the benefit of a creditor. Although the parameters of the constitutional protection have been defined, the point at which the lien attaches for the purpose of ascertaining the applicability of the homestead protection requires further judicial guidance. Those decisions which deal with the effect of the homestead protection in this context appear to conflict.

Where lien rights are created by contract or operation of law prior to the time the unit owner established the homestead character of its property, the constitutional protection is not contravened by enforcement of the lien. In *Avila,*[155] the Supreme Court of Florida rejected a claim by both an association and a unit owner that the lessor's lien rights violated the homestead protection. The plaintiffs argued that the lien rights which secured payment of an owner's share of the lease rents would subject an owner's unit to forced sale upon default and foreclosure. Having determined that the lien was created upon the filing of the declaration of condominium, the supreme court held that in all instances the homestead character of an owner's unit in the condominium would have been created subsequent to the creation of the lien since the Condominium Act requires the declaration of condominium to be filed prior to sale of the units.[156] Accordingly, the claim predicated upon the homestead exemption was dismissed for failure to state a cause of action.

The supreme court's determination that the lien was created upon the filing of the declaration of condominium offers an interesting comparison with the District Court of Appeal, Fourth District, decision in *Gersten v. Bessemer.*[157] In *Gersten,* a subdivision developer's lien for recreational use fees contained in a recorded declaration of restrictions was found to have been contractually created at the time of the delivery of the deed, not upon the recordation of the declaration.[158] Since the homestead was established at the time of the conveyance of title, the homestead exemption and the lien rights attached simultaneously. Under these circumstances, the homestead exemption was given priority to prevent enforcement of the lien. Although the purchase contract provided for the owner's obligation to pay the recreational use fee, the first contractual reference to the lien rights reserved in the declaration was contained in the

Although a creditor cannot foreclose his lien against homestead property, the lien remains as an encumbrance against the property on which it is filed so as to require satisfaction at the time of sale or financing. Additionally, should a loss of homestead status occur, the lien could then be foreclosed.

155. 347 So. 2d 599 (Fla. 1977).

156. *Id.* at 605.

157. 352 So. 2d 68 (Fla. 4th Dist. 1977).

158. *Id.* at 70.

deed. The deed made reference to the Declaration of Restrictions. Notwithstanding that the owners, prior to closing, were on constructive notice of the rights and restrictions of the recorded declaration, the lien rights contained therein were not created by contract or by operation of law until the conveyance of title.[159]

The point at which the Fourth District recognized the attachment of the lien appears to differ from that of the supreme court in *Avila,* where a recreational lease lien arose at the time of the declaration of condominium's recording. The supreme court did not indicate whether the purchase agreements, which were executed by the purchasers prior to closing, made reference to either the lessor's lien right or to the recorded declaration of condominium. Under such circumstances, the result would have been reconcilable with the Fourth District's decision because the lien might have been contractually created at the time of the purchase agreement.[160] Nevertheless, it would appear that a conflict exists between the Fourth District and the supreme court on the point at which a lien right attaches in circumstances where the right is contained in a recorded declaration of condominium or restrictions to which all subsequent conveyances are subject.[161]

### D. *Title to Demised Property*

Prior to the supreme court's decision in *Avila,* challenges to recreation leases could be maintained where, through poorly drafted or ambiguous provisions in the condominium documents, the property demised under the lease was, in actuality, declared to be part of the condominium property.[162] In *Avila* the supreme court elimi-

159. *Id.*

160. The disclosure provisions of the Condominium Act, since its 1974 amendment, require that a contract for the sale or lease of a unit that is subject to a lien for rent payable under a recreation or facilities lease contain a boldface or capital letter reference to such lien rights and the prospect of foreclosure upon default. FLA. STAT. § 718.503(1)(f) (1977). This same conspicuous disclosure must also appear in the developer's prospectus or offering circular. *Id.* § 718.504(8)(d).

161. On rehearing, the Fourth District certified a question to the Supreme Court of Florida on whether a lien for nonpayment of lease rents can be created prior to the conveyance of title by recording a declaration of restrictions. The supreme court has taken jurisdiction on certiorari. Presumably, the conflict is under review.

162. In Ackerman v. Spring Lake, 260 So. 2d 264 (Fla. 4th Dist. 1972) a challenge to a recreation lease was successful where it was shown that the leased property was declared to be condominium property and committed to the condominium form of ownership for the period of the lease. Although fee title was retained by the lessor, the property was brought within the common elements and precluded the developer's ability to lease the same property to unit owners in the condominium.

A developer's inadvertent classification of retained property as a common element occurred in Daytona Dev. Corp. v. Berquist, 308 So. 2d 548 (Fla. 2d Dist. 1975), where the

nated the viability of the cause of action. The condominium association and unit owners brought the action in their individual capacities and as representatives of a class of other unit owners for the purpose of challenging the lessor's title to the recreational units that were demised under the recreation lease. The supreme court affirmed the trial court's dismissal of this cause of action, determining that the association and its members were incapable of challenging the lessor's title to property demised under the lease.

The supreme court, relying upon the well established principle that lessees are estopped from denying the lessor's title, found the association to be without the right to maintain the cause of action.[163] In further support of the trial court's dismissal, the court cited *Reibel v. Rolling Green Condominium Association*[164] and *Commodore Plaza at Century 21 Condominium Association v. Saul J. Morgan Enterprises,*[165] wherein it was established that, since the common elements are owned in common by the unit owners, the association is not the real party in interest to maintain an action challenging the lessor's title to the leased property.[166]

Since the unit owners were, in effect, sublessees, whose rights with regard to the lease were derived from, and were coextensive with, the rights of the association, the same reasoning that barred maintenance of the action by the association served to bar the unit owners from stating a cause of action.[167] The supreme court applied and preserved traditional notions of landlord-tenant law in this area of lease litigation. In so doing, it has effectively eliminated attempts by unit owners to argue that the property demised under the recreation lease was, in fact, declared to be part of the condominium property.

In *Sauder v. Harbour Club Condominium,*[168] the District Court of Appeal, Second District, preserved a developer's right to receive

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developer's failure to have the declaration of condominium assign a percentage interest of the common elements to the demised property was a fatal defect in the developer's effort to retain title to this property. The District Court of Appeal, Second District, affirmed the trial court's summary judgment quieting title to the property in the unit owners. The Second District did not, however, comment on the obligation to make payments under the use agreements relating to these recreational units. Subsequently, the continuing obligation to pay the rent was established in Sauder v. Harbour Club Condominium No. Three, 346 So. 2d 556 (Fla. 2d Dist. 1977).

163. 347 So. 2d 599, 603 (Fla. 1977).

164. 311 So. 2d 156 (Fla. 3d Dist. 1975).

165. 301 So. 2d 783 (Fla. 3d Dist. 1974), *case dismissed,* 308 So. 2d 538 (Fla. 1975).

166. It is notable that in neither *Reibel* nor *Commodore Plaza* did the District Court of Appeal, Third District, preclude individual unit owners from maintaining the action as real parties in interest.

167. 347 So. 2d at 603.

168. 346 So. 2d 556 (Fla. 2d Dist. 1977).

rental payments under a use agreement, notwithstanding a prior adjudication which had vested title to a major portion of the recreational property in the condominium unit owners. Pursuant to an overall development plan, the developer constructed three separate buildings, each of which was a separate condominium with a separate declaration of condominium and condominium association. Recreation rooms were provided in two of the three condominiums. Notwithstanding the individual integrity of each condominium, each declaration provided for the use of all recreation facilities by all unit owners, regardless of the building in which their units were located. This right was further preserved by a recreation area use agreement between the developer and each condominium association.

The dispute was based in part upon a prior action in which one condominium association prevailed in having title to the recreation unit in its building declared a portion of the common elements, owned in common by the unit owners of that particular condominium.[169] As a result of this prior adjudication and the association's act of denying the use of its recreational facilities to the owners of the condominium in which no such facilities existed, suit was brought by the affected condominium, through the association, to cancel the recreation use agreement. The trial court, construing the recreation use agreement to be the equivalent of a lease, cancelled the use agreement under which the condominium association was obligated to the developer for rental payments. The trial court reasoned that since the prior adjudication established ownership of a major portion of the recreational facilities in the owners of one of the other condominiums, the lease failed in its entirety.

On appeal, the District Court of Appeal, Second District, rejected the trial court's view of the use agreement as a lease and reversed its cancellation, even though title to the recreational unit had not vested in the developer.[170] Furthermore, the association's rental obligation was not properly extinguished. The fact that the developer did not own the recreational unit was not dispositive of the issues of continued use rights and rental obligations. Rather, the issues were determined on the basis of an enforcement of the obligations contained in the respective declarations and use agreements to which all unit purchasers were subject.[171]

Each purchaser knew or should have known that the overall development plan guaranteed to all owners use rights to each recrea-

169. Daytona Dev. Corp. v. Berquist, 308 So. 2d 548 (Fla. 2d Dist. 1975).
170. 346 So. 2d at 559.
171. *Id.* at 560.

tional unit, regardless of the condominium in which it was located. Once the use rights were established and preserved, the court enforced the developer's right to receive rental payments without regard to whether the property subject to the use agreements was owned by the developer.

The formula for calculating rent under a recreation lease can take into consideration property not subject to the lease and not owned by the developer-lessor. In *Gundlach v. Marine Tower Condominium*,[172] a condominium association challenged the right of a developer to collect recreation lease rents where the rental formula was based, in part, upon parking spaces within the condominium property. The description of the leased property included a parking garage which extended into the condominium building.

The association contended that since the property described in the lease did not include any portion of the condominium building, the lessor could not charge rent for that portion of the parking garage that extended into the building. Despite the lessor's argument that no rent was charged for this portion of the parking garage but rather, that the collective rent under the lease was based upon a formula which included the parking spaces within the building, the trial court determined that the spaces were improperly included within the rent formula. The trial court assessed damages against the lessor in the amount of past rent charged for such spaces.

On the lessor's appeal, the District Court of Appeal, Fourth District, reversed the trial court's final judgment, holding that the formula for computing rent could include nonlease property.[173] The fact that title to a portion of the property included in the formula was vested in the unit owners was of no significance.

### E. *Self-Dealing by Developer Controlled Associations*

Ever since the District Court of Appeal, Third District, decision in *Fountainview Association v. Bell*,[174] challenges to recreation leases or management contracts have consistently been unsuccessful where the claim was predicated upon the execution of the lease or contract by association officers or directors who, at the time of execution, were also officers or directors of the developing entity.[175]

172. 338 So. 2d 1099 (Fla. 4th Dist. 1976).

173. *Id.* at 1101.

174. 203 So. 2d 657 (Fla. 3d Dist. 1967), *cert. discharged*, 214 So. 2d 609 (Fla. 1968).

175. Point E. Management Corp. v. Point E. One Condominium Corp., 282 So. 2d 628 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974); Commodore Plaza at 21 Condominium Ass'n v. Saul J. Morgan Enterprises, 301 So. 2d 783 (Fla. 3d Dist. 1974), *case dismissed*, 308 So. 2d 538 (Fla. 1975); Plaza Del Prado Condominium Ass'n v. GAC Properties, Inc., 295 So. 2d

Typically, the lease or contract obligation would be assumed by the association at a time when all units were owned by the developer. In all such cases, the officers' or directors' conduct which served to benefit the developing entity was alleged to be a breach of their fiduciary relationship to subsequent unit owner members of the association. In all instances, judicial refusal to give credence to the claim was based, in major part, upon the fact that at the time of the obligation's assumption, there were no members to whom the association's officers and directors owed a duty.

In *Avila South Condominium Association v. Kappa Corp.*,[176] the Supreme Court of Florida reexamined the rights and attendant remedies of the association and unit owners in the context of self-dealing. The court departed from strict adherence to the principles that completely barred the maintenance of the claim and permitted a cause of action based upon undisclosed self-dealing accompanied by unjust enrichment. In *Avila*, the condominium association and a group of owners sued the association's officers and directors who, on behalf of the association, had executed a recreational lease with the developer-lessor while also holding official positions with the developer-lessor. Plaintiffs charged that these individuals breached their fiduciary duty to the association and its members by having the association assume a contractual undertaking favorable to themselves in their lessor and developer capacities and unfavorable to the unit owners to whom they owed a fiduciary duty.

Consistent with the principles derived from the prior decisions, the trial court dismissed this cause of action. On review, the Supreme Court of Florida reexamined the view[177] expressed in *Point East Management Corp. v. Point East One Condominium Corp.*[178]

In *Avila*, the supreme court followed *Point East Management* insofar as it conceded that self-dealing by an association's officers and directors, without more, is not actionable. The supreme court, however, clarified the distinction that undisclosed self-dealing for inordinate personal gain is subject to challenge.[179] The supreme court stated that it could not recommend a rule of law which might encourage a secret betrayal by persons in a position of trust in order to reap inordinate personal gain.[180] As a result of the reexamination

718 (Fla. 3d Dist. 1974)(per curiam); Wechsler v. Goldman, 214 So. 2d 741 (Fla. 3d Dist. 1968).

176. 347 So. 2d 599 (Fla. 1977).

177. *Id.* at 607.

178. 282 So. 2d 628 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974).

179. 347 So. 2d at 607.

180. *Id.*

of *Point East Management* and the decisions on which it was based, the court determined that

> any officer or director of a condominium association who has contracted on behalf of the association with himself, or with another corporation in which he is, or becomes substantially interested, or with another for his personal benefit may be liable to the association for that amount by which he was unjustly enriched as a result of his contract. However, no director or officer shall be required to return any portion of moneys paid by the association where it is shown that he received the funds with the consent of the association or with the consent of a substantial number of the individuals comprising the association.[181]

Although it would appear that the remedy would be limited to a money judgment in the amount by which the self-dealing party is unjustly enriched, the court did not preclude the trial judge's discretion to grant other relief as equity dictated. Furthermore, since the cause of action lies in equity, an appropriate equitable resolution of the issue may be made by the court.

The relevant inquiry is directed toward consent, which will invariably be a function of disclosure. Although disclosure of the obligations assumed by the association has always been a major factor in the consistent judicial sanction of these arrangements, the supreme court's decision in *Avila* may require more than mere disclosure of the contractual undertaking itself. Rather, what would apparently be required to insulate the developer is a disclosure of the fact that the lease or management contract was executed by the association at a time when its officers and directors were also officers, directors or principals of the developer. A more cautious developer might expand the disclosure to include not only the names of the association's officers and directors, which are customarily contained in the articles of incorporation, but also the officers and directors of the developing corporation and the interrelationship that exists between one group and the other.

## IV. Enforcement of Declaration of Condominium

### A. *Introduction*

Condominium owners are in a unique situation as owners of real property. Unit owners live in close proximity to each other and share the benefits, obligations and responsibilities of owning in common real property and its improvements. The right of the individual

181. *Id.*

owner to the unregulated use and enjoyment of his unit must often be compromised because of this unique situation.[182] All unit purchases are made subject to the declaration of condominium, the provisions of which assume the stature of covenants running with the land[183] and represent a method of private control over the use of real property. It is not uncommon for a declaration of condominium to regulate the manner by which an owner may use his unit and enjoy common property. An owner's right to lease or otherwise convey his unit is typically subject to restriction. The conflict that arises between the individual unit owner and such restrictions governing the condominium generally centers upon the condominium association, the entity responsible for the administration of the condominium and the enforcement of the declaration of condominium.[184] In resolving these conflicts, the courts have not been reluctant to strictly enforce the covenants and restrictions contained in the governing declaration of condominium.

### B. *Leasing and Transfer of Units*

The courts have consistently upheld restrictions on an owner's right to lease or to convey his unit. In all such instances, however, the restrictions have been specifically grounded in the provisions of the declaration to which all unit purchases were subject. In each case, the restrictions were not considered unreasonable when viewed in the context of the condominium's peculiar need for a system to promote a cohesive and comfortable living arrangement for all of its owners.

Illustrative of this consistent judicial enforcement are those decisions which enforce restrictions on an owner's right to lease his unit. In *Kroop v. Caravelle Condominium, Inc.*,[185] the District Court of Appeal, Third District, upheld a restriction limiting to one occa-

182. The compromise was aptly noted by the District Court of Appeal, Fourth District, in Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. 4th Dist. 1975). In supporting the right of an association to pass rules prohibiting the use of alcoholic beverages in portions of the common elements, the court commented:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

*Id.* at 181-82.

183. FLA. STAT. § 718.104(7) (1977).

184. *Id.* § 718.103(2).

185. 323 So. 2d 307 (Fla. 3d Dist. 1975).

sion an owner's right to lease his unit during the course of his ownership. The court concluded that the limitation was neither unreasonable nor an unlawful restraint on alienation.[186] The unit owner had contended that the leasing restriction violated the Condominium Act and impermissibly infringed upon his rights of alienation and his constitutional right to own, to possess and to enjoy property.[187] The Third District found no error in the trial court's conclusion that the restriction, having been added to the declaration by amendment, was valid and enforceable.[188]

More recently, the District Court of Appeal, Fourth District, reached the same conclusion upon reviewing a trial court determination that a leasing restriction was an unlawful restraint on alienation. In *Seagate Condominium Association, Inc. v. Duffy,*[189] the Fourth District refused to classify restrictions against an owner leasing his unit for business or investment purposes or for periods less than four months as an unlimited or absolute restriction, characteristic of an unlawful restraint on alienation.[190] It is notable that the leasing restrictions were incorporated into the declaration by an amendment approved by a nearly unanimous vote of unit owners.[191] In both *Kroop* and *Seagate,* the courts summarily enforced restrictions against an owner leasing his unit. It is significant, however, that in both cases, the courts enforced specific limitations contained in the declarations as they existed at the time of an owner's purchase or as they were lawfully amended with the voting participation of all owners.

Restrictions on the manner in which an owner may convey title to his unit are also common mechanisms of internal control within the condominium. An owner desiring to convey title to his unit generally must first obtain the consent of the condominium association for the transfer to the prospective purchaser. As a means to ensure prompt and reasonable exercise of its authority, many declarations provide that upon the association's disapproval of the prospective purchaser, the association must purchase the unit on equal terms or provide a purchaser within a prescribed period of time.[192] An owner's right to compel the association to purchase or provide a purchaser does not arise solely upon an association's refusal to ap-

186. *Id.* at 309.
187. *Id.* at 308.
188. *Id.* at 309.
189. 330 So. 2d 484 (Fla. 4th Dist. 1976).
190. *Id.* at 486.
191. *Id.* at 484.
192. The limitations imposed by such an approval mechanism were first upheld in Chianese v. Culley, 397 F. Supp. 1344 (S.D. Fla. 1975).

prove the prospective purchaser. According to the District Court of Appeal, Second District, in *Coquina Club, Inc. v. Mantz*,[193] an owner cannot assert the obligation of the association to purchase or to provide a purchaser until the association has withheld approval of an applicant who on the face of his application qualifies for membership.[194] Notwithstanding a restriction in the declaration prohibiting occupancy by minors less than twelve years of age, a unit owner submitted a prospective purchaser for approval whose application revealed two children below the minimum age. The association denied the application and refused the owner's demand that the association purchase the unit or provide a purchaser. The Second District concluded that the only circumstance in which such a demand could be made is one in which the association has disapproved an applicant who appears to satisfy the requirements of condominium ownership. The court noted that any other construction of the declaration's provision would permit abuse of the association's obligation to purchase or to provide a purchaser where an applicant's approval is denied.[195]

The validity of the age restriction was only briefly discussed by the Second District in *Coquina Club*.[196] The court concluded that the age restriction was valid, noting that the Condominium Act permitted the declaration to contain reasonable restrictions on use and occupancy.[197] More recently, however, a constitutional challenge to similar age restrictions was squarely presented to the District Court of Appeal, Fourth District, in *Franklin v. White Egret Condominium*.[198] In *Franklin*, an age restriction prohibiting occupancy by minors below the age of twelve was found by the Fourth District to have impermissibly infringed upon the owner's constitutional right to marry and to procreate, in violation of the fourteenth amendment of the Constitution of the United States.[199] In opposition to an owner's transfer of an interest in his unit, the condominium association contended that the grantee's use of the unit would conflict with the declaration's age restriction. In a suit to enforce compliance with the restriction and to set aside the conveyance, the trial court granted the relief requested by the association.[200]

193. 342 So. 2d 112 (Fla. 2d Dist. 1977).

194. *Id.* at 114.

195. *Id.*

196. It is not clear from the decision whether the restriction's validity was an issue on appeal.

197. FLA. STAT. § 718.104(5) (1977).

198. No. 76-1535 (Fla. 4th Dist. Aug. 9, 1977).

199. *Id.* slip op. at 6.

200. *Id.*

The issue of the restriction's validity was central inasmuch as the only reason expressed for the association's opposition to the transfer was noncompliance with the age restriction. Without any significant discussion or analysis, the Fourth District held the age restriction in violation of the fundamental constitutional right to marry and to procreate. The court's analysis was limited to citation of the decisions of the Supreme Court of the United States in *Loving v. Virginia*,[201] *Griswold v. Connecticut*[202] and *Skinner v. Oklahoma*.[203] It is, however, curious to note that the court does not discuss the presence of any state action sufficient to invoke the protections of the due process and equal protection clauses of the fourteenth amendment.[204]

### C. *Assessments*

An assessment is an owner's share of the funds required to pay for the common expenses associated with the administration and operation of the condominium.[205] The recorded declaration of condominium must establish each owner's percentage or fractional share of common expenses.[206] The amount of the assessment is de-

201. 388 U.S. 1 (1967).

202. 381 U.S. 479 (1965).

203. 316 U.S. 535 (1942).

204. The essential dichotomy between state and private action appears to have been ignored. Absent the state action link to the fourteenth amendment, the analogy to the Supreme Court's decisions in Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965), and Skinner v. Oklahoma, 316 U.S. 533 (1941), is weak. In *Loving*, the central issue was whether Virginia's statutory prohibition against marriages on the basis of race violated the due process and equal protection clauses of the fourteenth amendment. The Court found the statute to invidiously discriminate on the basis of race and to strike at the heart of the right to marry. 388 U.S. at 11-12. In *Griswold*, the Connecticut statute making unlawful the use of any drug or instrument for the purpose of preventing conception, or the assistance of anyone in that regard, was held to infringe upon constitutional rights of privacy. 381 U.S. at 485. Similarly, impermissible state action was found in *Skinner* where Oklahoma's Habitual Criminal Sterilization Act was found lacking in equal protection. 316 U.S. at 538. Central to all decisions, however, was the presence of state action through state regulatory schemes.

A stronger case may have been made by the Fourth District had the court relied on Shelley v. Kraemer, 334 U.S. 1 (1948). In that case, the Supreme Court held that purchasers of real property were denied equal protection of the law by judicial enforcement of a private racially restrictive covenant. If an age restriction covenant is found to be an impermissible infringement upon an owner's fundamental right to procreate, then judicial enforcement of such a private agreement constitutes state action and deprives the owner of equal protection of the law.

205. FLA. STAT. § 718.103(1) (1977).

206. *Id.* § 718.104(4)(g). In addition to allocating an owner's share of common expenses, the declaration must also specify an owner's undivided interest in the common elements and common surplus in a percentage or fractional share. *Id.* § 718.104(4)(f)-(g). Although it is probable that an owner's share of ownership in common elements and common surplus will be the same as his share of common expenses, such an equivalence was not always required

termined by applying each owner's percentage or fractional share to the total common expenses incurred by the condominium association. This proportion or percentage of sharing in common expenses has assumed a protected position and, in the absence of a provision of the declaration to the contrary, it cannot be altered without consent of the owner.[207]

In *Pepe v. Whispering Sands Condominium Association,*[208] the District Court of Appeal, Second District, invalidated an association's attempt to consolidate the budgets of separate condominium sections within a multi-section condominium development where the consolidation had the effect of reallocating an owner's share of common expenses.[209] Within a single complex, each of seven separate condominiums, while sharing use and responsibility for a specific portion of the complex's property, had common elements owned and used exclusively by owners of units in that particular condominium. Each condominium's expenses for its common elements were allocated only to its owners pursuant to a separate budget. The association responsible for the management of all of the condominiums adopted a resolution in which it determined that the allocation of the total of the common expenses of all of the condominiums to each owner would benefit the overall management and administration of the development.

In an apparent attempt to avoid the prohibition against alteration of the pro rata common expenses without owner consent, the association argued that its management control over all of the condominiums included the authority to consolidate the budgets. In reversing the trial court's approval of the alteration of the formula by which owners share in common expense, the Second District found that the intent of the declarations was to maintain separate condominiums despite a consolidation under one source of management.[210] Of further significance was the fact that the change was implemented by association resolution and without formal consent by owners or amendment of the declaration.[211]

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by the Condominium Act. However, effective July 1, 1975, FLA. STAT. § 711.14(2)-(4) (Supp. 1974)(current version at FLA. STAT. § 713.104(4)(g)(1977)), required that in a residential condominium, assessments for common expenses must be made against owners in the same proportion or percentage of ownership as common elements and common surplus.

207. FLA. STAT. § 718.110(4) (1977). Even prior to this statutory protection, the District Court of Appeal, Second District, had held an amendment which altered the percentage of sharing in common expenses unenforceable against an owner who refused to consent to the change. Thiess v. Island House Ass'n, 311 So. 2d 142 (Fla. 2d Dist. 1975).

208. 351 So. 2d 755 (Fla. 2d Dist. 1977).

209. *Id.* at 757.

210. *Id.*

211. *Id.*

It is not uncommon for a condominium developer to find himself in a position of paying assessments used, in part, to support legal actions against himself. The typical situation is where a developer has relinquished control of the association to the unit owners at a time when units remain unsold and owned by the developer. The association decision to maintain, for any reason, a legal action against the developer may bring the expenses for such litigation within the scope of the common expenses shared by all unit owners, including the developer as the owner of all unsold units. In *Margate Village Condominium Association v. Wilfred, Inc.*,[212] the District Court of Appeal, Fourth District, held a developer responsible for assessments which included the expenses of litigation brought by the association against the developer.[213] In further response to the developer's complaint for injunctive relief with regard to the proposed assessment, the Fourth District indicated that the proper time to challenge assessments is when the assessment is enforced.[214]

## V. DEVELOPER-BUILDER LIABILITY

### A. *Implied Warranty of Fitness and Merchantability*

The doctrine of caveat emptor in the sale of residential real property by a builder-vendor in Florida was laid to rest in *Gable v. Silver*,[215] in which the District Court of Appeal, Fourth District, extended an implied warranty of fitness and merchantability to the sale of new homes and condominiums.[216] Under the implied warranty theory adopted in *Gable*, a claim could be brought only by a purchaser of a new home from the builder and recovery would be conditioned upon the purchaser's proof that the house or condominium was defective when sold.[217] Although the scope of the war-

212. 350 So. 2d 16 (Fla. 4th Dist. 1977).

213. *Id.* at 17.

214. *Id.* at 18.

215. 258 So. 2d 11 (Fla. 4th Dist.), *aff'd*, 264 So. 2d 418 (Fla. 1972).

216. *Id.* at 18.

217. *Id.* at 17. The limits on the extension of the implied warranty were clearly marked. Although the court questioned the propriety of artificially limiting the warranty's extension, the extension was limited to first purchasers of new homes or condominiums. It is notable, however, that the Fourth District has, on two occasions, sanctioned the ability of a condominium association to maintain a breach of implied warranty claim on behalf of its members, including remote purchasers, with regard to common element construction deficiencies. Imperial Towers Condominium, Inc. v. Brown, 338 So. 2d 1081 (Fla. 4th Dist. 1976); Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So. 2d 463 (Fla. 4th Dist. 1975). In neither case did the court deal squarely with the issue of whether the implied warranty extended beyond first purchasers to subsequent owners. Responding to the developer's contention in *Imperial Towers* that the class would include both purchasers from the developer and purchasers of units on resale, the Fourth District commented that subclasses could be

ranty's extension has remained largely unchanged since the *Gable* decision in 1972,[218] the manner in which the implied warranty has been defined and applied has undergone some development.

One approach is embodied in *David v. B&J Holding Corp.*,[219] in which the District Court of Appeal, Third District, held that a builder-developer impliedly warranted to the purchasers of condominium units that the units would be constructed in accordance with the plans and specifications on file with the municipality's building department.[220] By equating the concepts of fitness and merchantability to compliance with filed plans and specifications, the Third District may have significantly altered the basis of liability under the implied warranty theory.

Plaintiffs were purchasers of a condominium unit from the defendant-developer. Subsequent to taking title to their unit, they discovered that the developer failed to provide sound proofing and insulation in the party walls, according to the plans and specifications on file with the building department.[221] Although the developer had reserved the contract right in the purchase agreements to make changes in the plans and specifications, the exercise of this right was not evidenced by a change filed and approved by the building department.[222]

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created for determining damages. 338 So. 2d at 1084. In *Wittington*, the Fourth District did not decide whether the implied warranties of fitness and merchantability extended to remote purchasers. In discussing the standing of the association to maintain the implied warranty claim on behalf of its members, the court noted that *Gable* limited the extension to first purchasers of new units from the developer. 313 So. 2d at 468 n.5. It appears, therefore, that neither *Wittington* nor *Imperial Towers* altered or extended the implied warranty beyond the limits established in *Gable*.

218. The Florida Legislature has adopted a series of implied warranties that extend not only from the developer to the purchaser, but also from the contractor, subcontractors and suppliers to the purchaser. FLA. STAT. § 718.203 (1977) implies warranties of fitness and merchantability made by the developer as to: (1) the unit; (2) personal property; (3) the roof and structural components; and (4) other property and improvements. Although § 718.203 became effective on January 1, 1977, its warranties would not affect a condominium: (1) on which construction commenced prior to July 1, 1974; (2) where at least 10% of the units were under contracts for sale prior to July 1, 1974; or (3) where an insurance program, approved by the Department of Insurance, has been provided which is of equal or greater warranty than the statute. Unlike the common law implied warranty, the legislative scheme is defined and extended according to the nature of the property and from whom the warranty is to run. Furthermore, it extends an implied warranty from contractors, subcontractors and suppliers, all of whom previously did not warrant their performance to purchasers of units. *Id.* § 718.203 is the current codification of FLA. STAT. § 711.65 (Supp. 1974). Noticeably absent from this replacement is the prior legislative determination that the implied warranties enumerated in the statute inured "to the benefit of each owner and his successor owners." *Id.*

219. 349 So. 2d 676 (Fla. 3d Dist. 1977).

220. *Id.* at 678.

221. *Id.* at 677.

222. *Id.* at 678.

It is significant that on a theory of breach of implied warranty the court did not expressly require, as a predicate to liability, that the modification or variance result in a defect which renders the unit either unfit for its intended use or unmerchantable. Perhaps this prerequisite is implied in the decision. Presumably, nonmaterial modifications, which neither create a defective condition nor measurably affect the value of the unit, would not support a damage award.

While the Third District's concept of liability may permit a simple showing of a deviation (however technical and insignificant) from the filed plans and specifications, the District Court of Appeal, Second District, has assumed a different posture with regard to establishing a breach of the implied warranty. In *Putnam v. Roudebush*,[223] the Second District reversed a jury verdict for the purchaser on a claim of breach of implied warranty where the evidence did not establish, on an objective basis, that the condominium unit was not reasonably fit for use as living quarters.[224] The purchaser's claim against the developer was grounded upon alleged air conditioner noise. The purchaser's evidence established that his sensitivity to noise rendered the unit uninhabitable. The evidence, however, did not establish that the unit failed to meet ordinary and reasonably expected standards.[225] Furthermore, the jury's verdict was not based upon testimony of a diminution in value of the unit.[226]

The Second District's concept of the implied warranty of fitness and merchantability conditions liability upon an objective showing that the unit is unfit for its intended use. The standard is far removed from the mere showing of a deviation from the plans and specifications on file with the appropriate building department, but is more closely aligned with the implied warranty principles first recognized in the products liability area.[227] Furthermore, the Second District's application of the implied warranty principles developed in products liability litigation included a recognition of the defense that the aggrieved party had a reasonable opportunity to discover the defect and failed to do so.[228]

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223. 352 So. 2d 908 (Fla. 2d Dist. 1977).

224. *Id.* at 910.

225. *Id.*

226. *Id.* In fact, the court noted that the evidence offered at trial established that the value of plaintiff's unit had increased in value since the purchase. *Id.* Apparently, the purchaser must show that the value of the unit was measurably affected by the defect notwithstanding any increase in value as a result of inflation or other factors affecting value.

227. The standard applied in the area of product sales has been characterized as reasonable fitness. *See* Fletcher Co. v. Melroe Mfg. Co., 238 So. 2d 142, 144 (Fla. 1st Dist. 1970); Wisner v. Goodyear Tire and Rubber Co., 167 So. 2d 254, 255 (Fla. 2d Dist. 1964).

228. Putnam v. Roudebush, 352 So. 2d 908, 909 (Fla. 2d Dist. 1977)(citing Lambert v.

### B. *Sale and Purchase of Units*

Prior to and during the course of construction, the developer, through advertising and sales efforts, may make oral and written representations as to facilities, improvements and other features of the development. The alteration or omission of these representations typically gives rise to disputes between the contract purchaser and the developer. The condition of a unit at the time of closing may also give rise to disputes affecting a purchaser's willingness to take title to the unit. Depending upon the contract rights between the parties and the circumstances of the dispute, a purchaser may have a claim for breach of contract, fraud or specific performance.

In *Mirenda v. Steinhardt,*[229] a purchaser was held to have waived any claim for fraud where he was informed of, and failed to object to, a change that may have altered prior representations regarding an unobstructed view from the unit. The purchaser testified that the decision to purchase the unit was based upon verbal and written representations that his unit's location would provide an unobstructed view of the Intracoastal Waterway. Prior to the scheduled closing, the developer notified, by letter, all affected purchasers that their view may, in fact, be obstructed. The purchaser's failure to object or to inquire further, in addition to the act of completing the contract, combined to waive any fraud claim based upon the representation concerning the apartment's view.[230]

A developer's failure to offer proof substantiating its claim that a unit, subject of a prior purchase agreement, had been conveyed to a third party bona fide purchaser for value resulted in a decree for specific performance in favor of the prior contract purchaser. In *Henderson Development Co. v. Gerrits,*[231] the plaintiff had entered into an agreement with a condominium developer for the purchase of a particular unit. The purchaser inspected the unit prior to the scheduled closing and discovered certain deficiencies. The purchaser expressed his unwillingness to close the transaction until the deficiencies were corrected. The purchaser did not attend the closing, and the developer subsequently conveyed title to a third party.[232]

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Sistrunk, 58 So. 2d 434 (Fla. 1952) and Fletcher Co. v. Melroe Mfg. Co., 238 So. 2d 142 (Fla. 1st Dist. 1970)). Whether a purchaser has had a reasonable opportunity to discover the defect will undoubtedly depend upon the nature of the defect and the facts and circumstances of each case.

229. 350 So. 2d 499 (Fla. 4th Dis. 1977).

230. *Id.* at 501.

231. 340 So. 2d 1205 (Fla. 3d Dist. 1977).

232. *Id.*

The original contract purchaser commenced an action for specific performance. By way of affirmative defense, the developer argued that a decree of specific performance would not lie in view of the conveyance of the unit to a third party purchaser for value.[233] The trial court's final judgment of specific performance was predicated upon a finding that the developer had created deficiencies in the unit and did not act reasonably to correct them prior to closing. The developer did not offer any proof to substantiate the contention that the subsequent conveyance was to a third party bona fide purchaser for value. In affirming the trial court decree, the District Court of Appeal, Third District, found that the burden of going forward on the issue of whether the unit was conveyed to a third party purchaser for value and without knowledge of the plaintiff's outstanding contract rested with the developer and not with the plaintiff, as the developer had contended.[234]

## VI. LENDER LIABILITY

A lender who funds the construction and development of a condominium project typically exercises his responsibility for protecting the security for his loan by reviewing the plans and the specifications, the project's feasibility and the developer's marketing plan. A construction lender may reserve the right of inspection during the course of construction and may employ an architect or engineer to make inspections. A permanent lender, committed to loan mortgage money to qualified applicants, may also assume a noticeable presence in the condominium's development and sales program. This mutual interest in the success of the project has prompted recent attempts to charge the lender with a duty of care to purchasers of homes within the project.

Recently, the District Court of Appeal, Fourth District, refused to recognize a construction lender's duty to purchasers of condominium units. The court provided a framework within which a construction lender's responsibility to unit owners for the construction and maintenance of a condominium project can be measured. In *First Wisconsin National Bank v. Roose*,[235] a unit owner, faced with a defunct developer and wasting condominium project, brought suit against the construction lender. As security for the loan, the lender held a mortgage on the entire development, including common areas and recreational facilities. Plaintiff, individually and on be-

233. *Id.*
234. *Id.* at 1206.
235. 348 So. 2d 610 (Fla. 4th Dist. 1977).

half of a class of other unit owners, sued the lender as a joint venturer with the developer and upon a claim that the lender breached an independent duty of care to the purchasers of units. Plaintiff contended that this duty included the supervision of the developer's construction and maintenance activities with regard to the condominium project.[236] Furthermore, plaintiff sought to have the trial court compel the lender to foreclose its lien on the recreational property, reasoning that the lender should not be able to avoid assumption of the maintenance obligation that would flow from foreclosure on the recreational property.[237]

The Fourth District concluded that insufficient facts were alleged to support imposition of this duty. Furthermore, the court determined that plaintiff's cause of action to compel foreclosure was without precedent and subject to dismissal.[238] Plaintiff alleged that, at the time the loan was made, the lender knew of the developer's promotional representations regarding construction and maintenance of the project, and further, that the property was insufficient security for the loan.[239] There were no allegations of an agreement between the lender and the developer which imposed duties upon the lender beyond those which were contained in the loan agreement. There were no allegations that the lender had a proprietary interest in the undertaking or an interest in common with the developer as to the performance of a common purpose. While admittedly the lender would benefit from the developer's success through a repayment of principal and interest, there were no allegations that each would share in the profits of the other. Absent factual allegations in support of the foregoing essential elements of a joint enterprise, the Fourth District refused to hold the lender responsible for obligations beyond those assumed in the loan agreement.[240]

Having determined that the scope of the lender's responsibilities were defined by the loan agreement, the Fourth District also refused to impose an independent duty of care to unit purchasers.[241]

236. *Id.* at 611.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* The fact that a lender may have reserved the right of inspection and may have inspected the property during the course of construction does not imply a duty of care to supervise construction for the benefit of the purchasers. Rice v. First Fed. Sav. & Loan Ass'n, 207 So. 2d 22 (Fla. 2d Dist. 1968). The most notable example of judicial imposition of an independent duty of care upon a lender was seen in Conner v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1969), where the court held that purchasers of defective single family homes in a large subdivision development could state a cause of action against the permanent lender arising from the lender's failure to police the developer's

Implied in the decision is the determination that a lender who restricts its activities or interest in the project to those of an ordinary lender will not be held liable to unit purchasers.

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construction and development. The theories offered by plaintiffs in *Conner* were the same as those alleged in First Wis. Nat'l Bank v. Roose, 348 So. 2d 610 (Fla. 4th Dist. 1977). For substantially the same reasons expressed by the Fourth District, the Supreme Court of California refused to find allegations which, if proved, would establish a joint venture. The supreme court did, however, impose an independent duty which ran from the lender to the home purchasers in circumstances where the lender completely failed to deal responsibly with significant risks created by an incompetent and undercapitalized developer when such circumstances were clearly evident during the course of the relationship between lender and developer. An instructive analysis of the *Conner* decision appears in Callaizakis v. Astor Dev. Co., 4 Ill. App. 3d 163, 280 N.E.2d 512 (1972), where the court did not impose an independent duty of care upon a lender whose participation in the development of the project was not analogous to the degree of participation found in *Conner*.