Nova Law Review

Volume 18, *Issue* 1 1993 *Article* 12

Condominium, Cooperative and Homeowner's Association Law

Paul L. Wean*

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Condominium, Cooperative and Homeowner Association Law: 1993 Leading Cases and Significant Developments in Florida Law

Paul L. Wean*

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* J.D., Western New England College, School of Law, 1978; B.A., Boston University, College of Liberal Arts, 1974; Senior Associate and Managing Attorney of Becker & Poliakoff, P.A.'s Central Florida Regional Offices.

I. INTRODUCTION

In 1991 and 1992, the Florida Legislature enacted over 130 pages of amendments to the Florida Condominium Act[1] and made comparable changes to the Florida Cooperative Act.[2] In 1992, the Florida Legislature also enacted a short addition to the Florida "Corporations Not for Profit" Statute[3] which for the first time provided a regulatory framework, albeit of limited applicability, for so-called homeowner associations.

Because of the difficulty of assimilating the sheer volume of these changes and perhaps in part, out of sheer exhaustion, the 1993 Florida Legislature made no further direct changes to either the Condominium Act or the Cooperative Act. It also failed to adopt proposals by various groups to correct technical errors in the fledgling Homeowners Association Act.[4]

While the 1993 legislative session did make significant changes to other related substantive areas affecting the operation of all types of community associations, the main developments in community association law during 1993 occurred in the administrative and judicial forums. These changes perpetuate the turbulence and confusion that surrounds common ownership and common use communities in Florida.

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1. *Compare* FLA. STAT. §§ 718.101-718.622 (Supp. 1990) *with* ch. 91-103, 1991 Fla. Laws 772 (containing more than 90 pages of text relating to condominiums).

2. *Compare* FLA. STAT. §§ 719.101-719.622 (Supp. 1990) *with* Ch. 92-49, 1992 Fla. Laws (containing more than 60 pages of new additions to the Florida Cooperative Act, most of them mirroring the new condominium provisions).

3. FLA. STAT. §§ 617.101-617.2101 (1991).

4. *See* FLA. STAT. §§ 617.301-617.306 (Supp. 1992). *See, e.g.*, H.B. 1351 (1993), created by The Florida Bar and supported by several other groups, including Florida Legislative Alliance, an arm of the Community Association Institute.

II. SIGNIFICANT LEGISLATIVE ACTION AND INACTION

A. *Timeshare and Interval Ownership*

One area of legislative activity in 1993 was passage of substantial additions to an already complicated Florida Vacation and Time-Share Act.[5] The changes introduce new concepts into the Act and provide greater protection for unwary consumers while giving developers, associations, and managers needed flexibility in such areas as promotions, exchange programs, and amenities.[6] For example, section 721.03 of the Florida Statutes was amended to give the Act effect outside the state of Florida when time-share interests are offered for sale outside the state.[7] However, as long as specified disclosures are made, the Act does not apply to sales offerings made outside the United States.[8] Additionally, the Act does not apply when the total financial obligations of a purchaser will not exceed $1,000 during the life of the plan.[9]

The Act now defines an "incidental benefit"[10] and excludes such benefits from most regulations in the Act.[11] This allows developers and other sellers to offer perks, such as free use of the facilities on a one-time basis, as sales tools without having such usage regulated as part of the time-share estate. The definitions of both "developer" and "seller" have been changed to exclude parties dealing in blocks of eight or more time-share periods.[12] The Act further requires developers to structure the allocation of common expenses so that all interests, including those retained by the developer, pay a proportionate share and allow collection of an administrative late fee on delinquent assessments.[13]

The Legislature also enacted an adjunct to the Florida Vacation and Time-Share Act called the Florida Vacation Club Act.[14] This new Act

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5. *See* Ch. 93-58, 1993 Fla. Laws 345.

6. *Id.* § 1, 1993 Fla. Laws at 345 (amending FLA. STAT. § 721.03(6) (1991)); *id.* § 7, 1993 Fla. Laws at 357 (amending FLA. STAT. § 721.11(5)(a) (1991)).

7. Ch. 93-58, § 1, 1993 Fla. Laws 345 (amending FLA. STAT. § 721.03(6) (1991)). *See also id.* § 7, 1993 Fla. Laws at 357 (amending FLA. STAT. § 721.11(5)(a) (1991)).

8. Ch. 93-58, § 1, 1993 Fla. Laws 345 (to be codified at FLA. STAT. § 721.03(8)).

9. *Id.* (to be codified at FLA. STAT. § 721.03(9)).

10. *Id.* § 2, 1993 Fla. Laws at 346 (to be codified at FLA. STAT. § 721.05(17)).

11. *Id.*

12. *Id.* (amending FLA. STAT. § 721.05(9)(c) (1991)); Ch. 93-58, § 2, 1993 Fla. Laws 197 (amending FLA. STAT. 721.05(23) (1991), to be codified at FLA. STAT. § 721.05(26)).

13. Ch. 93-58, § 9, 1993 Fla. Laws at 358 (amending FLA. STAT. § 721.15 (1991)).

14. *Id.* § 12, 1993 Fla. Laws at 360 (creating FLA. STAT. §§ 721.50-721.58).

regulates exchange programs and other multiple site time-share plans and sets forth required disclosures and provisions governing the operation and management of reservations systems.[15]

B. *Other Significant Actions*

1. Removal of Applicability of Chapter 607

In a deceptively simple but obscure move, the Legislature also amended section 617.1908 of the Florida Statutes.[16] This short provision changes established law by preventing the provisions of chapter 607, the Florida Business Corporations Act,[17] from supplementing those of chapter 617, the Corporations Not for Profit Statute.[18] In the past, a practitioner looked to chapter 607 to supply the rule of law in the frequent instances when chapter 617 was silent. This change may leave homeowner associations in doubt as to many issues; it certainly creates confusion in condominiums and cooperatives. In fact, the Florida Condominium Act continues to provide: "The powers and duties of the association include those set forth in this section and, except as expressly limited or restricted *in this chapter*, those set forth in the declaration and bylaws and chapters 607 and 617, as applicable."[19] The extent to which chapter 607 continues to apply, if at all, to condominiums and cooperatives remains unclear.

2. Modifications to Lien Foreclosure Procedures

The Legislature also made substantial changes to the method by which mortgage foreclosures are conducted in Florida.[20] Because section

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15. *Id.*

16. Ch. 93-281, § 76, 1993 Fla. Laws 2670 (amending FLA. STAT. § 617.1908 (1991)). The provision in its entirety now reads: "The provisions of chapter 607, the Florida Business Corporation Act, shall not apply to any corporations not for profit." *Id.* This section was enacted as part of a large package of amendments that included many new sections to fill in the gaps left by removal of chapter 607. Only time will tell how many unanticipated gaps remain.

17. FLA. STAT. §§ 607.0101-607.1907 (1991 & Supp. 1992).

18. *Id.* §§ 617.001-617.306.

19. FLA. STAT. § 718.111(2) (Supp. 1992) (emphasis added). In 1992, the Florida Legislature inserted an almost identical provision into the Florida Cooperative Act. *See id.* § 719.104(9).

20. *See* Ch. 93-88, 1993 Fla. Laws 294 (amending Chapter 697 (1991 & Supp. 1992)). Discussion of the substantive changes made by this enactment, however, is beyond the scope of this article.

718.116(6)(a) of the Condominium Act provides that liens for unpaid assessments are foreclosed "in the manner a mortgage of real property is foreclosed," these changes will also apply to lien foreclosures.[21]

C. *Significant Inaction—Failure to Approve "Glitch Bill"*

The main area of legislative inaction in 1993 was the failure to enact a so-called glitch bill, such as the one proposed by The Florida Bar Association.[22] This bill would correct technical errors and omissions in the operation of the homeowner association provisions that were engrafted into chapter 617 in 1992.[23]

III. SIGNIFICANT ADMINISTRATIVE ACTIONS

A. *Procedures of Electing, Removing, and Replacing Directors*

The Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division") is the primary administrative agency regulating both condominiums and cooperatives.[24] The 1993 Legislature transferred the Division to the newly consolidated Department of Business and Professional Regulation.[25] This resulted in a wholesale renumbering and relocation of

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21. *See* FLA. STAT. § 718.116(6)(a) (Supp. 1992). For cooperatives, section 719.108(5) provides that liens for unpaid rents and assessments are foreclosed "in like manner as a foreclosure of a mortgage on real property." FLA. STAT. § 719.108(5) (1991). The exact effect of these changes on homeowners' associations is unclear. Often the governing documents of such associations reference the provisions of the Construction Liens Statute, chapter 713, as governing lien foreclosures. FLA. STAT. §§ 713.01-713.3471 (1991 & Supp. 1992). Often there is no reference to any controlling law.

22. Fla. H.B. 1351 (1992).

23. FLA. STAT. §§ 617.301-617.306 (Supp. 1992). The confusing procedure for electing directors is the principle difficulty with section 617.301 to section 617.306. *See id.* Section 617.306(4) indicates that proxies may not be used to elect directors. *See id.* § 617.306(3). Instead, a separate ballot must be cast by the homeowner, either at the meeting or on an absentee basis. *See id.* However, the statute fails to prescribe a method for establishing the identity of all candidates in advance of the annual meeting. *See id.* §§ 617.301-617.306. Nor does it prohibit nomination of additional candidates from the floor at the annual meeting. FLA. STAT. §§ 617.301-617.306 (Supp. 1992). Thus, members voting by absentee ballot are not given any guarantee they are considering *all* candidates when voting. *Id.* §§ 617.301-617.306.

24. *See id.* §§ 718.501, 719.501.

25. Ch. 93-220, § 2(3), 1993 Fla. Laws 2312.

the Division's administrative regulations within the Florida Administrative Code.[26]

Starting in 1992 and continuing throughout 1993, the Division embarked on an ambitious campaign to rewrite and update existing administrative regulations and to add new, more detailed regulations covering heretofore unregulated areas.[27] New regulations effective on December 20, 1992, revised administrative rules adopted earlier in 1992 governing the complicated procedure for electing directors to condominium boards of administration.[28] Also effective at that time were new rules governing two separate procedures for recalling the same directors.[29] The election procedure contained in the rule supplements the statute[30] by delineating such matters as how, when, and by whom election ballots may be processed in advance of the election, and under what circumstances ballots must be disregarded.[31]

The two recall processes set out in the rules also supplement the statutory provisions[32] and address several likely scenarios, such as how to recall and replace a developer representative on the board when both unit owner and developer representatives are on the board.[33] There are two separate and distinct methods of recalling unit owner directors: first, by vote of the members at a recall meeting,[34] and second, by written joinder or agreement of the members without a meeting.[35] A comparative review of the two provisions leaves the clear impression that action by written agreement without a meeting is the least complicated procedure and is to be

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26. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 61B-23.001-23.0028 (1993) (changing chapter designation from 70 to 61B but retaining the same numbering).

27. *See, e.g., id.*

28. *See id.*

29. *Id.*

30. FLA. STAT. § 718.112(2)(d) (Supp. 1992).

31. FLA. ADMIN. CODE ANN. r. 61B-23.0021(10)(b) (1993). The rule provides for the following: (1) when all candidates are not listed on the official ballot; (2) when the exterior envelope (containing a smaller ballot envelope and the completed election ballot) is not signed by the "eligible" voter (for example, the voter may be specified on a voting certificate previously supplied to the association, if required by the governing documents of the association); and (3) when the inner ballot envelope is found to contain more than one ballot. *Id.* Although not stated in the rule, a ballot must also be disregarded if it contains more votes than the number of available seats. *Id.*

32. FLA. STAT. § 718.112(2)(k) (Supp. 1992).

33. FLA. ADMIN. CODE ANN. r. 61B-23.0026 (1993).

34. *Id.* r. 61B-23.0027.

35. *Id.* r. 61B-23.0028.

recommended. It also has the advantage of avoiding the need for a stormy and emotionally charged recall meeting.

The recall rules also distinguish instances when less than a majority of the unit owner board is recalled (in which case replacement directors are appointed by the remaining board members) from instances when all or a majority of the board is recalled (in which event a slate of replacement candidates is proposed and voted on by the members in an expedited fashion, without benefit of the double envelope procedures).[36]

B. *Evolving Arbitration Procedures*

On January 17, 1993, the Division also issued a set of rules governing arbitration of disputes arising from recalls.[37] These rules are separate and distinct from other extensive procedural rules adopted by the Division on April 1, 1992, to govern mandatory, non-binding arbitration of "disputes"[38] between unit owners and the association under the authority of section 718.1255 of the Florida Statutes.[39]

C. *Financial, Accounting, Budgeting, and Reserve Rules*

On July 11, 1993, the Division adopted a series of revised, relocated, and expanded financial rules.[40] These rules place greater emphasis on the proper operation and financial record-keeping of multiple condominiums and

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36. *Id.* r. 61B-23.0027, 61B-23.0028.

37. *See id.* r. 61B-50.101-61B-50.141. Although some of the provisions of this rule previously existed, the rule has been substantially rewritten with many new provisions.

38. Section 718.1255(1) defines "disputes" subject to arbitration as:

> (a) The authority of the board of directors, under any law or association document to:
>
> 1. Require any owner to take any action, or not to take any action, involving that owner's unit.
> 2. Alter or add to a common area or element.
>
> (b) The failure of a governing body, when required by law or an association document, to:
>
> 1. Properly conduct elections.
> 2. Give adequate notice of meetings or other actions.
> 3. Properly conduct meetings.
> 4. Allow inspection of books and records.

FLA. STAT. § 718.1255(1) (Supp. 1992).

39. FLA. ADMIN. CODE ANN. r. 61B-45.001-45.048 (1993). While these rules were originally adopted on April 1, 1992, they were amended on February 2, 1993.

40. *Id.* r. 61B-15.0001, 61B-17.006, 61B-18.005-18.006, 61B-22.001-22.0062, 61B-23.003-23.004 (1993).

the associations that operate them. Multiple condominiums are communities which are composed of more than one condominium, though they are all operated by a single corporate association.[41] The rules make it clear that accounting records must be separately kept for each condominium and each association.[42] Moreover, certain actions related to financial matters, such as waiving or reducing reserve funding, must be accomplished by a vote of each condominium for which separate reserves are kept.[43] The rules further require that separate records be kept for *each* "ancillary operation" conducted by a condominium association.[44] Such operations include rental programs, laundry facilities, vending machines, convenience markets, golf courses and the like.[45]

Another area of expanded regulation is reserve funding. The Condominium Act defines certain types of deferred maintenance and capital improvement accounts as so-called statutory reserves.[46] The rules continue to require that funds for each category of statutory reserve be the subject of separate financial records.[47] However, new rules expand upon the statutory definition of "reserves" by including all funds for deferred maintenance or capital improvements which are restricted as to use by *either* the Condominium Act, the associations' governing documents, or the associations' actual administrative practices.[48] This means that the stringent accounting requirements and budgetary disclosure requirements for reserves now apply to an expanded group of funds.[49] The same is true for reserve disclosures contained in annual financial reports.[50] Both the budget and the financial report must give certain reserve disclosures, now calculated as of the starting date of the budgetary period covered.[51] Rule 61B-22.001(4) of the Florida Administrative Code also creates a new category of funds that are not subject to the same stringent requirements governing other reserves.[52] This new category is termed "contingency reserves" and is, by definition, *not* a

41. *Id.* r. 61B-15.001 (1993).
42. *Id.* r. 61B-22.002(2)(a).
43. *Id.* r. 61B-22.0053(1).
44. FLA. ADMIN. CODE ANN. r. 61B-22.002(c) (1993).
45. *Id.*; *see, e.g., id.* r. 61B-22.001.
46. *See* FLA. STAT. § 718.112(2)(f) (Supp. 1992).
47. *Id.*
48. FLA. ADMIN. CODE ANN. r. 61B-22.001(4) (1993).
49. *See id.* r. 61B-22.002(1)(b); *see also id.* r. 61B-22.003(1)(e).
50. *See id.* r. 61B-22.006(3).
51. *Id.* r. 61B-22.003(1)(e), r. 61B-22.006(3)(a).
52. *See* FLA. ADMIN. CODE ANN. r. 61B-22.001(4) (1993).

reserve.[53] Any deferred maintenance or capital improvement funds that are *not restricted* as to use fall within this new category.[54] Such contingency funds are not subject to the reserve requirements otherwise imposed by the rules. Furthermore, the rules revise existing practices related to developer guarantees of assessments[55] and to turnover of control of the association from the developer to the owners.[56]

D. *Cooperatives Governed by Separate, Specific Rules*

The Division has also embarked on an attempt to codify the operation of cooperatives as well. In addition to administrative regulations promulgated by the Department of Legal Affairs,[57] the Division has started adopting cooperative rules comparable to the rules for condominiums.[58]

IV. SIGNIFICANT CASE LAW DEVELOPMENTS

A. *Determining Circuit and County Court Subject Matter Jurisdiction in Lien Foreclosure and Covenant Enforcement Matters*

The two cases decided during 1993 having the greatest daily impact on community associations and their attorneys are *Nachon Enterprises v. Alexdex Corp.*[59] and *Spradley v. Doe*.[60] These cases are the first to address the changes made in 1990 by the Florida Legislature to section 34.01 of the Florida Statutes.[61] That section grants county court judges equitable powers over all matters within the monetary limits of the county courts' jurisdiction.[62] The Legislature's failure to simultaneously amend existing section 26.012 of the Florida Statutes created a conflict between them because the latter recites that the circuit court jurisdiction in equity cases is "exclusive."[63] Neither the *Nachon* nor the *Spradley* court had

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53. *Id.* r. 61B-22.001(4).
54. *Id.*
55. *Id.* r. 61B-22.004.
56. *Id.* r. 61B-22.003.
57. *See* FLA. ADMIN. CODE ANN. r. 2-16.001-2-16.004 (1993).
58. *Id.* r. 61B-75.005-61B-75.008.
59. 615 So. 2d 245 (Fla. 3d Dist. Ct. App. 1993), *review granted*, ___ So. 2d ___ (Fla. 1993).
60. 612 So. 2d 722 (Fla. 1st Dist. Ct. App. 1993).
61. *See* FLA. STAT. § 34.01 (1991).
62. *Id.*
63. *Id.* § 26.012 (1991).

difficulty in determining that the Legislature's actions were effective to grant equitable powers to the county courts. The *Nachon* case, which involved the foreclosure of a small construction lien, determined that such actions did not involve "the title and boundaries of real property."[64] A contrary finding would have kept subject matter jurisdiction over lien foreclosures within the exclusive jurisdiction of the circuit courts.

Based on these decisions, most judicial circuits have issued administrative orders either transferring assessment lien foreclosure cases to county court or retaining them in circuit court. Attorneys and clients alike have been frustrated by time delays and redundancies caused by this caseload migration. Questions have also arisen over how to determine whether other matters sounding in equity, such as covenant enforcement matters, fall within the jurisdictional amount of the county court.[65]

B. *Applicability of Section 718.116(1)(A) to Existing Mortgages*

On the subject of liens, a continuing battle is being waged between first mortgagees and condominium associations over whether the 1992 amendments to section 718.116(1)(a) of the Florida Statutes apply to pre-existing mortgages.[66] Because the amounts in controversy are usually small, there have been no reported appellate decisions on the issue, though there are

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64. *Nachon*, 615 So. 2d at 247; *see also* FLA. STAT. § 26.012(2)(g) (1991).

65. FLA. STAT. § 34.01(1)(c) (1991). This statute provides that the jurisdictional amount for county courts is $15,000 or less for all actions accruing on or after July 1, 1992. *Id.* It has been suggested by my colleague (and Nova Law graduate), Michael R. Whitt, Esq., that community associations can find a new benefit to using their available fining powers to establish a monetary value with some certainty in an otherwise purely equitable matter.

66. *Id.* § 718.116(1)(a) (Supp. 1992). This statute provides in relevant part:

> A first mortgagee who acquires title to the unit by foreclosure or by deed in lieu of foreclosure is liable for the unpaid assessments that become due prior to the mortgagee's receipt of the deed. However, the mortgagee's liability is limited to a period not exceeding 6 months, but in no event does the first mortgagee's liability exceed 1 percent of the original mortgage debt. The first mortgagee's liability for such expenses or assessments does not commence until 30 days after the date the first mortgagee received the last payment of principal or interest. In no event shall the mortgagee be liable for more than 6 months of the unit's unpaid common expenses or assessments accrued before the acquisition of the title to the unit by the mortgagee or 1 percent of the original mortgage debt, whichever amount is less.

Id.

some written circuit courts opinions that have found no impairment to existing first mortgages when enforcing the current version of the Act.[67]

C. *Limits on Associations' Ability to Assess Members*

On the subject of administration of community associations, a new and disturbing case is *Mead v. Ocean Trail Unit Owners Ass'n*,[68] limiting the ability of an association to assess unit owners to correct errors made by the board of directors.[69] In a very convoluted set of facts, the association had originally assessed its owners to purchase adjoining property.[70] When some of the owners brought suit, the court ruled that purchase of the property was outside the powers of the board.[71] After recovering funds paid to the seller and settling with its own insurance carrier, the association still found itself short of funds to repay the original assessment to all the owners, the costs and fees due the prevailing owners, and its own defense costs.[72] Therefore, using the only fundraising source available to it, the association again assessed its owners and was again sued by the owners challenging the new assessment. The Fourth District Court of Appeal also found this assessment to be improper as the "direct product of the first unauthorized act."[73] The court went on to state:

> It is immaterial that this second assessment was not used to make the purchase itself, but instead merely to pay costs and expenses directly related to the fact of the purchase. It was a natural and entirely foreseeable consequence of the directors' folly. Directors cannot be at once unauthorized to do some act and at the same time authorized to impose assessments to pay for the consequences of the unauthorized act. . . . To state it as simply and directly as we can, an association's power to impose assessments on unit owners for common expenses is limited to *authorized* expenses, and does not extend, as is the case here, to unauthorized acts by the directors.[74]

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67. *See, e.g.*, Home Sav. of Am. v. Stango, No. 92-8393 (Fla. 15th Cir. Ct. 1992); Federal Nat'l Mortgage Ass'n v. Craig, No. 92-6358 (Fla. 15th Cir. Ct. 1992). *But see* Citibank v. Torres, No. 92-9617 (Fla. 13th Cir. Ct. 1992).

68. 18 Fla. L. Weekly D464 (Fla. 4th Dist. Ct. App. Feb. 10, 1993).

69. *See* Ocean Trail Unit Owners Ass'n v. Levy, 489 So. 2d 103 (Fla. 4th Dist. Ct. App. 1986), for the underlying decision.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Mead*, 18 Fla. L. Weekly at D464.

74. *Id.*

It is indeed unfortunate that the court neglected to consider section 718.111(3) of the Florida Statutes, which grants condominium associations the power to sue and be sued, and section 718.115(1), which provides that common expenses include the costs of carrying out the powers and duties of the association.[75] While the court correctly stated that the propriety of an assessment is tied to the purposes for which it is made,[76] the court failed to appreciate the difference between an assessment for an *ultra vires* purpose and an assessment in furtherance of the association's statutory power to defend itself. As a result, this decision leaves an association board with no source of funds to protect itself beyond available insurance, thereby both unduly limiting the exercise of business judgment and making the volunteer directors insurers of last resort of association actions.[77]

D. *Limits on Recovery of Attorney's Fees*

Another unsettling result came from a later decision in the same litigation. In *Ziontz v. Ocean Trail Unit Owners Ass'n*,[78] the Fourth District Court of Appeal considered the amount of the attorney's fee awarded by the trial court in this litigation. The court, seemingly in derogation of existing precedent,[79] stated:

> This obsession with hours and rates has apparently caused judges and lawyers to lose sight of a truth they formerly accepted almost universally: viz., that there is an economic relationship to almost every legal service in the market place. . . . Trial judges and lawyers used to accept *a priori* the idea that, no matter how much time was spent or how good the advocate, the fair price of some legal victories simply could not exceed—or, conversely, should not be less than—some relevant sum not determined alone by hours or rates. Since *Rowe*, that all seems lamentably forgotten.[80]

The court applied the "manifest justice rule" as expressed by *Miller v. First American Bank & Trust*[81] to determine that the fees awarded by the trial court were too disproportionate to the economic value of the right

75. FLA. STAT. §§ 718.111(3), 718.115(1) (Supp. 1992).

76. *Mead*, 18 Fla. L. Weekly at D464.

77. *See id.*

78. 18 Fla. L. Weekly D1146 (Fla. 4th Dist. Ct. App. May 5, 1993).

79. *See* Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990).

80. *Ziontz*, 18 Fla. L. Weekly at D1147.

81. 607 So. 2d 483, 484 (Fla. 4th Dist. Ct. App. 1992).

sought to be vindicated. The limits of this standard are, at best, vague and overly subjective.

E. *Construction Defect Claims*

1. Date that Statute of Limitations Commences to Run

Three significant cases were decided in late 1992 and 1993 in the area of construction defects litigation. The first, *Seawatch at Marathon Condominium Ass'n v. Charley Toppino & Sons, Inc.*,[82] addressed the relationship between sections 718.124 and 718.203 of the Florida Statutes.[83] While the Third District Court of Appeal ultimately certified the question[84] to the Florida Supreme Court as one of great public importance, it held that the former section operates to toll any statute of limitations time period created by the latter section until such time as non-developer unit owners assume control of the condominium association.[85] While the result is both logical and favorable to condominium associations, one is nevertheless prompted to question the court's treatment of section 718.203 of the Florida Statutes, as a statute of limitations. That section is entitled "Warranties," and all time periods referred to in that section appear to be warranty periods. Generally, warranty periods and statutes of limitation are not equivalent: the warranty period is the maximum time during which a cause of action may accrue (by discovery or reasonable opportunity to discover the defect),[86] while statutes of limitations set the time during

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82. 610 So. 2d 470 (Fla. 3d Dist. Ct. App. 1992).

83. *Id.* at 472. Section 718.203 of the Florida Statutes sets forth the maximum time that warranties exist on various components of the condominium, including three years on the roof and structural components, as measured from the date of issuance of the certificate of occupancy. FLA. STAT. § 718.203 (Supp. 1992). Section 718.124 provides:

> The statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the board of administration.

FLA. STAT. § 718.124 (1991).

84. *Seawatch*, 610 So. 2d at 471. The court certified the following issue:

> Does section 718.124, Florida Statutes (1991), grant a condominium association an extended period of time in which it may assert a cause of action for damage to common elements in condominium buildings, beyond the time granted in section 718.203, Florida Statutes (1991), after unit owners have elected a majority of the members of the board of administration?

Id.

85. *Id.*

86. 35 FLA. JUR. 2D *Limitations and Laches* § 56 (1982).

which an accrued cause must be asserted.[87] For example, actions based upon breach of warranty under section 718.203(2)(a) of the Florida Statutes may accrue during the three year period after issuance of the certificate of occupancy, and the condominium association would then have four years[88] from the date the owners assume control of the association to assert their claim for breach of warranty.

2. Standing of Unit Owners to Bring Claims

The second case in this substantive area is *Carlandia Corp. v. Rogers & Ford Construction Corp.*[89] Once again, a district court of appeal certified the question raised by this case as being of great public importance, this time after holding that an individual condominium unit owner has standing to assert a claim for construction defects against a party involved in the construction process.[90] The court's decision relied on the fact that a unit owner, though analogous to a shareholder in a business corporation, also *owns* an undivided portion of the common elements and as an owner is deemed a real party in interest under Rule 1.210(a) of the Florida Rules of Civil Procedure.[91] Additionally, though condominiums are purely creatures of statute, section 718.111(3) of the Florida Statutes specifically reserves to each owner all statutory and common law rights they may have.[92] The court recognized that its ruling could easily create quagmires in many areas, such as valuation of damages to a single owner and the possibility of multiple and inconsistent adjudications, and accordingly chose to certify the question.[93]

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87. *Id.* § 3.

88. *See* FLA. STAT. § 95.11(3)(c) (Supp. 1992).

89. 605 So. 2d 1014 (Fla. 4th Dist. Ct. App. 1992), *review granted*, 618 So. 2d 1369 (Fla.), *aff'd*, 1993 WL 458443 (Fla. Nov. 10, 1993).

90. *Id.* at 1015.

91. *Id.* (citing FLA. R. CIV. P. 1.210(a)).

92. *Id.*

93. *Id.* at 1016. The certified question was as follows:

> MAY AN INDIVIDUAL CONDOMINIUM OWNER MAINTAIN AN ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS OR COMMON AREAS OF THE CONDOMINIUM?

Carlandia, 605 So. 2d at 1016.

3. Economic Loss Rule

The landmark case of *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*[94] represents the extension of the "Economic Loss Rule"[95] into the area of condominium construction defect cases. The owners in this condominium had brought suit against many parties involved in building their condominium, including the concrete supplier.[96] The concrete used to build the structures contained too high a salt content, causing the reinforcing steel bars to prematurely corrode, allowing the concrete to crumble away.[97] The suits brought by the owners sounded *inter alia* in common law warranty, negligence and products liability. The Florida Supreme Court followed a very strict interpretation of the rule, so much so that it neglected to look at whether the plaintiffs had a contractual remedy available. In fact they did not, since they were neither in privity with the concrete supplier nor third party beneficiaries to the contract between the developer and the supplier. The effect of this application of the Economic Loss Rule was to deprive innocent third party owners of a tort remedy based on defective products.[98] As a result, the "Economic Loss Rule" drastically limits negligence claims in many typical construction litigation cases where the main developer is not available or viable.

F. *Fair Housing Act Decisions*

Finally, additional cases have further clarified the impact of the Fair Housing Amendments Act of 1988[99] on community associations.[100] In *Seniors Civil Liberties Ass'n v. Kemp*,[101] the provisions of the Act banning

94. 620 So. 2d 1244 (Fla. 1993).

95. *Id.* at 1245. The Economic Loss Rule is the principle that distinguishes claims in tort from claims in contract and holds that there can be no recovery in tort for a defective product unless there exists either personal injuries or damage to property other than to the defective product itself. In instances where a purchased product is defective and damages itself only, the interest to be compensated is the contractually bargained-for expectation interest, and remedies for harm to life, health, and property are not involved. *Id.*

96. *Id.*

97. *Id.*

98. *Casa Clara*, 620 So. 2d at 1248 (Shaw, J., concurring in part and dissenting in part).

99. Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619) (1988)). *See also* FLA. STAT. ch. 760 (1991) (Florida counterpart to the federal statute).

100. *See* Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir. 1992).

101. *Id.*

discrimination based on "familial status"[102] were found constitutional against arguments that they were constitutionally vague, that they violated First Amendment rights of freedom of association, and that they violated rights of privacy.[103] Furthermore, the provisions of the Act were found constitutional against arguments that they violated Fifth Amendment rights by both discriminating against the plaintiffs and depriving them of contract and property rights without due process[104] and that they violated the Tenth Amendment sovereignty of Florida.[105]

In *HUD v. Paradise Gardens*,[106] a condominium association's rules prohibited children under the age of five from using the swimming pool and also limited the hours of pool use of children between ages five and sixteen.[107] Although the condominium cited health and safety concerns as the justification for both rules, the presiding administrative law judge found that the proof adduced failed to support these concerns.[108] Associations desiring to adopt and enforce this common type of rule should seek expert guidance before doing so.

V. CONCLUSION

Ownership of a home is a traditional and primary indicia of the American dream. As the most recent legislative waves wash ashore and subsidiary waves of administrative and judicial "clarification" begin to crest, many citizens fortunate enough to own a home are quickly finding themselves inundated. The tide engendered by complicated and constantly increasing regulation has turned many forms of home ownership into a very bad dream.

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102. *See* 42 U.S.C. §§ 3604, 3607 (1988).

103. *Seniors*, 965 F.2d at 1036.

104. *Id.* at 1035.

105. *Id.* at 1034.

106. 2 Fair Housing-Fair Lending (P-H) ¶ 25,037 (No. HUDALJ 04-90-0321-1, Oct. 15, 1992). The Act allows administrative law judges to hold evidentiary hearings and award damages. 42 U.S.C. § 3612 (1988).

107. 2 Fair Housing-Fair Lending (P-H) at ¶ 25,037.

108. *Id.*