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Barry A. Mandelkorn
Michael H. Krul
Janice E. Podoll

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The Non-Unconscionability of Condominium Recreation Leases

BARRY A. MANDELKORN,* MICHAEL H. KRUL,** AND JANICE E. PODOLL***

The authors evaluate the theory of unconscionability as a basis for challenging long-term condominium recreation leases in Florida. They discuss the situation underlying such challenges and examine recent attempts to apply common law and U.C.C. unconscionability principles to recreation leases. An analysis of the realities of condominium development serves to dispel several commonly held misconceptions about recreation leases. The authors also analyze the presumption of unconscionability under the Florida Condominium Act, contrasting it with the proposed Federal Condominium Act. Recognizing the inefficacy of the unconscionability approach, the authors briefly discuss the recreation lease buy-out as a more feasible alternative solution.

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* A.B., Rutgers College, 1971; J.D., Rutgers School of Law, 1974. Member of the firm of Ruden, Barnett, McClosky, Schuster & Russell, Fort Lauderdale, Florida.


*** Member, University of Miami Law Review; J.D., University of Miami School of Law, 1980.
I. INTRODUCTION

A. Condominiums in Florida

In Florida, "real estate" and "condominium developments" have become virtually synonymous terms. The amount of condominium litigation and the comprehensiveness of the Condominium Act evidence the predominant role played by the condominium in Florida housing and underscore the importance of understanding that role and the course of its current development.

A condominium is a form of ownership of real property comprising individual units, owned by one or more persons, and an undivided share in the common elements appurtenant to each unit. Common elements are the portions of the condominium property not included in the units. A corporate entity known as the association operates the condominium. The unit owners compose the membership of the association. The powers of the association include the management, maintenance, and operation of the condominium property. The association has the power to enter into agreements and to acquire leaseholds and other possessory or use interests in lands or recreational facilities. Moreover, the declaration of condominium—the instrument by which the condominium is created—may provide that rentals and fees, along with operational, replacement, and other expenses arising out of such recreational facilities, are common expenses incurred by the association. The declaration may then make them the subject of covenants and restrictions, with the association assessing each unit owner for his portion of the common expenses.

The recreation or long-term lease is the usual instrument by

2. Id. § 718.103(9).
3. "Condominium property" means the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium." Id. § 718.103(11).
4. Id. § 718.103(6).
5. Id. § 718.103(2).
6. Id. § 718.111(1).
7. Id. § 718.111(2).
8. Id. § 718.114. This section of the present Florida Condominium Act incorporates the 1965 amendment which permitted a condominium association to enter into a lease of recreation or other facilities. 1965 Fla. Laws ch. 65-9.
10. Common expenses are "all expenses and assessments properly incurred by the association for the condominium." Id. § 718.103(7).
11. Id. § 718.114.
which the condominium association rents improved property from
the developer or from a third party who has purchased the lease-
hold from the developer as an investment. The recreation lease is a
type of financing device that allows the unit owner to spread out
his payments for the use of the developer's recreation facili-
ties. The lease suffers from a drawback, however, because of the re-
quirement of section 718.114 of the Florida Statutes (1979) that
the leasehold be in existence or created at the time of the record-
ing of the declaration of condominium. As a result of this require-
ment, the association typically assumes the recreation lease obliga-
tion at a time when the developer still owns all of the units. The
developer may, then, as an association officer, engage in self-deal-
ing by entering into a personally advantageous recreation contract
on behalf of the association. Such actions by developers could be
seen as a breach of the fiduciary duty owed to the condominium
association. The recreationally oriented facilities provided by the
lease often include swimming pools, tennis courts, clubhouses, card
rooms, exercise rooms, saunas, and putting greens. Since title re-
 mains in the lessor-owner, this improved real propery itself is not a
part of the common elements. The rights, privileges, and obliga-
tions created by the recreation lease, however, are part of the com-
mon elements, as appurtenances that have attached to each unit.
As appurtenances, they are given a protected status under the
Condominium Act: section 718.110(4) prohibits any alteration or
modification of the appurtenances to the condominium unit unless
certain conditions are met, including approval by all other unit
owners. Thus, there is an intimate relationship between the unit
owners, the association which operates the condominium, and the
recreation lease into which the association enters.

Many recreational leases contain rental escalation clauses. An
escalation clause provides for periodic increases in rent, such in-

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(Star Grant 78-2042, Florida State University).
13. Fla. Stat. § 718.111(1) (1979) provides that the officers and directors of the associa-
tion have a fiduciary relationship to the unit owners.
14. See note 3 supra.
15. Unless otherwise provided in the declaration as originally recorded, no
amendment may change the configuration or size of any condominium unit in
any material fashion, materially alter or modify the appurtenances to the unit,
or change the proportion or percentage by which the owner of the parcel shares
the common expenses and owns the common surplus unless the record owner of
the unit and all record owners of liens on it join in the execution of the amend-
ment and unless all the record owners of all other units approve the amendment.
creases to be determined by a set standard or formula. The vast majority of escalation clauses are designed to keep pace with, or at least minimize, the effects of inflation on their investment return. Most escalation clauses in recreational leases are tied into a nationally recognized commodity or consumer price index. Thus, at some stated interval—typically one, three, or five years—the lessee must pay the lessor an increased rental amount due to the rise in the cost of living as reflected in the price index. Because recreation leases usually have long terms of fifty years or more, with terms of ninety-nine years the most common, escalation clauses take on great significance for the price of leasing.

In 1975, the Florida Legislature prohibited the inclusion of escalation clauses tied to a price index. The legislation did not, however, prohibit fixed price increases stipulated in the original contract. Nor did the legislature alleviate the burden of the escalation clause on pre-1975 agreements.

The failure of the Florida Legislature to offer relief to unit owners bound to pre-1975 escalation clause leases has caused the attention of the public to focus on the recreation lease. Views of unit owners towards their recreation leases have changed radically since the first wave of condominium developments with long-term recreation leases in the mid-1960's. To many purchasers at that

16. Often, the lessee must bear the effects of inflation on other costs: under a "net-net-net" lease, the lessee must pay the property taxes, insurance, and maintenance expenses on the condominium unit, in addition to the monthly rent. Lewis & Zenz, supra note 12, at 13.
17. Id. at 28.
18. Id. at 13.
   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. The statute does not, however, prevent the lessor from tying the escalation clause to an inflation index which may not be nationally recognized, or to an inflation indicator which is not an index, or from translating his own prognostication of inflation into fixed percentage increases. For a discussion of the use of index clauses to allocate the risk of inflation, see Comment, Redistributing the Cost of Inflation, 34 U. Miami L. Rev. 301 (1980).
20. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); see notes 39-41 and accompanying text infra.
21. Section 711.121 of the Florida Statutes, enacted in 1965, first allowed attachment of leasehold interests to the purchase of condominium units.
time, the lease arrangement appeared advantageous. It enabled them to use the facilities of the condominium development without requiring an increased purchase price for the unit itself. Rather than pay a costly short-term investment outlay for the facilities themselves, the condominium owner could pay a monthly rental under a long-term lease. 22

Attacks on recreation leases became prevalent in the late 1960’s and throughout the 1970’s. The escalation clauses were the major source of litigation. When these clauses were initially placed in the lease contract, the Consumer Price Index showed inflation in the United States averaging less than three percent a year. By the time the first few rent adjustments came due under the escalation clauses, annual rates of inflation had almost doubled. 23 Projections indicated that if the inflation trend continued, lease payments could double every ten to twelve years. 24 Indignation kindled as successive rises in the cost of living caused lessees to pay more each month to meet their maintenance, insurance, and property tax obligations, apart from their rental payments under their net-net-net leases. As the rental payments also increased, unit owners realized that they could eventually be paying more for their recreation leases than for their mortgages. Owners began to realize that liens could be placed on their units by the condominium association for nonpayment to the lessor. 25

As public attention began to focus on the recreation lease, it became apparent that the rental amount of many leases was not in proportion to the quantity and quality of the facilities provided. 26 Unit owners who did not use recreational facilities chafed at being statutorily and contractually liable for the monthly payments. 27 If

22. Lewis & Zenz, supra note 12, at 18.
23. Id. at 23.
24. Id.
25. The association has a lien on each condominium parcel for any unpaid assessments with interest and, if the declaration so allows, for reasonable attorney’s fees incurred by the association incident to the collection of the assessment or enforcement of the lien. The lien is effective from and after recording a claim of lien in the public records in the county in which the condominium parcel is located, stating the description of the condominium parcel, the name of the record owner, the amount due, and the due dates. The lien is in effect until all sums secured by it have been fully paid or until barred by chapter 95. The claim of lien includes only assessments which are due when the claim is recorded . . . .

27. Fla. Stat. § 718.116(2) (1979) provides that the liability for assessments may not be
there had been misunderstandings as to the meaning of the recreation lease, they existed no longer. Unit owners realized that the facilities they possessed were actually owned, not by their association, which possibly could have responded to pressure by unit owners for relief, but by a third party who expected payment under the lease no matter what the amount. Resistance mounted and took the form of legal challenges to the validity of the recreation lease.

B. The Emergence of a Theory

As individual unit owners and condominium associations began to challenge recreation leases through legal action, they searched for a viable legal theory which would provide relief from the contractual burden of the lease. One of the earliest theories concerned the wide discrepancy between the value of the facilities and the cost of the rental. In *Fountainview Association, Inc. v. Bell,* several condominium associations contended that they had a right to recover from the lessor-developers any unconscionable profit which the developers may have obtained from, among other things, the lease of certain land to the associations. Plaintiffs argued that at the time the defendants negotiated the lease with the condominium association, the defendants were the directors and officers of the association and fiduciaries for all prospective members. The court held that the defendants' activities were not violative of fiduciary duties, because at the time that the leases were executed, there were no other members actually belonging to the condominium association. Accordingly, there was no one toward whom the developers could act as fiduciaries. The court analogized these facts to a long line of cases which had held that a corporation cannot, while its promoters own all of its outstanding stock, request equitable relief to avoid a purchase of property sold to the corporation by the promoters at a large profit. In these instances, a court will deny relief because the rights of innocent purchasers have not yet arisen.

In *Wechsler v. Goldman,* the unit owners sought to cancel or modify their ninety-nine year recreation lease, which the promoters had negotiated with themselves while they were the only mem-

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28. 203 So. 2d 657 (Fla. 3d DCA 1967), cert. dismissed, 214 So. 2d 609 (Fla. 1968).
29. Id. at 658-59; see, e.g., Lake Mabel Dev. Corp. v. Bird, 99 Fla. 253, 126 So. 356 (1930).
30. 214 So. 2d 741 (Fla. 3d DCA 1968).
bers of the condominium association. The lease returned more per year to the developers than the assessed value of the leased property. The lower court stated that although the developer was receiving exorbitant profits from the leases, it would not grant the requested relief, because the purchasers had not been harassed into signing a contract or closing a purchase. The unit owners had been given notice of the terms of the recreation lease in the condominium documents and lease, both of which were recorded, and in an abstract containing the documents, which was made available to all purchasers on request. The District Court of Appeal, Third District, held that the rights of the plaintiffs had been affected by their knowledge of the lease at closing and by their express acceptance of the lease in their closing contracts, notwithstanding the failure of the developers to inform the plaintiffs sooner that the lease existed. The court then affirmed on the basis of Fountainview, suggesting, however, that what had happened in both of these cases "may indicate a need for legislative action to amend the Condominium Act to prevent unfair dealing by promoters of condominium associations." Although the court did not mention the term "unconscionability" in its opinion, the discussion paved the way for later unit owners to try to use an unconscionability theory to defeat their recreation leases.

The Third District denied another attempt to cancel a recreation lease in Point East Management Corp. v. Point East One Condominium Corp. Citing Wechsler, the court held that the defendants had given full disclosure about the facilities and the recreation lease. At the time of the sale of the units, the purchasers had sufficient knowledge concerning the recreation lease to make an informed decision. Thus, the lease was duly ratified and confirmed. The Supreme Court of Florida approved this portion of the decision.

31. Id. at 744.
32. Id. at 743.
33. Id. at 744.
34. "It is not without some reluctance that we hold the plaintiff condominium associations do not have a cause for relief against the claimed exorbitant lease rental obligation imposed on them while both lessor and lessee were owned or controlled by the promoters." Id.
35. 258 So. 2d 322 (Fla. 3d DCA 1972), affirmed in part, 282 So. 2d 628 (Fla. 1973), cert. denied, 415 U.S. 921 (1974).
36. 214 So. 2d at 741.
37. 258 So. 2d at 325-26.
38. 282 So. 2d 628, 628 (Fla. 1973).
The Point East case also involved the validity of a twenty-five year management con-
In 1976, the supreme court held in *Fleeman v. Case* that the legislative prohibition on escalation clauses tied to national consumer price indices could not apply retroactively to contracts entered into before June 4, 1975, the effective date of the statute. In addition, the *Fleeman* opinion first hinted that there might be a cause of action for the unconscionability of recreation leases:

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 law as a basis for judicial invalidation, these matters are not considered or decided here.

These cases reveal that condominium associations, unit owners, and even courts were groping for a theory which could be used to invalidate unfair recreation leases. In 1976, the supreme court referred to a cause of action for unconscionability. One of the

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tract between the developer and the association. The lower court had invalidated the contract, stating that it violated provisions of the Condominium Act because it diverted control of the management of the condominiums away from the association. 392 So. 2d at 324-25. The supreme court, however, quashed the portion of the lower court decision which had invalidated the management contract, holding that the legislature, by placing the power and duty to manage condominium properties in the condominium associations, did not intend to restrict the associations' ability to contract for that management. 282 So. 2d at 630.

39. 342 So. 2d 815 (Fla. 1976).
40. See note 19 *supra*.
41. 342 So. 2d at 818.
42. *Id.*

Under Fla. Stat. § 672.302(1) (1979), courts may refuse to enforce an unconscionable contract, may enforce it without the unconscionable clause, or may so limit the application of any unconscionable contract clause as to avoid the unconscionable result.

43. One theory conceived to attack recreation leases was that the leases violated federal antitrust laws prohibiting unreasonable restraints on trade. Such a theory was attractive since it opened up the federal courts to the recreation lease challenges and provided an opportunity to obtain relief including cancellation of leases, treble damages, and attorneys' fees.

The Antitrust Division of the United States Department of Justice has stated that recreational leases are "not really an antitrust problem." John H. Shenefield, Acting Assistant Attorney General, wrote that the recreational lease was not part of an unlawful tying arrangement because (1) the purchaser was not being forced to accept any facilities that he did not want, (2) the facilities were not typically a separate product, but part of the overall "leisure living" package, (3) the seller-lessee, especially in the "condominium-rich areas of southern Florida," could not have possessed the requisite market power, and (4) interstate commerce was not substantially affected. Memorandum from John H. Shenefield, Acting Assistant Attorney General, Antitrust Division, to the United States Attorney General, *reprinted in Second Annual Institute on Condominium and Cluster Housing* 15-1 (University of Miami Law Center 1977). For a more comprehensive analysis of recreation leases and antitrust actions see Mandelkorn & Krul, *Condominium Litigation, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 875 (1978).
counts in *Avila South Condominium Association v. Kappa Corp.* alleged that parts of the recreation lease were unfair and unreasonable, and thus in violation of Florida Statutes section 711.66(5)(e). This section provided, *inter alia*, that any grant or reservation made by a condominium association prior to assumption of control by the nondeveloper unit owners must be fair and equitable. The court held that because the parties had entered into the recreation lease before the enactment of section 711.66(5)(e), the statute could not be applied retroactively. The court stated, however, that “we do not preclude the plaintiffs on remand [from] the possibility of stating an amended claim of unconscionability, independent of Section 711.66(5)(e).”

In a second action, *Point East One Condominium Corp. v. Point East Developers, Inc.*, several condominium associations challenged the validity of a recreation lease, alleging that the lease was not fair and reasonable and therefore violated the Florida Deceptive and Unfair Trade Practice Act and section 711.66(5)(e) of the Condominium Act. The Third District, in referring to *Fleeman* and *Avila*, held that these statutes could not apply retroactively to a lease entered into before the enactment of the statutes. The court then said, citing *Fleeman*, that the recrea-

44. 347 So. 2d 599 (Fla. 1977).
45. *Fla. Stat. § 711.66(5)(e) (1975) (current version with some modifications at Fla. Stat. § 718.302 (1979)) provided: “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.”
46. 347 So. 2d at 605. See Burleigh House Condominium, Inc. v. Buchwald, 368 So. 2d 1316 (Fla. 3d DCA 1979) (cause of action for unconscionability of recreation lease came into existence on March 31, 1977, the date of the *Avila* decision; therefore, the statute of limitations for such a cause of action—involving a recreation lease entered into prior to that date—did not begin to run until March 31, 1977).
47. 348 So. 2d 32 (Fla. 3d DCA 1977).
48. *Fla. Stat. §§ 501.201-.213 (1979). Under these provisions plaintiffs alleged first that the lease was unconscionable in that revenues would be collected by the lessor well after he had no economic interest left in the condominium complex, and that he had sufficient leverage to induce unit owners to accept the lease. The rationale for the latter theory was based on the developer offering the purchaser an item—a condominium unit—with consumer appeal and unique location, price, and facilities. Second, plaintiffs alleged that the lease, when combined with the sale and resale of condominium units, constituted an unlawful tying agreement resulting in an unreasonable restraint of trade and the destruction of competition within the lessees’ area of business. 348 So. 2d at 34-35.
50. 342 So. 2d at 815; see notes 39-42 and accompanying text supra.
51. 347 So. 2d at 599; see notes 44-46 and accompanying text supra.
52. 348 So. 2d at 35-36.
tional lease could be so unconscionable as to be unenforceable, independently of those statutes. The court remanded the case to the trial court and directed that the plaintiffs be allowed to amend the complaint in order to state an independent claim of unconscionability.

In Cole v. Angora Enterprises, Inc., the District Court of Appeal, Fourth District, also following Avila, held that the trial court erred in dismissing a count relating generally to the theory of unconscionability. The court stated that the trial court should have given the plaintiff an additional opportunity to amend the complaint, because the doctrine of unconscionability might provide a cause of action in suits challenging the enforcement of the recreation lease.

At present, Florida courts are experiencing a tremendous increase in the number of suits filed by unit owners trying to avoid their recreation lease obligations. It appears that the theory of unconscionability is one of the few causes of action that the Florida courts have left open to unit owners. This article will examine the doctrine of unconscionability as defined under the common law and by statute and its application to recreation leases. The article will attempt to refute the various myths surrounding the nature of the recreation lease and the applicability of the unconscionability theory to such leases. The recreation lease will be examined from the perspective of both the consumer-lessee and the developer-lessor.

II. UNCONSCIONABILITY: THE THEORY

A. Unconscionability Under the Common Law

As far back as 1889, the Supreme Court in Hume v. United States defined an "unconscionable" bargain as one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Today, the leading case on the theory of unconscionability is Wil-
liams v. Walker-Thomas Furniture Co. Walker-Thomas involved an action by a furniture company to replevy household items that had been purchased under installment contracts. The contract terms were printed on a form which provided that a balance remained due on each item until Williams liquidated the balance due on all items, whenever purchased. Thus, when Williams defaulted on the payment of one item, the store owner sought to replevy all items purchased since the first transaction. Williams argued that the contracts were unconscionable. The Court of Appeals for the District of Columbia stated that the dual requirements for unconscionability were: (1) absence of meaningful choice on the part of one of the parties, and (2) contract terms unreasonably favorable to the other party. Since the trial court in Walker-Thomas had not made any findings on the possible unconscionability of the contracts, the court of appeals remanded the case for further proceedings.

1. ABSENCE OF MEANINGFUL CHOICE

The first component of unconscionability—absence of meaningful choice—is often referred to as procedural unconscionability, while substantive unconscionability refers to harsh or one-sided clauses or terms in the contract. Procedural unconscionability is determined by examining the bargaining powers of the parties to the contract. This type of unconscionability denotes deceptive, high-pressure, and unfair tactics in obtaining the contract commitment. Evidence of such unconscionability is found in the circumstances surrounding the formation or execution of a contract. It may arise from the claimant’s lack of knowledge or understanding of the contractual terms, or from the lack of meaningful choice in the terms of the contract caused by unequal bargaining.
power, as in an adhesion contract. 69

In an early case involving procedural unconscionability, Stone v. Moody, 70 Moody entered into a contract to purchase land from Stone. The contract provided that Moody could sell any portion of the purchased land. Without Stone’s knowledge, Moody inserted a clause in the contract which stated that Stone would accept any land sales contracts entered into by Moody as cash payment for Moody’s purchase. Moody had previously assured Stone that such a provision would not be included. 71 The court rescinded the contract and stated that the added provision, as a matter of law, rendered “the contract obnoxious to every sense of fairness, honesty, and right, and is such as to make its enforcement clearly unconscionable.” 72

Henningsen v. Bloomfield Motors, Inc., 73 is an example of procedural unconscionability by means of an adhesion contract. Henningsen purchased an automobile manufactured by Chrysler. The purchase contract used by the dealer was a printed form, with the warranty used in the automobile industry 74 set forth on the reverse side. The court held that the warranty, which stated that it was expressly in lieu of all warranties express or implied, was invalid. 75 The court stated that such a provision showed the grossly unequal bargaining position occupied by the consumer in the automobile industry, since the automobile buyer could not go anywhere else to negotiate for better protection. 76

2. CONTRACT TERMS UNREASONABLY FAVORABLE TO THE OTHER PARTY

The second component of unconscionability, contract terms unreasonably favorable to the other party, or substantive unconscionability, 77 refers to overly harsh or unfair terms in the contract. The factors which tend to establish substantive unconscionability include a one-sided agreement, excessive price, and terms that de-

70. 41 Wash. 680, 84 P. 617 (1906).
71. Id. at 683, 84 P. at 618.
72. Id. at 686, 84 P. at 619.
73. 32 N.J. 358, 161 A.2d 69 (1960).
74. Id. at 366, 161 A.2d at 73-74.
75. Id. at 404, 161 A.2d at 95.
76. Id.
77. 86 Wash. 2d at 260, 544 P.2d at 23.
part from practice prevalent in the trade.\textsuperscript{78}

Jones v. Star Credit Corp.\textsuperscript{79} illustrates substantive unconscionability. There, the court found a contract unconscionable because of price-value disparity and gross inequality of bargaining power.\textsuperscript{80} The plaintiff in Jones, a welfare recipient, agreed to purchase a home freezer unit for $900 from a door-to-door salesman. Added to the cost of the freezer were charges for time credit, credit life insurance, credit property insurance and sales tax, making the total purchase price $1,234.80. There was uncontroverted proof at trial that the freezer had a maximum retail value of approximately $300.\textsuperscript{81} The court held that the price-value disparity alone was enough to make the contract unconscionable. The very limited financial resources of the purchaser, known to the seller at the time, only increased the unconscionability. In the context of grossly unequal bargaining power, the great disparity between price and value precluded the buyer from making a meaningful choice.\textsuperscript{82}

In contrast to Star Credit Corp., a Florida court in Mobile America Corp. v. Howard\textsuperscript{83} found that an 11.75\% interest rate on an installment sales contract was not unconscionable.\textsuperscript{84} In Howard, the seller of a mobile home sought to replevy the home because of the buyers’ default on their payments. The trial court had refused to grant the sellers relief, finding that the installment sales contract under which the mobile home was purchased was unconscionable, in calling for an annual interest rate of 11.75\%.\textsuperscript{85} The appellate court reversed, holding that the 11.75\% rate was not unconscionable, since it was within the limits of current installment sales interest rates. Moreover, the court noted that most cases which find unconscionability require, in addition to grossly excessive price, some element of nondisclosure, fraud, overreaching, or unequal bargaining position.\textsuperscript{86}

\begin{thebibliography}{99}
\bibitem{78} Catalina, supra note 67, at 61.
\bibitem{79} 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).
\bibitem{80} Id. at 192, 298 N.Y.S.2d at 266-67.
\bibitem{81} Id. at 190, 298 N.Y.S.2d at 264-65.
\bibitem{82} Id. at 192, 298 N.Y.S.2d at 266-67. See also American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (the Supreme Court of New Hampshire found a contract to paint and install windows and a door unconscionable; the total price of the contract was $2,568.60, of which $809.60 was interest and carrying charges and $800 was a salesman’s commission).
\bibitem{83} 307 So. 2d 507 (Fla. 2d DCA 1975).
\bibitem{84} Id. at 507-08.
\bibitem{85} Id. at 507.
\bibitem{86} Id. at 508.
\end{thebibliography}
There has been no reported appellate decision in Florida using the unconscionability argument offensively to set aside a contract. Florida courts have provided relief from unconscionable contracts or contractual provisions only where unconscionability was raised as a defense in an action to enforce a contract. Nonetheless, an analysis of the cases that have used the unconscionability concept in a defensive manner illustrates that the court’s ability to provide relief from an unconscionable contract is confined to a narrow set of circumstances.  

Florida courts have provided relief from contractual undertakings only in situations in which fraud, deception, undue influence, overreaching, or oppression were pleaded and proved. A court will not set aside a merely improvident contract when the facts are equally available to both parties at the time of contracting. In *Hirschman v. Hodges, O'Hara & Russell Co.* the buyer of turpentine property complained that the seller had fraudulently misrepresented the size of the land and the quantity of turpentine timber. The evidence revealed, however, that the price of turpentine spirits had declined in value after the complainant purchased the land. The Supreme Court of Florida held that the buyer had had the opportunity to examine thoroughly every acre of the land and that although the contract might have been improvident, the court could void it only if there were unfair surprise, mistake, undue influence, or suppression of the truth.

Even though the parties to a contract may be inexperienced in business, if the record discloses arm’s length dealing, the parties are charged with all the knowledge they might have received had they made a complete inquiry. In *Peacock Hotel, Inc. v. Shipman* the defendants appealed from a foreclosure decree, alleging that the plaintiffs had obtained the mortgage by fraudulent in-
ducement. Defendants claimed that they had been told that the hotel they purchased had sixty rooms, when it actually had only fifty-six, and that the roof was in good repair, when in fact it was leaking. The Supreme Court of Florida refused to set aside the contract, because it did not involve an unjust and unfair advantage. Both of the parties could have made a diligent and complete inquiry into these matters.

B. Unconscionability Under the Florida Uniform Commercial Code

Although Florida's Uniform Commercial Code does not apply to leases, its provisions concerning unconscionability are instructive for the application of the theory to recreation leases. Section 672.302 provides:

1. If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

2. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

This section does not, however, define "unconscionability." The comments to section 672.302 indicate that the basic test for unconscionability is whether "the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining position."
power."

Whether a contract contains elements of unfair surprise depends on several factors. One must examine what the relationship of the parties was, whether the buyer sought out the seller or vice versa, what sales techniques were involved, whether a form contract was used, and how unexpected such a clause was in the particular kind of contract.102

Seabrook v. Commuter Housing Co., Inc.,103 is illustrative of the element of unfair surprise in a lease situation. In Seabrook, the lessor presented the lessee with a complex lease, containing fifty-four clauses and printed in small type,104 the term to commence on March 1, 1972. The lease provided, however, that if the building was not finished on that date, the term would begin on the completion date. Four months after the lease was to begin, the lessor told the lessee that the building would be ready for occupancy in two days. Meanwhile, the lessee had been forced to seek shelter elsewhere. The lessor refused to cancel the lease, stating that the clauses contained within the lease controlled what would happen in the event of late completion.105

The court in Seabrook, although acknowledging that the Uniform Commercial Code section 2-302 did not apply, used it by analogy to find the construction clauses unconscionable.106 The court held that “an expert cannot hide behind legal clauses of this kind when dealing with an occasional lessee that has neither a knowledge of real estate law nor the advice of legal counsel.”107

III. APPLICATION OF THE UNCONSCIONABILITY THEORY TO CONDOMINIUM RECREATION LEASES

A. Recent Florida Cases

In Bennett v. Behring Corp.,108 the United States District Court for the Southern District of Florida applied both common law and statutory109 principles of unconscionability to a deed restriction challenge and found that the unconscionability argument

104. Id. at 10, 338 N.Y.S.2d at 71.
105. Id. at 7, 338 N.Y.S.2d at 68-69.
106. Id. at 8-12, 338 N.Y.S.2d at 70-73.
107. Id. at 12, 338 N.Y.S.2d at 73.
was not viable. Bennett did not involve a condominium recreation lease plan; nonetheless, the analysis of a recreation lease arrangement in a development of single-family homes is instructive. In Bennett, the original developer had provided various recreational facilities for each single-family home community in the City of Tamarac. The deed restrictions filed by the developer required all homeowners to be lessees of their community recreational facility. For the use and maintenance of the facilities the homeowners paid fees to the developer according to the terms of the recreation leases, some of which contained escalation clauses. Plaintiffs filed a class action against the developer on behalf of all Tamarac homeowners, alleging that the deed restrictions on the recreational facilities were unconscionable, unreasonable, and violative of Florida law and public policy. The court characterized the plaintiffs' reliance on dicta from Fleeman, Avila, and Point East One Condominium Corp. as an "attempt to fashion the silk purse of the unenforceability of their contracts."

In applying the two-part procedural test of Walker-Thomas, the court found no procedural unconscionability. The plaintiffs had claimed fraud in the contract formation process on two grounds. First, the developer had failed to disclose the legal ramifications of the deed restrictions in its newspaper advertisements. Second, the plaintiffs had not received their deeds containing the restrictions until after the closing of the real estate transaction. The court, however, rejected both arguments, noting that the deed restrictions were recorded and "were a matter of public record long prior to closing, and the individual deeds themselves specifically remind plaintiffs of their duty thereunder."

The court also rejected plaintiffs' allegations of substantive

110. 466 F. Supp. at 694-700.
111. Id. at 692.
112. Id. at 691.
113. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); see notes 39-42 and accompanying text, supra.
114. Avila S. Condominium Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); see notes 44-46 and accompanying text supra.
115. Point E. One Condominium Corp., v. Point E. Developers, Inc., 348 So. 2d 32 (Fla. 3d DCA 1977); see notes 35-41 and accompanying text supra.
116. 466 F. Supp. at 694.
118. 466 F. Supp. at 697.
119. Id.
120. Id.
unconscionability, which were based, *inter alia*, on the theory of gross price-value disparity, *i.e.*, excessive rents.\textsuperscript{121} That the lessor was making too much money did not lead to substantive unconscionability.\textsuperscript{122} "A contract, fair when entered into, does not thereafter become unconscionable simply because a great many other persons enter into identical contracts with defendant thereby increasing defendants' profits."\textsuperscript{123} The court framed the issue as not whether "the lessor-seller is making too much money?" but whether "the lessee-buyer is paying an amount grossly in excess of what other similarly situated are paying for the same thing?"\textsuperscript{124}

The court addressed the escalation clause challenge and found the clause not substantively unconscionable as a matter of law.\textsuperscript{125} Furthermore, the clause had to be tested as of the time the contract was entered into; if the clause was fair at that time, the plaintiffs could not seek judicial relief from a bargain later determined to be unfair.\textsuperscript{126} Moreover, in this case the escalation clause was not hidden from the plaintiffs. The argument of *Henningsen*\textsuperscript{127} based on finding an adhesion contract or unconscionability did not apply in the *Bennett* situation, because as the court pointed out, if "a buyer is free to engage in comparative shopping a contract will not be held unconscionable on the grounds of price alone."\textsuperscript{128}

Similarly, the court quickly disposed of the plaintiffs' contention that it was unconscionable for their property to be subject to a lien. "It is so well known as to require no citation of authority that liens may be placed on land to secure payment of a debt."\textsuperscript{129}

In the case of *Cohen v. Commodore Plaza at Century 21 Condominium Association*,\textsuperscript{130} which had been remanded by the District Court of Appeal, Third District,\textsuperscript{131} for further findings on the issue of unconscionability, the lower court upheld a ninety-nine

\textsuperscript{121} \textit{Id.} Plaintiffs also based their claim of substantive unconscionability on two other theories: "the onerous and oppressive effect of the escalator clause contained in the leases; and the unconscionability of having their property subject to a lien." \textit{Id.}
\textsuperscript{122} \textit{Id.} at 698.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} Judge Gonzalez stressed that the plaintiffs failed to introduce evidence of what similar facilities charged. Instead, the plaintiffs "simply compare the total value of the rents being paid to the value of the property being used." \textit{Id.}
\textsuperscript{125} \textit{Id.} at 699.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} 32 N.J. 358, 161 A.2d 69 (1960); see notes 73-76 and accompanying text supra.
\textsuperscript{128} 466 F. Supp. at 699-700.
\textsuperscript{129} \textit{Id.} at 700.
\textsuperscript{130} No. 73-6939 (Fla. 11th Cir. Ct. March 30, 1979).
\textsuperscript{131} 350 So. 2d 502 (Fla. 3d DCA 1977), cert. denied, 362 So. 2d 1051 (Fla. 1978).
year condominium recreation lease by applying the Bennett\textsuperscript{133} analysis.\textsuperscript{138} In Commodore Plaza, the lessor sued the condominium association for the recovery of recreation lease payments.\textsuperscript{134} The condominium association responded that the ninety-nine year lease was entered into at a time when the developer, condominium association, and unit owners were all the same; therefore, there was no arm's length bargaining. The association also argued that the information given to the unit owners was incomplete and insufficient, and that there was an unreasonable relationship between the value of the property and the profit return to the lessors.\textsuperscript{135}

Finding that the unit owners had full knowledge of both the ninety-nine year recreation lease and the escalation clause at the time of contracting, the court held that if the lease was fair when entered into, subsequent events could not make it unfair.\textsuperscript{136} The court then adopted, almost verbatim, the unconscionability analysis of Bennett.\textsuperscript{137} The condominium association "failed to carry its burden to show any matters which would establish any fraud, unfair surprise, oppression, or inability for any unit owner to have determined the existence and legal ramifications of the 99 year lease and the escalation clause therein."\textsuperscript{138} Moreover, the court noted that the parties had stipulated that the ninety-nine year lease and the escalation clause were not hidden from the unit purchasers.\textsuperscript{139}

**B. Statutory Presumption of Unconscionability of Certain Leases**

On July 1, 1977, section 718.122 of the Florida Statutes, a provision directed at long-term recreation leases, became effective. Section 718.122, however, merely creates a rebuttable presumption of unconscionability and not a cause of action.

It is the intent of the Legislature that this section is remedial and does not create any new cause of action to invalidate any condominium lease, but shall operate as a statutory pre-

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\textsuperscript{132} Bennett v. Behring Corp., 466 F. Supp. 689 (S.D. Fla. 1979); see notes 108-29 and accompanying text supra.

\textsuperscript{133} No. 73-6939, slip op. at 2-6.

\textsuperscript{134} Id. at 1.

\textsuperscript{135} Id. at 2.

\textsuperscript{136} Id.

\textsuperscript{137} See id. at 2-6.

\textsuperscript{138} Id. at 4-5.

\textsuperscript{139} Id. at 7.
scription on procedural matters in actions brought on one or more causes of action existing at the time of the execution of such lease.140

Section 718.122 acknowledges that many recreation leases were entered into by parties representing the interests of the developer at a time when the unit owners were not in control of the condominium.141 Thus, “[s]uch leases often contain numerous obligations on the part of either . . . a condominium association [or] condominium unit owners [or both,] with relatively few obligations on the part of the lessor.”142

Simply put, section 718.122 sets out certain elements which, if all are met, presumptively make the recreation lease unconscionable.143 The statutory elements of unconscionability incorporate some of the complaints generally asserted by plaintiffs who chal-

141. Id.
142. Id.
143. Id. § 718.122(1) provides:
   (1) A lease pertaining to use by condominium unit owners of recreational or other common facilities, irrespective of the date on which such lease was entered into, is presumptively unconscionable if all of the following elements exist:
      (a) The lease was executed by persons none of whom at the time of the execution of the lease were elected by condominium unit owners, other than the developer, to represent their interests;
      (b) The lease requires either the condominium association or the condominium unit owners to pay real estate taxes on the subject real property;
      (c) The lease requires either the condominium association or the condominium unit owners to insure buildings or other facilities on the subject real property against fire or any other hazard;
      (d) The lease requires either the condominium association or the condominium unit owners to perform some or all maintenance obligations pertaining to the subject real property or facilities located upon the subject real property;
      (e) The lease requires either the condominium association or the condominium unit owners to pay rents to the lessor for a period of 21 years or more;
      (f) The lease provides that failure of the lessee to make payments of rents due under the lease either creates, establishes, or permits establishment of a lien upon individual condominium units of the condominium to secure claims for rent;
      (g) The lease requires an annual rental which exceeds 25 percent of the appraised value of the leased property as improved, provided that, for purposes of this paragraph, “annual rental” means the amount due during the first 12 months of the lease for all units, regardless of whether such units were in fact occupied or sold during that period, and “appraised value” means the appraised value placed upon the leased property the first tax year after the sale of a unit in the condominium;
      (h) The lease provides for a periodic rental increase based upon reference to a price index; and
      (i) The lease or other condominium documents require that every transferee of a condominium unit must assume obligations under the lease.
CONDOMINIUM RECREATION LEASES

lenge recreation leases. But four of the elements listed in section 718.122(1) are, in fact, required by the Condominium Act itself. Thus, the rebuttable presumption of unconscionability creates a "catch-22" situation: if one follows the guidelines of the Condominium Act in drafting a recreation lease, he is building a rebuttable presumption that such a lease is unconscionable.

For example, one element of the presumption of unconscionability is a lease executed by persons, none of whom were elected by non-developer unit owners to represent their interests. The mechanics of establishing a condominium under the Act, however, require that persons other than unit owners execute the recreation lease. Section 718.114 stipulates that such leases must be stated and fully described in the declaration of condominium. A condominium is not created until after a declaration of condominium is recorded in the public records of the county where the land is located. Accordingly, because a recreation lease must be recorded when the declaration of condominium is recorded, the lease is executed before the condominium entity exists, at a time when the developer is the only association member. A second element of the statutory presumption of unconscionability is satisfied if the lease requires rental payments for a period of twenty-one or more years. The Condominium Act, however, mandates that a recreation lease have an unexpired term of at least fifty years. A lease that permits the association to place a lien on individual condominium units because of the failure of the lessee to make lease rental payments gives rise to a third element of the unconscionability presumption. If the lessor is the condominium association, however, the Condominium Act expressly provides for such a lien

144. See notes 28-58 and accompanying text supra.
146. Id. § 718.114. The statute does provide that declaration may authorize the association to acquire leaseholds after execution of the declaration. Because the developer is usually the one executing the declaration, however, the alternative of allowing the association to purchase or lease recreation facilities after unit owners become association members is unlikely to be viable.
147. Id. § 718.104(2).
148. Id. § 718.122(1)(e).
149. Id. § 718.401 provides:

A condominium may be created on lands held by a developer under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years . . .

150. Id. § 718.122(1)(f).
on each condominium parcel for unpaid assessments.\footnote{151}

A fourth element of unconscionability appears when the lease or another condominium document requires that every transferee of a condominium unit assume obligations under the lease.\footnote{152} This element, too, is required under the Condominium Act. Section 718.116(2) provides that the liability for assessments, such as recreation lease rentals, cannot be avoided by waiver of the use or enjoyment of any of the common elements.\footnote{153} Section 718.107(1) also provides that the undivided share of the common elements appurtenant to a unit cannot be separated from it and must pass with title to the unit.\footnote{154}

Whether required by other sections of the Act or inspired by the developer, \textit{all} the elements are necessary to raise a presumption of unconscionability.\footnote{155} Nonetheless, the presumption may be rebutted by a lessor upon the showing of additional facts and circumstances to justify and confirm what otherwise appears unconscionable.\footnote{156} In \textit{Urbanek v. Kandell}\footnote{157} the presumption of unconscionability of section 718.122 was rebutted when owners of a recreation lease and recreational facilities sued to enforce the payment of monies due under the lease. The condominium association defended the action by asserting that the lease was unconscionable and unenforceable.\footnote{158} Defendants introduced evidence to prove the existence of the factors giving rise to a rebuttable presumption of unconscionability under section 718.122(1).\footnote{159} The court, in concluding that the presumption of unconscionability had been rebutted, made the following findings:

\footnote{151} Id. § 718.116(4)(a); see note 25 and accompanying text \textit{supra}.\footnote{152} Id. § 718.122(1)(i).\footnote{153} Id. § 718.116(2).\footnote{154} Id. § 718.107(1).\footnote{155} Id. § 718.122(1).\footnote{156} Id. § 718.122(2). The Attorney General of Florida initiated rule-making proceedings regarding unconscionable service contracts under the Little FTC Act. \textit{See Unconscionable Recreation Service Contracts; Rule No. 2-25, Fla. Admin. Weekly, May 27, 1977, at 2. Proposed chapter 2-25 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." Proposed Rule 2-25.03, Department of Legal Affairs, State of Florida. On November 1, 1977, a partial final order was entered by the Director of the Division of Administrative Hearings, sitting as hearing examiner. Such order stated that should the unconscionability rules be made effective, they could only be applied prospectively since retroactive application would violate the constitutional prohibition against impairment of contracts.\footnote{157} No. 75-542-CA (Fla. 19th Cir. Ct. Aug. 26, 1977).\footnote{158} Id., slip op. at 3.\footnote{159} Id. at 4.
(a) No evidence was adduced at trial raising any question that there was a lack of knowledge of the obligation to pay rent on the recreation lease.

(b) There was no evidence of any fraud or misrepresentation perpetrated on the Condominium Association at the time the lease was executed.

(c) The document contains no fine print, was presented in ordinary type style, is easily readable, and is not difficult for the average person to understand.

(d) The Lease was relatively standard in form and content as those in use at the time of its execution and none of the provisions thereof violated the law as it existed at the time of its execution.

(f) The Court believes that the facilities are somewhat plush and are a fair value for the rents charged when compared to the prevailing community standards for like facilities in existence at the time of the execution of the lease.

(g) That at the time of the sales of condominium units there were other projects available in the South Florida area both with and without recreational leases and that the same were available.

(h) That the required disclosures were made in accordance with the Condominium Act in effect at the time the condominium units were sold.

The court in Urbanek also noted that notwithstanding section 718.122, the doctrine of unconscionability rests on equitable considerations solely within the province of the court. The court did not limit its determination of unconscionability to the elements delineated in the presumption statute, but examined the facts and circumstances surrounding the transaction itself. The court looked to the language in the recreation lease and the declaration, the general business practices in effect when the documents were created, the average intelligence, economic status, and bargaining power of the parties to the contract, and the applicable statutes in effect at the time the documents were signed.

Moreover, the court stated that section 718.122, running

afoul of State constitutional standards of substantive due process [and] prohibitions against impairment of contractual obligations, constitutes an impermissible incursion by a politically
motivated legislature into the judicial province of the Court, and may constitute the adoption of a prohibited "rule of practice and procedure" in violation of the province of the Supreme Court under Article V of the Florida Constitution... the elements set forth [in section 718.122] do not bear a reasonable relationship to the doctrine of unconscionability as exists in this State.\textsuperscript{163}

C. \textit{Old Recreation Leases and New Statutory Provisions}

As pointed out in \textit{Urbanek}, when examining a recreation lease for unconscionability, a court must view a lease in light of the statutes in effect and the circumstances existing at the time the parties entered into it.\textsuperscript{164} This principle has been recognized in the majority of cases dealing with unconscionability of contracts.\textsuperscript{165} While the great majority of recreation leases became effective in the period from 1965 to 1971,\textsuperscript{166} the amendments to the Condominium Act concerning unconscionability did not become law until 1974 and thereafter. Thus, these provisions become relevant only for leases entered into after 1973.

Effective October 1, 1974, the Condominium Act stipulates that before a developer can offer to sell units in a condominium containing more than twenty residential units, he must prepare a prospectus or offering circular.\textsuperscript{167} This prospectus must give fuller disclosure before sale than the previous statute required.\textsuperscript{168} The circular must describe the recreation facility, the lease term and price, and the option to buy, if one is included.\textsuperscript{169} Additionally, the front cover or first page of the prospectus must contain the following statements in bold type:

1. This prospectus (offering circular) contains important mat-

\begin{itemize}
\item \textsuperscript{163} Id. at 5. For a discussion of the supreme court's rulemaking power, see Kramer, Halpern \& Robbins, \textit{Constitutional Law, 1979 Developments in Florida Law}, 34 U. MIAMI L. Rev. 597, 602-08 (1980).
\item \textsuperscript{164} \textit{Urbanek}, slip op. at 5.
\item \textsuperscript{165} See, \textit{e.g.}, Bennett v. Behring Corp., 466 F. Supp. 689, 698 (S.D. Fla. 1979); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).
\item \textsuperscript{166} Lewis \& Zenz, supra note 12, at 21
\item \textsuperscript{167} FLA. STAT. § 711.69 (1974) (current version at §§ 718.503, .504 (1979)).
\item \textsuperscript{168} FLA. STAT. § 711.24 (1973).
\item \textsuperscript{169} Id. § 711.69 (1974) (current version at §§ 718.503, .504 (1979)). If there is a recreation lease, the following statement is to appear in conspicuous type: THERE IS A RECREATION FACILITIES LEASE ASSOCIATED WITH THIS CONDOMINIUM. If the unit owner must pay a fee under such a lease, that fact must also appear in conspicuous type in a form set forth in the statute, as must any lien right which the lessor has against each unit to secure such payment.
\end{itemize}
ters to be considered in acquiring a condominium unit.

2. The statements contained herein are only summary in nature. A prospective purchaser should refer to all references, all exhibits hereto, the contract documents, and sales materials.

3. Oral representations cannot be relied upon as correctly stating the representations of the developer. Refer to this prospectus (offering circular) and its exhibits for correct representations.\(^{170}\)

The next page of the prospectus must contain all statements required to be in conspicuous type, including whether, as a condition of ownership, the unit owners are required to be lessees, whether rent is charged, and whether a lien right is permitted against each unit to secure payment of rent. The prospectus also must indicate whether there is to be a management contract for the condominium, whether the developer has the right to retain control of the association after a majority of the units have been sold, and whether the sale, lease, or transfer of units is restricted or controlled.\(^{171}\) Section 711.66(5)(e), also effective in 1974, requires that any lease made by an association prior to assumption of control by unit owners must be fair and reasonable.\(^{172}\)

In 1977, the legislature provided the unit owner with two methods of release from an unconscionable recreation lease: section 718.122,\(^{173}\) which creates the rebuttable presumption of unconscionability, and section 718.401(6)(a), which provides unit owners with an option to purchase the recreation lease on any anniversary date after the tenth year of the lease.\(^{174}\)

The Condominium Acts that have become effective since 1974 have served to protect unit owners in a way that the old assumption in sales, "caveat emptor," never did. Not only do the statutes treat the unit owner as a layman, requiring full disclosure in a prospectus or offering circular before sale, but they are written to insure fairness in leases that are entered into by parties with unequal bargaining power. Furthermore, in recent acts, the legislature has addressed the possible unfairness of recreation leases by requiring

\(^{170}\) Id. § 718.504(1)(b).

\(^{171}\) Id. "If a developer, in good faith, has attempted to comply with the requirements of this part, and if, in fact, he has substantially complied with the disclosure requirement of this chapter, nonmaterial errors or omissions in the disclosure materials shall not be actionable." Id. § 718.505 (1979).

\(^{172}\) Id. § 711.66(5)(e) (1974); see note 45 and accompanying text supra.

\(^{173}\) Id. § 718.122 (1979); see notes 140-44 and accompanying text supra.

\(^{174}\) Id. § 718.401(6)(a). The price of the buy-out is to be determined by agreement of the parties. If there is no agreement as to price, the price shall be determined by arbitration.
conspicuous disclosure if the purchase includes such a lease, and by creating new remedies for unit owners.

IV. COMMONLY HELD MISCONCEPTIONS ABOUT RECREATION LEASES

As previously pointed out, recreation leases have often been looked on with disfavor by the Florida community. Because many misconceptions have developed concerning such leases, the Florida Division of Land Sales and Condominiums commissioned a study\(^\text{175}\) to be done on the recreation lease in Florida. Authors John Lewis and Gary Zenz made numerous findings in their study that help to dispel many of the untruths associated with the recreation lease. Much of their analysis is helpful to prove that recreation leases are not generally unconscionable.

The first of these myths is that recreation leases do not lower the front end cost of the condominium unit. Evidence indicates that the use of the lease does lower the cost of the condominium unit by approximately thirteen percent. Developers can charge a lower initial amount for the units by deferring to later years their foregone profits in the form of lease payments.\(^\text{176}\) Thus, from the consumer's viewpoint, the lease enables the unit purchaser to invest less initially and still obtain the recreational amenities appurtenant to his unit by paying a monthly rental. The recreation lease may be viewed as a financing device similar to a second mortgage, allowing the consumer to spread over time the cost of his recreation facilities,\(^\text{177}\) while allowing the developer a continuing income.\(^\text{178}\)

As pointed out earlier, the purchaser of a lease with an escalation clause tied to a Consumer Price Index may not have foreseen the near doubling of his monthly lease rental.\(^\text{179}\) An indexed escalation clause, however, is intended to act as an inflation hedge for

\(^{175}\) Lewis & Zenz, supra note 12.

\(^{176}\) Id. at 29. For example, Plaza Del Prado in North Miami Beach, a 624-unit condominium, reported gross sales of $22,406,289; however, the net profit before federal income tax totalled $1,148,349, or 5.12%. This profit of approximately 5% must be compared with the norm of 20% that is usually made on such a project. The Plaza Del Prado project also involved a 99-year recreational lease with payments of $224,640 per year which enabled the developers to keep the front end unit costs to 5.12%. See note 187 and accompanying text infra.

\(^{177}\) Id. at 11.

\(^{178}\) Id. at 17-18.

\(^{179}\) See note 19 and accompanying text supra.
the developer, who must wait for his deferred profit.180 Such a result may not be unjustified if it is understood that the developer could have demanded his total profit up front by charging higher unit prices.

A second commonly held misconception about the recreation lease is that escalation clauses are unique to the condominium recreation lease situation. Escalation clauses have traditionally been used in the real estate field whenever long-term leases were involved. Most leases of nonresidential space include provisions for the escalation of rent. These clauses distribute the liability for escalation of costs among all the tenants of a building or a shipping center, who usually share the liability on a pro rata basis according to the amount of space they are leasing.181

Escalation clauses tied to cost-of-living indexes are often used in commercial and ground leases.182 Increases both in a landlord's operating expenses and in real estate taxes may be factors in rent escalation, in addition to the increase in cost of living. It is not uncommon for commercial leases to require the lessee to pay maintenance and insurance expenses, which act as a "tax stop" and have the effect of shielding the lessor from property tax increases.183

A third myth regarding recreation leases is that consumers prefer not to be bound by such a lease. Evidence suggests that if given a choice, consumers will exercise the recreation lease option. For example, purchasers at Century Village West in Boca Raton and Century Village East in Deerfield Beach, were given the option of executing a recreation lease or forfeiting the right to use the recreation facilities. Of the 6,000 units sold with this option, not one purchaser chose to avoid the recreation lease.184 In fact, the recreation lease is readily acceptable to Florida unit owners, many of whom buy condominiums in Florida to have a second home for

181. Id. at 28.
182. Id. at 28. See also 1 M. Friedman, Friedman on Leases 83-99 (1974). For an example of a commercial lease with an escalation clause, see Pittsburgh Allied Fabricators, Inc. v. Haber, 440 Pa. 545, 271 A.2d 217 (1970).
183. Lewis & Zenz, supra note 12, at 28.
184. Id. at 30. At the Highpoint of Delray Beach, unit purchasers of approximately 1400 units were given the option of executing a recreation lease or paying a higher price for the unit and avoiding the lease. The higher price was $1,800 for the one-bedroom unit and $2,400 for the two-bedroom unit. The recreation lease was a 99-year net-net-net lease without an escalation provision. The annual lease rental for a one-bedroom unit was $180 and for a two-bedroom unit, $240. The developer indicated that less than 20% of all purchasers elected to pay the higher price and avoid the lease. Id.
vacations or to spend retirement years in a warm climate. Purchasers usually desire the resort recreation facilities provided for by the leases and appurtenant to their condominium units. Additionally, the clubhouse, which is often one of the recreation lease amenities, offers lessees a desirable social environment.\textsuperscript{185} Condominium recreation facilities are easily accessible and naturally limit the number of users to the unit owners and their guests. Instead of paying a membership fee to a private country club, the unit purchasers pay a monthly recreation lease fee.

Statistics show that only sixty percent of the condominiums in Florida have recreation leases. Whether comparable facilities are provided by the other forty percent of the condominiums is an important consideration. In evaluating a recreation lease, one must confront the possibility that on the open market there might not be similar facilities—that is, accessible facilities with a limited membership—available at a comparable cost.\textsuperscript{186}

Another of the misconceptions regarding the recreation lease is that the developer's profits are unconscionable. Before labelling the return on a recreation lease unconscionable, one must first determine what an unconscionable profit is, taking into account the risk involved in the venture and the profit to be made on the entire condominium project. The probable norm of profit realized on a condominium development is twenty percent. In determining the total profit from such a development accompanied by a recreation lease, one must look not only at the profit made on gross sales of the units, but also at the profit realized from the yearly payments on the recreation lease.\textsuperscript{187} For example, in the Plaza Del Prado Condominium project in North Miami Beach, the pre-tax profit on gross sales was approximately five percent. When the profits made on the recreation lease were added to that figure, the developer realized a fifteen percent before-tax profit,\textsuperscript{188} well within the norm for such a project. To determine if this percentage is unconscionable, one must take into account that this project took four years to construct, that the developer had a personal endorsement liability on $16,500,000 in construction costs over this period, and that the developer must wait to receive a return on the investment in in-

\textsuperscript{185} See Rohan, Condominium Law and Practice (1979).
\textsuperscript{186} Lewis & Zenz, supra note 12, at 60.
\textsuperscript{187} Id. at 31.
\textsuperscript{188} Id. Profit from sales equaled $1,148,349, whereas profit from the lease valued $2,246,400. To determine the total profit realized from the projects the sum of these figures was divided by the gross sales of $22,406,289.
cremental rental payments. Clearly, all the facts in a particular case must be considered in determining whether profits made on a condominium development with a recreation lease are unconscionable.\footnote{189}

The last major misconception about recreation leases is the likelihood that foreclosures will result when unit owners fail to pay their monthly rental, or other assessments due for the use, maintenance, upkeep or repair of the recreational facilities.\footnote{190} The \textit{HUD Condominium and Cooperative Housing Study} pointed out this threat in July 1975 when it predicted: “many foreclosures on individual units are possible in the next few years in Florida.”\footnote{191} To date, however, there has not been one case of foreclosure of a condominium unit in Florida for a unit owner’s failure to make timely lease payments.\footnote{192} Moreover, the harshness of foreclosure by the association is minimized, since the lien right must be conspicuously detailed in the lease itself and in the prospectus. Thus, the buyer has notice of the provision and has no justification for claiming either fraud or unfair surprise.

V. \textbf{The Status of the Recreation Lease and The Unconscionability Argument in 1979}

A. \textbf{Unconscionability and the Federal Condominium Act of 1979}

Presently, Congress has before it the Condominium Act of 1979.\footnote{193} The purpose of the proposed federal legislation is “to establish national standards for consumer protection and disclosure together with appropriate enforcement procedures . . . and to correct and prevent . . . [the] abusive use of long-term leasing of recreation and other condominium-related facilities.”\footnote{194}

Section 210 of the Senate version\footnote{195} of the Condominium Act concerns civil actions for unconscionable leases. This section permits unit owners, by a vote of not less than two-thirds of the units

\begin{itemize}
  \item \footnote{189} \textit{Id.}
  \item \footnote{190} See note 25 and accompanying text \textit{supra}.
  \item \footnote{191} \textit{UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, CONDOMINIUM AND COOPERATIVE HOUSING STUDY} at V-18 to -19 (1975).
  \item \footnote{192} Lewis & Zenz, \textit{supra} note 12, at 32.
  \item \footnote{193} S. 612, 96th Cong., 1st Sess. (1979); H.R. 2792, 96th Cong., 2d Sess. (1979). The bills pending in both the Senate and House of Representatives are companion bills. For purposes of simplicity, the discussion will refer only to S. 612.
  \item \footnote{194} S. 612, 96th Cong., 1st Sess., 125 CONG. REC. 2515 (1979).
  \item \footnote{195} \textit{Id.}
\end{itemize}
other than units owned by the developer, to seek a judicial deter-
mination that a lease or any portion of a lease is unconscionable, if
the lease has the following attributes:

(1) it was made in connection with a condominium project,
and
(2) it was entered into while the owners association is con-
trolled by the developer through special developer control or be-
cause the developer holds a majority of the votes in the owners
association; and
(3) it had to be accepted or ratified by purchasers or
through the unit owners association as a condition of purchase
of a unit in the condominium project.¹⁹⁶

Moreover, if the above three characteristics are established and the
lease

(1) is for a period of more than twenty-one years or is for a
period of less than twenty-one years but contains automatic re-
newal provisions for a period of more than twenty-one years;
and
(2) contains an automatic rent increase clause or creates a
lien subjecting any unit to foreclosure for failure to make pay-
ments; and
(3) contains provisions requiring the lessees to assume all or
substantially all obligations and liabilities associated with main-
tenance and use of the leased property;

then the court will consider the lease to be unconscionable, unless
otherwise proven by clear and convincing evidence under the stan-
dards in subsection (b).¹⁹⁷

Subsection (b) provides that in making its determination of
unconscionability, the court shall consider:

(1) any gross disparity between the obligation incurred and
the value of the benefit derived by the lessees, including consid-
eration of (i) the obligations to pay rent, taxes, and insurance,
and to maintain, repair, and replace the property, (ii) the value
of the leased property, (iii) the price at which comparable prop-
erty could have been acquired, and (iv) the lessor's rate of re-
turn on investment . . . ;
(2) the unequal bargaining position of the parties to the
lease;
(3) the adequacy of disclosure of the existence and terms of

¹⁹⁶. Id. § 210(a).
¹⁹⁷. Id. § 210(c).
the lease to purchasers and the ability of purchasers to comprehend their rights and obligations thereunder;

(4) the identity of interest, if any, of original parties to the lease; and

(5) subsequent ratification of amendment to the lease, agreed to by a majority of the unit owners other than the developer or an affiliate . . . .

Additionally, section 210 provides that escalation clauses as to future rental increases are unenforceable in a lease having all the following characteristics:

(1) it contains provisions requiring the lessees to assume all or substantially all obligations and liabilities associated with maintenance and use of leased property; and

(2) it was entered into while the owners association is controlled by the developer through special developer control or because the developer holds a majority of votes in the owners association; and

(3) it had to be accepted or ratified by purchasers or through the unit owners association as a condition of purchase of a unit in the condominium project.

This provision applies to future increases in rental occurring after the effective date of the Act.

While both the House of Representatives and the Senate have held hearings on the proposed Federal Condominium Act, the bill has not come out of committee. A comparison of section 210 to the unconscionability discussion in this article reveals many analytical conflicts. It is unclear whether the proposed federal Act goes beyond the provisions of the Florida Condominium Act for a rebuttable presumption of unconscionability. The federal Act provides that the court shall consider the factors in subsection 210(c) and "shall consider the lease to be unconscionable, unless proven otherwise by clear and convincing evidence." Significantly, the federal Act allows the court to make such a declaration of unconscionability before it has examined the bargaining power of the

198. Id. § 210(b).
199. Id. § 210(f).
200. Id. § 210(g).
201. H.R. 2792 was referred to the House Banking, Finance and Urban Affairs Committee, Subcommittee on Housing and Community Development. That subcommittee held hearings on the proposed act on March 26-30, 1979.
parties, the disclosure documents, the ability of the purchaser to engage in comparative shopping for a condominium without a lease, and the monthly rental in comparison to the prevailing community standards for like facilities. Through such provisions, the legislative branch is stepping into judicial territory, as suggested by the Urbanek court, since the Act does not permit the court to apply equitable considerations to the doctrine of unconscionability. Moreover, by prohibiting future increases in rental payments under current leases which have escalation clauses, Congress leaves the way open for an argument grounded on the impairment of contractual obligations, as discussed in Fleeman.

B. The Recreation Lease Buy-Out

One method by which an undesirable recreation lease can be terminated is through a buy-out, a contractual arrangement whereby a condominium association or the individual unit owners purchase the recreation facilities comprised in the recreation lease from the developer or third-party lessor. Thus, a buy-out will terminate the rent provision of the lease, which in turn will negate the application of any cost-of-living escalation clause associated with it. As a result, unit owners will be able to set the amount of their monthly recreational maintenance fees. From 1970 to 1979, over one hundred buy-outs took place in Florida. It is apparent, then, that the buy-out has proven to be a popular means of resolving recreation lease controversies.

A major problem with the buy-out, however, is the determination of an agreeable buy-out price or valuation. Lessees typically view the lease as consisting of the tangible amenities that comprise the recreation facilities. Thus, they argue that the valuation should be the replacement cost of the facilities, less depreciation. On the other hand, the recreation lease represents to the developer a valuable leased fee with the present value of a future income stream for the entire term of the lease. The right to that future income, not the underlying amenities, is of paramount importance.

203. See notes 166-63 and accompanying text supra.
204. See notes 39-42 and accompanying text supra.
205. Lewis & Zenz, supra note 12, at 84.
206. Id. at 114.
207. Id. at 89. Under the replacement cost approach, the cost of reproducing the amenities making up the recreational lease package is added to the value of the underlying land. This valuation, however, merely represents the current fair market value of the reversionary interest, which is only a part of the total recreational lease value. Id. at 119.
to the lessor. 208

Accordingly, the valuation approaches taken by the lessee and lessor produce greatly different results. The replacement-cost approach of the lessee fails to take into account the present value of the lessor's right to future rental payments. 209 The traditional method of valuation is that of multiplying the annual rental times ten. This capitalized figure, however, is generally not satisfactory to the developer. 210

VI. Conclusion

Whether recreation leases are virtuous or unsavory is not at issue in this article. Rather, the authors have examined the applicability of unconscionability theory and the various misconceptions surrounding condominium recreation leases. Although myths regarding the undesirability of recreation leases are widespread in Florida, it has never been alleged that an owner has been unable to resell a unit because of the recreation lease. Indeed, condominiums with recreation leases are selling in some cases for twice their original purchase price. One may reach a realistic perspective on the recreation lease by evaluating the circumstances surrounding the particular lease as well as the general trend of condominium development in Florida.

The realities of recreation leases simply do not fit into the dual requirements of unconscionability analysis developed in such cases as Walker-Thomas 211—absence of meaningful choice together with contract terms unreasonably favorable to the other party. 213 As to the first requirement, the purchaser does have a choice: he may purchase a condominium with a recreation lease or choose from the forty percent of Florida condominiums sold with no recreation lease. 213 As to the second requirement of unconscionability, it is difficult to argue that the recreation lease contains

208. Id. at 88-89. The income approach takes into consideration the present value of future rental payments and the reversionary value at the end of the lease. Id. at 122.
209. Id. at 117-19.
210. Id. at 121-22. John R. Lewis and Gary J. Zenz of Florida State University suggest in their study of condominium recreation leases that the “income approach” is the most accurate method of valuation. Their income approach model takes into account the value of the leased land and the reversion. The value of the land is the present value of the net income stream from the rents. The reversion is the net cash proceeds to the seller from disposing of the underlying fee, i.e., the land and facilities.
211. 350 F.2d at 445; see notes 61-64 and accompanying text supra.
212. See notes 65-97 and accompanying text supra.
213. Lewis & Zenz, supra note 12.
grossly excessive price terms that unreasonably favor the developer.\textsuperscript{214} Seen from the consumer-lessee's point of view, the lease is a substitute for a costly short-term investment for recreation facilities.\textsuperscript{215} This concept must be balanced against the developer-lessee's view of the lease as a valuable leased fee with the present value of a future income stream for the entire term of the lease.\textsuperscript{216}

Florida case law requires that in addition to grossly excessive price terms, some elements of fraud, overreaching, or unequal bargaining position must be present before a contract can be overturned.\textsuperscript{217} Moreover, a purchaser cannot argue that he was unaware of the recreation lease term when he purchased the condominium. Purchasers have been placed on constructive notice of the recreation lease by the requirement that it be filed in the public records of the appropriate county.\textsuperscript{218} Additionally, since 1974, the Condominium Act has required the offering circular to disclose, in boldface type, the presence and terms of the recreation lease.\textsuperscript{219}

Unconscionability arguments have been most effective in situations involving consumer transactions in which the buyers are poor, have little education, and either do not bother to read the contract or are not able to understand it. Purchasers of condominium units are different. Many come from business-oriented backgrounds and have the funds to invest in a Florida condominium. Such purchasers, when given a choice, overwhelmingly prefer a Florida condominium with appurtenant recreation facilities.\textsuperscript{220}

\textsuperscript{214} See notes 69 & 185 and accompanying text supra.
\textsuperscript{215} See note 176 and accompanying text supra.
\textsuperscript{216} See notes 175 & 177 and accompanying text supra.
\textsuperscript{217} See notes 83-86 and accompanying text supra.
\textsuperscript{218} See note 147 and accompanying text supra.
\textsuperscript{219} See notes 168-70 and accompanying text supra.
\textsuperscript{220} See note 183 and accompanying text supra.