Community Associations

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Community Associations: 1998 Survey of Florida Law
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TABLE OF CONTENTS

I. LEGISLATION ............................................................................. 66
   A. Condominiums .................................................................. 66
   B. Cooperatives ................................................................. 86
   C. Homeowners' Associations ............................................. 87

II. APPELLATE COURT DECISIONS ................................................... 90
   A. Condominium Dispute Jurisdiction; Arbitration ............ 90
   B. Community Association Assessment Cases ................ 96
   C. Community Association Litigation Pleading Cases;
      Class Actions ........................................................... 103
   D. Community Association Litigation-Attorney's Fees ...... 109
   E. Covenant Enforcement .................................................. 112
   F. Various Tort Liabilities ................................................. 115

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1. The reference to "community associations" means any mandatory membership corporation tied to the ownership of real property, which corporation has a right of lien for the collection of assessments. See Fla. Stat. § 468.431(1) (1997). The most common forms of community associations are condominium associations, cooperative associations, and homeowners' associations. This survey covers legislation and cases from July 1, 1997 to June 30, 1998. Condominium related arbitration decisions; Declaratory Statements; and 1998 Division of Florida Land Sales, Condominiums and Mobile Home penalty guidelines, which are found at Rules 61B-20, 21 and Rule 61B-78, Florida Administrative Code, should also be examined by readers for a comprehensive review of legal authorities affecting Florida community associations for the period covered by this Survey.

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I. LEGISLATION

A. Condominiums

Amending Florida's governing statute for condominiums, section 718 of the Florida Statute, seems to be one of the Florida Legislature's favorite pastimes. Before a legislative session begins, no one seems to know what ideas will be thrown into the caldron. After the session ends, many wonder why the changes were needed, and in many cases, what they mean.

There are approximately two million condominium residents in the State of Florida, whose communities are operated by some twenty thousand associations. Not surprisingly, the "condo vote" is a potent force in Florida's political climate. The perceived need to address individual constituent problems through legislation results in the state's condominium laws almost being in a constant state of change.

Florida's first Condominium Act was enacted in 1963, and was basically an enabling statute that allowed developers to create a condominium. When first written, the Condominium Act occupied six pages in the statute book. Today it occupies forty-seven pages with double columns on each page.

During the 1970's, significant consumer reforms were written into the Condominium Act. Notwithstanding the changes, the condominium development boom continued. Quite naturally, legislative efforts began to focus on operational areas. The Condominium Act was substantially rewritten in 1976, and renumbered from section 711 to section 718, with an effective date of January 1, 1977. The 1977 Act is still the basic format of today's Condominium Act.

In 1986, substantial amendments were again made to the Condominium Act. These amendments largely focused on operational issues, which

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2. FLA. STAT. § 718 (Supp. 1998). Hereinafter referred to as "The Condominium Act" or "the Act."
5. Id.
7. See, e.g., 1972 Fla. Laws ch. 72-201; 1974 Fla. Laws ch. 74-104. All citations to Florida's session laws in this article refer to the changes to the Condominium Act currently found at FLA. STAT. § 718 (Supp. 1998).
8. 1976 Fla. Laws ch. 76-222 (codified as amended at FLA. STAT. § 718 (1977)).
9. 1986 Fla. Laws ch. 86-175 (codified as amended at FLA. STAT. § 718 (Supp. 1986)).
arguably tried to make it easier for boards of directors to operate associations.  

Again, in 1990, there were a substantial number of amendments to the Act, adopted largely due to the initiative of the Florida Bar's Committee on Real Property, Subcommittee on Condominiums and Planned Unit Developments. In general, these amendments focused on technical glitches in the statute, and were generally favorable to the facilitation of association operations.

Then, in 1991, the legislative philosophical pendulum radically shifted. The 1990 Legislature created a "Condominium Study Commission" that went to nine cities around the State of Florida and listened to public comment about perceived problems in condominium living. In February of 1991, the Study Commission generated a 143-page report, which recommended numerous and significant changes to the condominium statute. The end result was the legislature's adoption of a major amendment package to the Condominium Act (a thirty-nine page bill), which fundamentally altered the philosophical underpinning of condominium operations.

After publication, the law raised considerable furor, particularly with board members. As a result, the legislature, in a special session convened to address a budget crisis, decided to suspend implementation of the law, which (after removal of some of the most controversial provisions) became law in 1992. Thus, it is plausible to state that the "progression" of the Condominium Act has gone from a developer's enabling statute, to a consumer protection statute, to a "pro-board" statute, to a "pro-unit owner" (or "anti-board") code of procedures.

The 1990's have been described as the "zenith of legislative micromanagement for Florida's condominium and cooperative communities." Although there has been no evidence of legislative intent to re-evaluate the regulatory excesses, which burden condominium communities, there remains an apparently irresistible urge to "open up" the

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10. Id.
11. 1990 Fla. Laws ch. 90-151 (codified as amended at FLA. STAT. § 718 (Supp. 1990)).
14. Id.
15. 1991 Fla. Laws ch. 91-103 (codified as amended at FLA. STAT. § 718(1991)).
17. 1992 Fla. Laws ch. 92-49 (codified as amended at FLA. STAT. § 718 (Supp. 1992)).
Condominium Act each year for some “improvement.” The legislature likewise remains willing to satiate those desires.

There were two condominium bills which passed out of the 1998 Legislative Session, both becoming law without the Governor’s signature. The first is chapter 98-195, of the Laws of Florida. Chapter 98-195 became a law on May 24, 1998. The main thrust of chapter 98-195 was the statutory codification of various regulations that had been previously adopted by the Division of Florida Land Sales, Condominiums, and Mobile Homes (“the Division”), and which still are a part of chapter 61B of the Florida Administrative Code.

In 1996, the Florida Legislature directed each state agency to review its rules by no later than October 1, 1997, and to provide the “Administrative Procedures Committee [with] a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by” the Administrative Procedures Act. This mandate, codified in section 120.536(2), of the Florida Statutes, further directed the 1998 Legislature to consider whether specific legislation authorizing the rules so identified, or portions thereof, should be enacted. The statute also requires each agency, by January 1, 1999, to “initiate proceedings pursuant to [section] 120.54, [of the] Florida Statutes, to repeal each rule, or [a] portion thereof, identified as exceeding the rulemaking authority permitted by” the Administrative Procedures Act, and for which no legislative grant of authority was given to the agency by the 1998 Legislature. The Department of Business and Professional Regulation identified twenty rule provisions which the Department believed exceeded the scope of its rulemaking authority under the Administrative Procedures Act. The Department recommended legislative treatment of fifteen of the identified rules. Most of the provisions found in chapter 98-195 emanate from that request.

Section 718.104(2) of the Condominium Act was amended to codify a Division rule providing that a developer must file the recording information for a declaration of condominium within thirty “business days” of the date of

23. Ch. 96-159, § 9, 1996 Fla. Laws 159, 159 (codified as amended at FLA. STAT. § 120.536(2) (1997)).
24. See id.
25. Id.
filing the declaration of condominium in the county public land records.\textsuperscript{27} The statute further requires the Division to prescribe a form for filing such information.\textsuperscript{28} A similar provision has been added to Section 718.403(8) of the Condominium Act, dealing with recordation of phase amendments.\textsuperscript{29} A developer is likewise required to notify the Division within thirty “business days” of filing a phase amendment, again on a form to be prescribed by the Division.\textsuperscript{30}

Sections 718.502 and 718.503 of the Act have been amended regarding a condominium unit purchaser’s right to void a contract for the purchase of a condominium unit (from a developer) within fifteen days of the execution of the purchase and sale agreement.\textsuperscript{31} Unfortunately, these changes add additional confusion to the law. The amendment to section 718.502(b) of the Act is a rule codification and states that a “developer may not close on any contract for sale or contract for a lease period of more than [five] years until the developer prepares and files with the [D]ivision documents complying with the requirements of” the Condominium Act and Division rules, and the “[D]ivision notifies the developer that the filing is proper and the developer prepares and delivers all documents required by [the Condominium Act] to the prospective buyer.”\textsuperscript{32}

The amendment to section 718.503(b) of the Condominium Act introduces the confusion.\textsuperscript{33} The new clause provides that although a developer may not close for fifteen days following the execution of a purchase and sale agreement, and delivery of required disclosure documents must be made to the buyer, a developer now is permitted to close if the “buyer is informed in the 15-day voidability period and agrees to close prior to the expiration of the 15 days.”\textsuperscript{34} This clause, in addition to containing an apparent typographical error (should “in” be “of” or “within”), or at least confusing grammar, seems to conflict with the disclosure language found in section 718.503 of the Condominium Act which provides: “ANY

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} \ § 1, 1998 Fla. Laws 1727, 1727 (codified as amended at FLA. STAT. § 718.104(2) (Supp. 1998)).
\item \textsuperscript{28} \textit{See id.} \ § 1, 1998 Fla. Laws at 1727 (amending FLA. STAT. § 718.104(2) (Supp. 1998)).
\item \textsuperscript{29} \textit{See id.} \ § 5, 1998 Fla. Laws at 1730 (amending FLA. STAT. § 718.403(8) (Supp. 1998)).
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} Ch. 98-195, §§ 6-7, 1998 Fla. Laws at 1730–33 (codified as amended at FLA. STAT. §718.502–503 (Supp. 1998)).
\item \textsuperscript{32} \textit{Id.} \ § 6, 1998 Fla. Laws at 1730 (codified as amended at FLA. STAT. § 718.502(b) (Supp. 1998)).
\item \textsuperscript{33} \textit{Id.} \ § 7, 1998 Fla. Laws at 1730–33 (codified as amended at FLA. STAT. § 718.503(b) (Supp. 1998)).
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT.\textsuperscript{35}

Further, in the case of \textit{Asbury Arms Development Corp. v. Florida Department of Business Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes},\textsuperscript{36} the Second District Court of Appeal held that the above quoted language in the statute means what it says, and that the fifteen day voidability period could not be waived.\textsuperscript{37} Given the holding of this case, it might be questioned whether the legislature intended to remove this language from section 718.503(1)(a)1 of the Condominium Act.

Section 718.117 of the Condominium Act has been amended to codify another Division rule regarding notification to the Division relative to the termination or merger of condominiums, or the dissolution or merger of condominium associations.\textsuperscript{38} Pursuant to the new law, a board of directors must notify the Division “before taking any action” to terminate, merge, or dissolve.\textsuperscript{39} Within thirty “business days” after recordation of the action, the Division must likewise be notified.\textsuperscript{40} These reporting requirements apply to all associations, not only those operated by developers.

Section 718.301 of the Condominium Act has been amended with the addition of a new subsection (6),\textsuperscript{41} which specifically empowers the Division with the “authority to adopt rules pursuant to the Administrative Procedure Act to ensure the efficient and effective transition from developer control of a condominium to the establishment of a unit owner controlled association.”\textsuperscript{42}

Likewise, a new provision of the “Roth Act”\textsuperscript{43} section of the Condominium Act was added.\textsuperscript{44} New section 718.621 of the Condominium Act specifically empowers the Division to adopt rules “to administer and ensure compliance with developers’ obligations with respect to condominium conversions concerning the filing and noticing of intended

\begin{thebibliography}{99}
\bibitem{35} FLA. STAT. § 718.503(1)(a)1 (Supp. 1998).
\bibitem{36} 456 So. 2d 1291 (Fla. 2d Dist. Ct. App. 1984).
\bibitem{37} \textit{Id.} at 1293.
\bibitem{38} Ch. 98-195, § 3, 1998 Fla. Laws 1729, 1729 (codified as amended at FLA. STAT. § 718.117 (Supp. 1998)).
\bibitem{39} \textit{Id.}
\bibitem{40} \textit{Id.}
\bibitem{41} \textit{Id.} § 4, 1998 Fla. Laws at 1726, 1729 (codified as amended at FLA. STAT. § 718.301(6) (Supp. 1998)).
\bibitem{42} \textit{Id. See also}, Ch. 98-200, § 221, 1998 Fla. Laws 1892, 1892 (codified as amended at FLA. STAT. § 718.501(1)(f) (Supp. 1998)).
\bibitem{43} FLA. STAT. § 718.604 (1997).
\bibitem{44} Ch. 98-195, § 8, 1998 Fla. Laws 1726, 1733 (codified as amended at FLA. STAT. § 718.621 (Supp. 1998)).
\end{thebibliography}
conversion, rental agreement extensions, rights of first refusal, and disclosure and postpurchase protections."

The final changes of chapter 98-195 deal with operational details of condominium associations. Perhaps the most nonsensical clause of the 1998 amendments to the Condominium Act is a new provision found at section 718.112(2)(b)4 of the Act. This new law permits a member of the board of directors, or a committee, who is not present at a board or committee meeting, to "submit in writing his or her agreement or disagreement with any action taken" by the board or the committee, after the meeting has occurred. The statutory clause goes on to say that this expression of "agreement or disagreement may not be used as a vote for or against the action taken and may not be used for the purposes" of constituting a quorum for the board or committee. There is nothing in prior law which would have prohibited such written expressions of "agreement or disagreement." Since the law specifically states that these expressions cannot be used as a vote for or against the action, nor for the purpose of creating a quorum, it is certainly unclear as to the intended significance of this provision.

Another operational issue embodied in chapter 98-195 involves statutory codification of a Division rule permitting telephonic conference call meetings for association boards of directors. Since most condominium associations are not-for-profit corporations governed by section 617 of the Florida Statutes, it should be noted that section 617.0820(4) has, for a number of years, permitted associations to participate in regular or special board meetings by telephone conference calls. Section 617.0825(2) of the Not-For-Profit-Corporation Act would also extend such a right to committees. In any event, the Condominium Act now clearly states that the board or any committee may conduct meetings by telephone. The statute also codifies a Division rule, which requires that a speaker phone must be used at the situs of the meeting, so that the conversation of those board or committee members attending by telephone may be heard by the

45. FLA. STAT. § 718.621 (Supp. 1998).
47. Id. § 2, 1998 Fla. Laws at 1727–28 (codified as amended at FLA. STAT. § 718.112 (2)(b)(4) (Supp. 1998)).
48. Id.
49. Id.
52. FLA. STAT. § 617.0825(2) (1997).
board or committee members attending the meeting in person, as well as by any unit owners present at the meeting.\footnote{Id.}

The final operational amendment of chapter 98-195, new section 718.112(2)(c) of the Act codifies a Division rule,\footnote{FLA. ADMIN. CODE ANN. r. 61B-23.002(10) (1998).} which requires that any association rule regulating unit owner statements at board or committee meetings must be in writing.\footnote{Ch. 98-195, § 2, 1998 Fla. Laws 1727, 1728 (codified as amended at FLA. STAT. § 718.112(2)(c) (Supp. 1998)).} Presumably, if there is no written rule, a board cannot limit the “frequency, duration, and manner” of unit owner statements at board or committee meetings.

The much more significant condominium bill that passed out of the 1998 Legislative Session is found at chapter 98-322 of the \emph{Laws of Florida}, which became law without the Governor’s signature on May 30, 1998.\footnote{1998 Fla. Laws ch. 98-322.}

Chapter 98-322 is actually an amalgamation of several pre-filed bills, which were combined during the legislative process. One of the more significant topics in the pre-filed legislation, relating to the governance of “master associations,”\footnote{See, e.g., Downey v. Jungle Den Villas Recreation Ass’n, 525 So. 2d 438 (Fla. 5th Dist. Ct. App. 1988).} was withdrawn from consideration by the legislation’s sponsors, at the request of the Division.\footnote{The Division has recently appointed a “study group” to consider the advisability of “master association” and related legislative initiatives for the 1999 Legislative Session.}

Perhaps the most significant legislative enactment from the 1998 Session was an amendment to section 718.111(6) of the Act, having to do with consolidated financial operations of pre-1977 “phase” condominiums.\footnote{Ch. 98-322, § 2, 1998 Fla. Laws 2757, 2757 (codified as amended at FLA. STAT. § 718.111(6) (Supp. 1998)).} The reference to “phase” condominiums in section 718.111(6) of the Act is a misnomer. True “phase” condominiums are developed under section 718.403 of the Act, and are sometimes known as “expandable” or “flexible” condominiums. The “phase” condominium for purposes of section 718.111(6) consolidated operations are more accurately described as “series” condominiums. \emph{See also} Gary A. Poliakoff, \emph{Condominiums, The Assessment Dilemma}, 54 FLA. B.J. 268 (1980).

As has been the case from topics as wide-ranging as trimming mangrove trees to conducting bingo games, the language now engrafted into the Act by the 1998 amendment to section 718.111(6) arose out of the perceived plight of a single condominium community,\footnote{The Innisbrook condominium community in the Tarpon Springs area (on file with the author).} which sought to address its apparently questioned consolidated financial operations by seeking statutory
change. The bill initially introduced into the legislature would have been limited to condominiums that were operated "as part of a rental pool in a hotel or resort-type setting, where each unit of a similar type and square footage receives a uniform rental income . . . [and where] the condominium units were registered and sold as securities with the Securities and Exchange Commission (SEC)" (i.e., the initial bill would have probably only applied to this particular community).

According to information obtained by this author, another multi-condominium community, with the Division support, requested that the Bill's sponsors expand the statutory language, and allow any pre-1977 multi-condominium community to provide for consolidated financial operations in the declaration or in the bylaws, upon less than unanimous approval of the unit owners. The Division's stated reason for supporting such legislation was that there are a significant number of older "phase" projects that are operating in an "illegal" consolidated financial fashion anyway, with many cases involving such operations going back twenty years or more.

Although there is undoubtedly adequate public policy to support this amendment, particularly in the case of associations that have always operated on a consolidated financial basis, the law presents some ambiguity, and also some constitutional concerns. The new statute provides that an association that has operated on a consolidated financial basis "may continue to so operate," as long as the authority for same is contained in the applicable declarations of condominium, or the bylaws. The reference to such authority having to be in the original version of the declarations or bylaws was omitted by the amendment.

Accordingly, associations that have been operating on a consolidated financial basis may legitimize such actions by amending the declaration of condominium or bylaws. The statute goes on to state that an association "for such condominiums" may provide for consolidated financial operations by

64. As Vice-Chair and Condominium Committee Chair of Community Associations Institute's Florida Legislative Alliance during the 1998 Legislative Session.
65. Id.
66. Id.
68. Id.
69. It is unclear whether "such condominiums" means multi-condominium associations that have heretofore operated on a consolidated financial basis or any multi-condominium association where the first declaration was recorded prior to January 1, 1997, although the latter interpretation seems more plausible.
“amending its declaration pursuant to [section] 718.110(1)(a) or by amending its bylaws and having the amendment approved by not less than two-thirds of the total voting interests.” It is unclear whether the two-thirds standard is applied only to bylaw amendments (regardless of the percentage vote stated in the bylaws to amend them), or whether the two-thirds standard also serves to qualify the vote necessary to amend the declaration of condominium (regardless of the vote required in the declaration for amendment of the declaration). By reference to section 718.110(1)(a) of the Act, which incorporates a two-thirds standard, as well as the lack of a comma in the text of the amendment, it is reasonable to conclude that a two-thirds vote of all voting interests is required whether the declaration or bylaws is used as the vehicle for the amendment.

Although valid public policy may be served by legitimizing long-standing “illegal” consolidated financial operations for certain communities, it is submitted that the “invitation” which has been extended to other multi-condominium associations (which had found a way to comply with the previous law) may also result in unintended consequences. The Condominium Act requires the declaration of condominium to specify the percentage of, “and manner of sharing common expenses and owning common surplus” in a residential condominium, which must be the same as the ownership of undivided shares in the common elements. The Condominium Act further states that any amendment to the declaration, which changes the percentage of sharing common expenses, must receive unanimous approval of all unit owners and lienors.

Additionally, the provision in the declaration regarding the sharing of common expenses is a contractual right, and the law in effect when those contracts were entered into (recording of the declarations of condominium), “is controlling as if engrafted onto the condominium documents.” In addressing a somewhat analogous issue, the Second District Court of Appeal held that changes to the Condominium Act could not be applied to alter assessment allocation provisions in the declaration, even where the declaration incorporated future amendments to the

71. FLA. STAT. § 718.110(1)(a) (1997).
72. FLA. STAT. § 718.104(4)(g) (1997).
73. FLA. STAT. § 718.110(4) (1997).
Condominium Act. Further, since the declaration of condominium is a contract, it is certainly arguable that the retroactive application of the 1998 amendments to section 718.111(6) of the Act will create an unconstitutional impairment of vested contract rights.

Another significant (and regrettably ambiguous) 1998 change to the condominium statute involves the insurance requirements of section 718.111(11)(a) of the Act and the "budget guarantee" provision of section 718.116(9) of the Act. As a result of Hurricane Opal, certain developers found they had unanticipated exposure arising out of uninsured or underinsured storm damage.

The premise of a "budget guarantee" is that, during the initial sales phase, a developer should be excused from paying assessments on its inventory units, so as to not bear a disproportionate burden in maintenance of the community, when its "units" are typically unsold, and thus not "consuming" services of the condominium association. The "budget guarantee" language in section 718.116(9) of the Act permits the developer to excuse itself from the payment of common expenses on developer-owned units, so long as the developer guarantees in the purchase contracts, the prospectus, or the condominium documents, that assessments against non-developer unit owners will not exceed a stated dollar amount during the guarantee period. In exchange for this excusal from paying assessments, the developer agrees to "cap" the nondeveloper unit owner's assessments, and must further undertake to fund any deficit incurred in the operation of the condominium (including funding of reserves, unless properly waived) during the guarantee period. Obviously, reconstruction of condominium property after a catastrophic storm event is a common expense of the condominium. If insufficient proceeds from insurance exist to reconstruct the community, then the developer would be called upon to fund any

76. Island Manor Apartments, Inc. v. Division of Fla. Land Sales, Condominiums, and Mobile Homes, 515 So. 2d 1327, 1329 (Fla. 2d Dist. Ct. App. 1987).
77. Pepe, 351 So. 2d at 757.
78. Fleeman v. Case, 342 So. 2d 815, 818 (Fla. 1976).
83. Id.
84. FLA. ADMIN. CODE ANN. r. 61B-22.004 (1998).
reconstruction costs not covered by the nondeveloper unit owners’ assessments, at the guaranteed level. While some might argue that with the rewards come the risks, the 1998 Legislature apparently decided to let developers “have their cake and eat it too.”

Section 718.111(11)(a) of the Condominium Act now provides that “[a] unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance.”

Previously, the law required all associations to use “best efforts” to obtain such insurance. As to developer-controlled associations, the law now requires the association to use “due diligence” in obtaining and maintaining such insurance. Neither the term “best efforts” nor “due diligence” are defined in the statute. There is no expression of legislative intent, at least from the language of the statute itself, as to whether “due diligence” is intended to be a higher or lower standard than “best efforts.”

Section 718.111(11)(a) of the Act, as amended, goes on to provide that a developer’s “[f]ailure to obtain and maintain adequate insurance during any period of developer control shall constitute a breach of fiduciary responsibility by the developer appointed members of the board of directors of the association, unless said members can show that despite such failure, they have exercised due diligence.” At least, this legislative pronouncement will soften the impact of a 1992 appellate court decision, which exonerated developer appointees to the board of directors in a claim of breach of fiduciary duty involving the failure to renew a fire insurance policy, when fire destroyed common area buildings.

The provisions of section 718.116(9) of the Act, which further implements this new policy, provides that “if a developer-controlled association has maintained all insurances required the common expenses incurred during the guarantee period resulting from a natural disaster or an act of God, which are not covered by insurance proceeds” may be assigned against all unit owners, as well as their successors and assigns, “on the date of such natural disaster or act of God.”

85. Similar legislation was introduced in the 1997 Legislative Session and failed to progress through the process.
86. FLA. STAT. § 718.111(11)(a) (Supp. 1998).
89. Id.
90. Id.
course, included in any such assessment. It is interesting to note that the developer-controlled association is permitted to levy an assessment for “the common expenses incurred during the guarantee period,” providing they “result” from a natural disaster or an act of God. Therefore, not only would the actual cost of reconstruction be assessable against the unit owners, but also any other costs “resulting” from the natural disaster, which would presumably include engineering fees, attorney’s fees, insurance consultant/adjuster fees, and perhaps more.

The new law does not clarify how the expenses are to be “assigned,” and no treatment is given to the issue of whether the assessments would be booked to the units on an “accrual” basis, when the damage occurs, or on a “cash” basis, when the work is actually done. The latter approach, cash basis, seems more practical and will possibly result in further developer excusal, since a developer will most likely have transferred title to units between the time of a casualty and the repair work being done.

Another insurance related change to the Condominium Act effectuated by the 1998 Legislature involves the issue of “fidelity bonding,” which is also a misnomer, since there is typically no “bond” purchased, but rather an insurance policy, sometimes called an “employee dishonesty” or “crimes coverage” policy. There have been previous legislative attempts to address this issue. For instance, in 1992, the Act was amended to implement a minimum schedule of fidelity bonds based upon the association’s annual gross receipts. The 1992 statute required “bonding” of any person who could “control or disburse” association funds, and specifically identified such persons as the association president, secretary, the treasurer, and any other person with check signing authority. The new statute also requires “bonding” of persons who “control or disburse,” using the same definitional scheme, but also stating that persons who “control or disburse” include, but are not limited to the president, secretary, treasurer, and any person with check signing authority. It is unclear who else was intended to be covered.

Most significantly, the new law requires that the bond or insurance policy must cover “the maximum funds that will be in the custody of the

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94. Id. § 7, 1998 Fla. Laws at 2781 (codified as amended at FLA. STAT. § 718.116(9)(a)(1) (Supp. 1998)).
95. Id.
96. Id. § 2, Fla. Laws at 2758 (codified as amended at FLA. STAT. § 718.111(11)(d) (Supp. 1998)).
98. Id.
association or its management agent at any one time." This language creates a potential ambiguity as to whether an association must obtain a fidelity bond for all of the funds that would be in the “custody . . . of its management agent,” when a large management company may control millions of dollars, for many different associations. It is doubtful that this was the legislative intent, or that the statute would be applied in that fashion.

Although this legislation is founded upon legitimate policy objectives, and perhaps reiterates advice that most community association legal practitioners would give to their clients anyway, whether the benefits outweigh the burdens remains to be seen. If an association levies a major special assessment for a significant repair project, it will have a large sum of money under its “control” at one time, although it may spend that money very quickly. It is unknown how the insurance market will adjust to the need for flexibility that will be necessary for associations in obtaining adequate insurance in such cases. Also, the law of supply and demand being what it is, it further remains to be seen whether insurance companies will adjust rates for “fidelity bonding,” which has heretofore been a fairly insignificant aspect of most associations’ insurance premiums, to account for increased exposure and/or its new “captive market.” It should also be noted that the Division has taken the position that the 1998 amendment to the fidelity bonding section of the statute will not be enforced by the Division as to pre-existing insurance contracts, until such contracts are up for renewal.

Section 718.111(12)(c) of the Act has been amended to include the year-end financial reporting information required by the Act as part of the disclosure documents that are to be made available to prospective unit purchasers. Section 718.111(12) of the Act requires the association to maintain an “adequate number” of these year-end reports, along with copies of the declaration of condominium, articles of incorporation, bylaws, and rules, and all amendments to the foregoing, as well as the “Question and Answer Sheet.” The “adequate number of copies” must be maintained “on the condominium property to ensure their availability to unit owners and prospective purchasers.” This segment of the statute, which is not new, does not take into account that many condominium communities do not have on-site office facilities and, instead, a management company or other agent serves as the repository of official records.

100. Id.
101. See Memorandum from Bureau of Condominium Legal Department to Bureau Chief (June 19, 1998) (on file with the Nova Law Review).
104. See id.
The inclusion of the year-end financial reporting information as a required disclosure document is also enunciated in section 718.503(2) of the Act as part of the documents that a nondeveloper seller must give to a prospective buyer prior to closing. Likewise, these year-end reports now also comprise part of the disclosure documents that a developer must append to the prospectus prior to the sale of a unit, as provided in section 718.504 of the Act. This change is clearly an improvement to the statute, at least for those who believe that prospective condominium unit purchasers should "know what they are getting into" prior to the purchase of a unit. Providing year-end financial reports (although the statute is not clear, it presumably means the latest year-end report) will permit prospective purchasers to review the association's reserve funding policy, and other assessment spending trends, such as special assessments.

Another financially oriented change to the Act was approved by the 1998 Legislature. There has been an ongoing debate within the condominium industry as to whether associations should be allowed to "commingle" operating funds and reserve funds. Proponents of "commingling" argue that associations should be allowed to maximize investment returns, which can usually be accomplished by obtaining the higher account balances affiliated with "commingling" all of the association funds in a single account. Opponents of commingling investment and reserve funds argue that reserve funds are sacrosanct under the law, and should be kept out of "harm's way," lest the board of directors be tempted to spend money set aside for capital expenditures on operational needs.

The 1991 amendments to the Condominium Act prohibited an association from commingling investment and operating funds. Prior to the effective date of this change, the 1992 Legislature changed section 718.111(15) of the Act to permit commingling of operating and reserve funds "for purposes of investment." The game of "legislative ping-pong" continued when the 1995 Legislature once again absolutely prohibited

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108. Id.
In the latest volley, associations may now, once again "commingle," so long as the commingling is done for "investment purposes." Of course, only the future will tell whether the "anti-commingling" forces will once again have their way.

The 1998 Legislative session produced two amendments involving the election of condominium directors. The first is another example of a law of statewide application that exists to address the concerns of one Florida condominium association. Apparently, it was discovered that a condominium director in Dade County had been convicted of a felony. After the association determined that Florida law would not prohibit a convicted felon from serving on its board, legislative reform was sought to address this. During the session, proposed legislation was introduced that would prohibit any "felon" from serving on the board of directors of a condominium association. When it was pointed out to the legislation's sponsors that this might prohibit expatriates of oppressive foreign governments (e.g., Cuba, Libya, etc.) from serving on a condominium board, the legislation's sponsors wrote an amendment providing that the conviction must have occurred in a court of record in the United States. It was pointed out to the sponsors that an association only has ten to twenty days to mail out election ballots after receipt of unit owners' self-nomination forms. Thus, they could not be expected to conduct criminal background checks within that time period. Therefore, sponsors approved further amendatory language for the Bill, which provided that an association's election of a convicted felon would not affect the validity of any action of the association's board of directors taken prior to the discovery of the conviction.

As a result, section 718.112(2)(d)1 of the Condominium Act now provides that in order to be eligible for board membership, a person must

115. Id.
116. Id.
117. Id.
119. Id. See also Fla. Stat. § 718.112(2)(d)3 (1997).
meet the requirements "set forth in the declaration." Further, the law provides that "[a] person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored . . . is not eligible for board membership." Finally, this clause in the statute now provides that "[t]he validity of an action by [a] board is not affected if it is later determined that a member of the board is ineligible for board membership due to having been convicted of a felony."

Although this statute is certainly an instructive case study on how condominium legislation in Florida is sometimes conceived and enacted, it is doubtful that this law will have any practical effect on the operation of most condominium associations. Perhaps the most problematic aspect of the law, and presumably an unintended consequence, is the language in the new statute which states that in order to be eligible for board membership, a person must meet the requirements "set forth in the declaration." As a practical matter, very few declarations of condominium associations contain qualifications for board membership, and the Condominium Act does not require the declaration to contain such information. In fact, the Act requires the bylaws to set forth the manner of selection of boards of directors. It could now be argued that the failure of a declaration of condominium to establish board membership requirements results in any person, whether or not a unit owner, being eligible to run for the board, with qualifications contained in the articles of incorporation or bylaws having no consequence. It is submitted that the legislature did not intend this result.

The other statutory change involving board elections involves a long-standing conflict between provisions of the Not-For-Profit Corporations Act, and a Division rule involving whether vacancies on condominium boards are filled for the unexpired term thereof, or only until the next annual election. Notwithstanding the general precedence that the statute should be afforded over an agency rule, the Division has historically adopted the position that the rule stating that vacancies are filled only through the next general election is enforceable and would be enforced. The 1998 amendment eliminates any potential inconsistency, and clearly negates the

121. FLA. STAT. § 718.112(2)(d)1 (Supp. 1998).
122. Id.
123. Id.
124. Id.
125. See FLA. STAT. § 718.104 (1997).
127. FLA. STAT. § 617.0809 (1997).
129. Id.
130. Id.
Division's rule. The statute now provides that vacancies occurring on a board of directors, before the expiration of a term, may be filled by the remaining directors or sole director, or the directors may elect to hold an election in conformance with statutory procedures. In either case, "[u]nless otherwise provided in the bylaws, a board member appointed or elected . . . shall fill the vacancy for the unexpired term of the seat being filled."

In another game of "legislative ping-pong," the legislature has once again attempted to address the percentage vote required to waive or spend "reserve" funds. There are two issues involved in this subject. First, is the vote required to waive or reduce the funding of reserves for a given year's budget, and second, the vote required to spend those statutory reserves (or the interest earned thereon) for a nonscheduled purpose, after the funds have been so designated. The 1977 version of the Act did not even mandate the establishment of reserves. In 1979, the Act was amended to require the funding of reserves for roof replacement, building painting, and pavement resurfacing. The 1979 statute further permitted waiver of reserves by a "two-thirds vote at a duly called meeting of the association." The two-thirds standard was reduced to a majority in 1980. The 1991 amendment to the statute added the clause that "[r]eserve funds and any interest accruing thereon must remain in the reserve account for authorized reserve expenditures, unless their use for other purposes is approved in advance by a vote of the majority of the voting interests present at a duly called meeting of the association."

132. Id.
134. See supra Part I.A for a discussion regarding "commingling."
140. Ch. 79-314, § 6, 1979 Fla. Laws 1666, 1667 (codified as amended at Fla. Stat. § 718.112(2)(k) (1979)).
In 1994, the statute was amended to eliminate the reference to "members present" for votes to waive reserves, with the required vote being a majority "of the total voting interests voting in person or by limited proxy . . . at a duly called meeting of the association."\(^{143}\) However, the parallel provision of section 718.112(2)(f)3 of the Act, relating to use of reserves for nonscheduled purposes, was not amended, so reserves could still be used for nonscheduled purposes by a vote of the majority "of the voting interests present at a duly called meeting."\(^{144}\)

The 1995 Legislature did not help matters when it addressed these voting requirements. Section 718.112(2)(f)2 of the Act was amended to strike the reference to "majority of the total voting interests voting in person or by limited proxy" and to replace same with the standard "by a majority vote at a duly called meeting of the association."\(^{145}\) It would be fair to conclude that the 1995 version of the statute stood for the proposition that waiver of reserves could be effectuated by a "majority of a quorum" vote. Unfortunately, the 1995 Legislature also amended section 718.112(2)(f)3 of the Act, and specifically struck the word "present" from the statute, leaving this subsection of the statute saying that use of reserve funds or interest accruing thereon for nonscheduled purposes could only be authorized by "a vote of the majority of the voting interests, voting in person or by proxy at a duly called meeting of the association."\(^{146}\) Many commentators perceived this as a "flip-flop" of the previous year's law\(^ {147}\) to mean that reserves could now be waived by a majority of a quorum, but once established, use of reserves for nonscheduled purposes would require approval of a majority of the entire voting interests.

Although the 1998 Legislature certainly chose a worthwhile candidate for statutory clarification, its amendment to section 718.112(2)(f)3 of the Act falls short of the mark.\(^ {148}\) The reference to "a vote of the majority of the voting interests voting in person or by limited proxy at a duly called meeting of the association" is replaced by the standard of "a majority vote at a duly called meeting of the association."\(^ {149}\) It is submitted that the difference

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146. Ch. 95-274, § 36, 1995 Fla. Laws 2525, 2529 (codified as amended at FLA. STAT. § 718.112(2)(f)(3)).
149. Id.
between the two concepts, at least based upon the grammar and words used, is difficult to perceive. It is assumed that since the legislature undertook amendment of this section, it was intended to amend prior law, and that the legislature would not engage in a futile act. The Division has espoused this view and has announced its position that both the vote to waive or reduce reserves, as well as the vote to use reserves (or the interest earned thereon) for nonscheduled purposes is now based on the "majority of the quorum" standard.\textsuperscript{150}

In a relatively minor change to the Act, section 718.112(2)(f)1 now provides that an association no longer needs to list the budget categories specified in section 718.504(20) of the Act, if those expenses do not apply to a particular association.\textsuperscript{151} Pursuant to a Division rule,\textsuperscript{152} an association's budget is required to reflect "n/a" in the column beside items that do not apply to that association (e.g., recreational lease fees, common area taxes, etc.).\textsuperscript{153} Although it is debatable whether the previous statute required such a silly disclosure anyway,\textsuperscript{154} the Division was nonetheless pursuing non-adherence to this technicality as a violation of the law. Therefore, although one would hope that matters of greater import should command the attention of our elected and appointed representatives, it appears appropriate to have eliminated this problem.

The final amendment to the Condominium Act that was adopted in 1998 deals with the allocation of bulk cable television service charges to a condominium association.\textsuperscript{155} Prior to 1991, it had been held that a condominium association's provision of cable television services, as part of the condominium budget, was not a proper common expense.\textsuperscript{156}

In 1991, the legislature amended chapter 718.115(b) of the Act to provide that cable television services would be a proper common expense.\textsuperscript{157} The 1991 statute provided that "the cost of a master antenna television or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense" as so provided in the declaration, and if

\begin{footnotesize}
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\item\textsuperscript{150} See Fla. Admin. Code Ann. r. 61B-22.005(7) (1998).
\item\textsuperscript{151} Fla. Stat. § 718.112(2)(f)1 (Supp. 1998).
\item\textsuperscript{152} Fla. Admin. Code Ann. r. 61B-22.003(1)(d) (1998).
\item\textsuperscript{153} Id.
\item\textsuperscript{154} The 1997 version of section 718.112(2)(f)1 of the Florida Statutes required the proposed budget to show certain expense classifications "if applicable." Fla. Stat. § 718.112(2)(f)1 (1997).
\item\textsuperscript{155} Ch. 98-322, § 4, 1998 Fla. Laws 2768, 2769 (codified as amended at Fla. Stat. § 718.115 (Supp. 1998)).
\item\textsuperscript{156} See In Re: Petition For Declaratory Statement of Becker, Courtyards of Broward Condominium Ass'n, Inc. DFLSCMH Case No. 89L-75.
\item\textsuperscript{157} Ch. 91-116, §3, 1991 Fla. Laws 1241, 1241–42 (codified as amended at Fla. Stat. § 718.115(1)(b) (1991)).
\end{itemize}
\end{footnotesize}
the declaration of condominiums did not so provide, bulk cable television services could still be a proper common expense, "if it is designated as such in a written contract between the board of administration and the company providing ... cable television service."\(^{158}\) It seemed that the legislative intent (or the intent of the lobbyists for the cable industry) was that if the board so wished, a condominium association would be able to buy bulk cable television service, and charge all of the members. Obviously, it is not very difficult to designate the service as a common expense in the contract. The perceived inequity created by this law was that many condominiums assess "common expenses" based upon the square footage of the individual units, as opposed to equal assessments for each unit. Accordingly, an apartment a few hundred square feet larger than the unit next door could pay more for the exact same services under a bulk cable arrangement (a specified number of outlets, basic channels, etc.). Of course, in any condominium association with assessments keyed to unit size, the same could be said for all services "consumed" (and paid for) by the larger units on a greater percentage basis than the smaller units.

In an apparent effort to achieve equity, the 1998 Legislature has created an amorphous new category of "common expenses" that may not be equal to a unit's ownership of the common elements, nor its sharing of other "common expenses."\(^ {159}\) The 1998 amendment to section 718.115(1)(b) of the Act provides:

If the declaration [of condominium] does not provide for the cost of ... cable television ... as a common expense, the board of administration may [still] enter into ... a contract [for bulk service] and the cost ... will be a common expense but allocated on a per-unit basis rather than a percentage basis if the declaration provides for other than an equal sharing of common expenses.\(^ {160}\)

The law further provides that any contract entered into before July 1, 1998, and where the cost of services is not divided equally among all unit owners, the internal allocation of the expenses (i.e. to an equal basis), may be made by vote of "a majority of the voting interests present at a regular or special meeting of the association."\(^ {161}\) Although the statute presents some of the constitutional and retroactivity issues that pertain to the "phase" condominium associations' consolidated financial operations,\(^ {162}\) it appears

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158. *Id.*
160. *Id.*
161. *Id.*
162. See supra Part I.A.
that certain associations now have a vehicle to more “fairly allocate cable television charges” (although owners of the smaller units probably do not think so).

B. Cooperatives

Although lip service is usually given to the need to keep changes to the Cooperative Act in step with changes to the Condominium Act, the reality is that this does not happen. Although the cooperative form of ownership has been statutorily recognized in Florida since 1974, cooperative development in Florida has been limited. The most often stated reason is that the mortgage banking industry is not comfortable with the concept of loaning money secured by a share of stock and a “muniment of title,” as opposed to a fee simple deed to real estate. In the writer’s experience, there are very few residential cooperative apartment buildings throughout the state, and there has been almost no cooperative development for new apartment buildings in Florida for the last fifteen years. The bulk of cooperatives which are still being created are “mobile home cooperatives,” as defined in section 723.0791 of the Florida Statutes. The most often stated reason why there is still cooperative development in the mobile home context is that most of these communities are the consequence of residents’ purchase of rental mobile home parks (“park buy-outs”). Since the Cooperative Act does not require lot surveys to create a valid cooperative, as would the Condominium Act, or a platted subdivision, the park owners selling the parks, and the residents buying the parks, can save substantial costs by avoiding a survey requirement.

Like legislative amendments in years past, the 1998 amendments to the Cooperative Act did not keep pace with the 1998 amendments to the Condominium Act. Most of the “Division rule” provisions from chapter 98-195 were included, while none of the “substantive” changes from chapter 98-322 were included in the Cooperative Act. The clauses that were included are essentially identical to those pertinent to condominiums, discussed above. Some include thirty days notice after recording the

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165. FLA. STAT. § 723.0791 (1997).
166. FLA. STAT. § 719 (1997).
168. Id.
170. See supra Part I.A.
cooperative documents, notice to the Division of dissolution or merger, board and committee member right to “agree or disagree” with board or committee action, provision for telephonic board and committee conference calls, requirement that unit owner meeting participation rules be in writing, Division rulemaking authority for transfer of control, requirement for filing phase cooperative documents with the Division, prohibition against closing until disclosure documents have been provided to the Division, provision for waiver of fifteen-day voidability, and Division rule making authority with respect to conversion.

C. Homeowners' Associations

When Florida first enacted a homeowners' association statute in 1992, many felt that the “camel had gotten its nose in the tent” and that the statutory regulation of homeowners' associations would suffer the same politically driven growth that has plagued the condominium community.

Fortunately, at least so far, those prognostications have not come true. The growth of the homeowners' association statute seems to be somewhat more controlled than legislative developments in the condominium industry. What the future holds, of course, remains to be seen. Perhaps indicative of things to come is legislation that was introduced for homeowners' associations in the 1998 Legislative Session, but not passed. One bill, if passed, would have placed homeowners' associations under the jurisdiction of the Division. The bill would have required, inter alia, arbitration of homeowners' association “disputes” in the Division’s condominium arbitration program.

171. See supra Part I.A.
172. See supra Part I.A.
173. See supra Part I.A.
174. See supra Part I.A.
175. See supra Part I.A.
176. See supra Part I.A.
177. See supra Part I.A.
178. See supra Part I.A.
179. See supra Part I.A.
180. See supra Part I.A.
The legislation which did pass for homeowners' associations is found in chapter 98-261 of the *Laws of Florida*, which became law without the Governor's approval on May 28, 1998 and became effective on October 1, 1998. The original version of the bill contained a right to rescind contracts for the sale and purchase of parcels in homeowners' association communities for failure to comply with disclosure obligations of the statute. At the behest of the developers' and home builders' lobbies, the ultimate bill was substantially watered down, with the rescission remedy being the main casualty of the negotiation process.

Section 617.303(8) of the statute has been amended to require developer-controlled associations and developers to maintain association funds separately from the developer's funds, and separately from the funds of any other community association. Similar to the recent changes to the condominium statute, the law for homeowners' associations has been amended to provide that reserve and operating funds of the association shall not be commingled prior to turnover, although the association "may jointly invest reserve funds." This language is apparently intended to permit the pre-turnover "commingling" of operating and reserve funds for "investment purposes," as is the case for condominiums. After turnover, there appears to be no prohibition against "commingling," for investment purposes or otherwise.

Section 617.307 of the statute pertaining to homeowners' associations has been amended by the creation of a new sub-section (3). This new clause provides a "laundry list" of items that a developer is required to turn over to the board of directors of the homeowners association within ninety days of transition of control from the developer to the nondeveloper homeowners. The list is similar to the list for condominiums, with the most notable omission being the requirement for an audit.

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188. Ch. 98-261, § 1, 1998 Fla. Laws 2277, 2278 (codified as amended at FLA. STAT. § 617.303 (Supp. 1998)).
189. See supra Part I A.
190. Apparently they may be commingled after turnover. Ch. 98-261, § 1, 1998 Fla. Laws 2277, 2278 (codified as amended at FLA. STAT. § 617.307(3) (Supp. 1998)).
191. *Id*.
193. *Id*.
194. See FLA. STAT. § 718.301(4) (1997).
195. See FLA. STAT. § 718.301(4)(c) (1997).
A new section 617.3075 has been added to the law for homeowners' associations, which takes aim at apparent developer abuses involving the inclusion of onerous terms in homeowners' association documents. New section 617.3075 declares that "the public policy of [Florida] prohibits the inclusion or enforcement of certain types of clauses in homeowners' association documents." Among the forbidden clauses are those which have the effect of granting a developer unilateral ability to change homeowners' association documents, including declaration of covenants, articles of incorporation, and by-laws, after transition of control. Also forbidden are clauses that prohibit or "restrict" homeowners' associations from filing a lawsuit against the developer after turnover. Modern practice for many developers includes governing document restrictions against post-turnover suits, usually involving a requirement for super-majority from the property owners. Finally, clauses that permit a developer after transition of control to cast votes in an amount that exceed one vote per residential lot are declared to be against public policy.

The new statute declares all such clauses, granting a developer unilateral amendment rights after turnover, lawsuit restrictions or post-transition preferential voting rights, to be "null and void as against the public policy of this state." The legislature appears to provide a "grandfathering" clause in section 617.305(2) of the statute, wherein it states that the public policy described above "prohibits the inclusion or enforcement of such clauses created on or after the effective date of this section." Since the clauses are presumably "created" when the governing documents are recorded, filed, or created, it appears that the legislature did not intend for this law to apply to pre-existing governing documents for homeowners' associations.

The final amendment to chapter 98-261 of the Florida Laws does not actually involve the statute for homeowners' associations, but rather chapter 689.26 of the Florida Statutes, which somewhat generically

197. Id.
198. Id.
199. Id.
200. Id.
202. Id.
203. Id.
204. Id.
regulates conveyances of land.\textsuperscript{206} Section 689.26 has been amended\textsuperscript{207} to require any contract or agreement for sale of a parcel of land in a community operated by a homeowners' association to incorporate a bold faced disclosure summary, as well as "a statement that the potential buyer should not execute the contract or agreement until they have received and read the disclosure summary required [by the law]."\textsuperscript{208} Unfortunately, the law contained no remedy for its violation.\textsuperscript{209} As noted above, the right to rescind for statutory noncompliance was removed from the final version of the Bill.\textsuperscript{210}

II. APPELLATE COURT DECISIONS

A. Condominium Dispute Jurisdiction; Arbitration

One of the most positive effects of the 1991 changes to the Condominium Act\textsuperscript{211} was the institution of a mandatory, nonbinding program for the arbitration of condominium disputes,\textsuperscript{212} although the legislative findings "that unit owners are frequently at a disadvantage when litigating against an association"\textsuperscript{213} and "that the courts are . . . overcrowded with condominium . . . disputes"\textsuperscript{214} are suspect in light of the absence of any known empirical data to support those findings. Nonetheless, it is clear that the arbitration process for the resolution of condominium "disputes" has been a significant improvement to the industry, providing a forum for parties to condominium disputes a reasonable opportunity to be heard. Although each citizen is guaranteed access to the courts,\textsuperscript{215} the simple truth of the matter is that harried circuit court judges are often not the best public servants to hear many condominium disputes. In many cases, the enforcement or interpretation of a house rule or internal policy may seem petty or inconsequential. In other cases, the intricacies of complex or poorly written statutory provisions are foreign to many trial judges, many of whom

\textsuperscript{206} FLA. STAT. § 689.26 (1997).
\textsuperscript{207} Ch. 98-261, § 4, 1998 Fla. Laws 2280, 2280–81 (codified as amended at FLA. STAT. § 689.26 (Supp. 1998)).
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} See supra Part I A.
\textsuperscript{213} FLA. STAT. § 718.1255(3)(a) (1997).
\textsuperscript{214} Id. § 718.1255(3)(b).
\textsuperscript{215} See FLA. CONST. art. I, § 21.
Adams: Community Associations
do not come from real estate or corporate law backgrounds, and all of whom
are called upon to be “experts” in almost any aspect of Florida’s laws, on
any given day.

Arbitrators appointed by the Division are accustomed to mundane
matters and are also well schooled in some of the subtle complexities of
Florida condominium law, such as the difference between a material
modification of appurtenances and material alterations of common
elements.

During the past several legislative sessions, there has been a continuous
effort to refine what types of “disputes” will be resolved in the Division’s
arbitration program, and what matters must still be referred to court.
Likewise, there has been a noteworthy amount of reported appellate
litigation involving the topic. For the period covered by this survey, four
reported appellate decisions touch upon the issue of what “disputes” are
arbitrable or how the court must interact in the process.

In *Cypress Bend Condominium I Ass’n, Inc. v. Dexner*, the
Association and Mr. Dexner entered into arbitration proceedings regarding
Dexner’s alleged violation of condominium regulations. Upon entry of an
adverse arbitration order, Dexner filed suit seeking a trial de novo pursuant
to section 718.1255(4) of the *Florida Statutes*. “While the order contained
a certificate of service by mail dated May 19, 1997, Dexner did not file his
action until June 19, 1997, thirty-one (31) days later.”

The Association thereafter filed a motion in the trial court for summary
judgment, arguing that the suit was untimely filed pursuant to Rule 61B-
45.343(2) of the *Florida Administrative Code*, and parallel provisions of the
Act. The Association argued that the trial court did not have jurisdiction,
due to Dexner’s untimely filing of a complaint for trial de novo.

The circuit court denied the Association’s motion, holding that since
Dexner had served a copy of this suit by mail within thirty-five days of the
order, it was timely pursuant to Rule 60Q-2.002 of the *Florida Administrative Code*, which allows five days for mailing. The Fourth
District Court of Appeal found the thirty day requirement of the statute and

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216. For example, the most recent Subject Matter Index published by the Division’s
arbitration program discloses some 60 reported Final Orders on pet disputes.
218. *FLA. STAT.* § 718.113(2) (1997).
220. *Id.* at 681.
221. *Id.* (citing *FLA. STAT.* § 718.1255(4) (1997)).
222. *Id.*
223. *Id.* (citing *FLA. ADMIN. CODE ANN.* r. 60Q-2.002 (1998)).
224. *Dexner*, 705 So. 2d at 681.
225. *Id.* at 681 (citing *FLA. ADMIN. CODE ANN.* r. 60Q-2.002 (1998)).
rule to be jurisdictional.226 Citing Markham v. Moriarty,227 the fourth district
held that the circuit court exceeded its jurisdiction by not granting the
Association’s motion.228

In Summit Towers Condominium Ass’n v. Coren,229 a unit owner filed
suit against the condominium association regarding the Board’s assignment
of parking spaces.230 Although the court characterized the complaint as
alleging “multiple theories in several counts,”231 the court stated that the unit
owner essentially alleged that the board members preferentially assigned
themselves additional parking spaces unavailable to other unit owners.232
The unit owners’ complaint sought declaratory and injunctive relief, as well
as damages.233

The appellate court ruled that the trial court erred in denying the
Association’s motion to stay the action pending arbitration under the
Condominium Act.234 The court rejected the unit owner’s contention that the
dispute involved “title to any unit or common element,”235 which is excluded
from the statutory definition of “dispute”, and ruled that the “dispute”
involved the board’s authority to require a unit owner to “take any action, or
not to take any action, involving that owner’s unit or the appurtenances
thereto,”236 which is included in the statutory definition.237 Although the
court does not provide an extended analysis of the “multiple theories”
asserted by the unit owner, the case is consistent with those cited by the
court, which favor sending condominium “disputes” to arbitration wherever
possible.238

The case of Ruffin v. Kingswood E. Condominium Ass’n,239 runs counter
to the above noted trend in the cases of “when in doubt, arbitrate.”240 The
Association brought an arbitration proceeding against unit owner Mary

226. Id.
228. Dexner, 705 So. 2d at 682.
230. Id. at 417.
231. Id.
232. Id.
233. Id.
234. Coren, 707 So. 2d at 417.
237. Coren, 707 So. 2d at 417.
238. See Carlandia Corp. v. Obermaur, 695 So. 2d 408 (Fla. 4th Dist. Ct. App 1997);
Blum v. Tamarac Fairways Ass’n, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996).
Telephone conversation with Rod Tennyson, Counsel for Appellee Association (Sept. 2,
1998).
240. Id.
Ruffin, and her son, Paul Ruffin.241 The Association alleged that Paul Ruffin
was a tenant, and that because of physical altercations on the Association’s
premises involving Mr. Ruffin, both Mrs. Ruffin (the mother/unit owner)
and Mr. Ruffin (the son/tenant) were in violation of the condominium
documents, which prohibited unit owners from “permitting immoral or
illegal acts or a nuisance on the property.”242 In the arbitration action, the
Association requested that the Division issue an order requiring Mr. Ruffin
to vacate the premises, and to further restrain Mr. Ruffin from further entry
onto the condominium property. Mr. Ruffin, in his answer to the
Association’s petition, informed the arbitrator that his mother had moved
away from the condominium and that the matter was therefore moot.243 The
Association countered that because it still “wanted protection against [Mr.
Ruffin’s] possible return to the premises,” it was entitled to an order stating
that “Mr. Ruffin shall remain away and off the condominium property.”244
Although not clearly stated in the opinion, it appears that the Division
obliged the Association and entered such an order.

Mr. Ruffin filed a complaint for trial de novo within the prescribed time
frame.245 “The Association moved for summary judgment . . . on the ground
that the whole case was moot because [Mrs.] Ruffin had moved from the
condominium (and later died).”246 Thus, the Association argued, Mr. Ruffin,
who was never a unit owner, and allegedly a “tenant,” had no “standing to
request a trial de novo.”247 The trial court accepted the Association’s
argument, entered summary judgment on this ground, and reserved
jurisdiction as to an award of attorney’s fees.248

In a surprising decision, the Fourth District Court of Appeal, sua
sponte, ruled that the Division did not have subject matter jurisdiction in
the initial arbitration action as to Mr. Ruffin.249 The court held that subject
matter jurisdiction is conferred upon a court by constitution or statute and
may not be created by waiver.250 The court ruled that “[t]he Division should
have dismissed the petition prior to the entry of the order enjoining” Mr.
Ruffin from coming on to the condominium property.251 Thus, the fourth

241. Id.
242. Id.
243. Id.
245. Id.
246. Id.
247. Id.
248. Id.
250. Id.
251. Id.
district held that the request for "trial de novo was not moot." The court concluded that since Mr. Ruffin had requested the vacation of the arbitration order in his complaint, and "because the arbitrator had no subject matter jurisdiction to enter the order [in the first instance], . . . the relief [sought] should have been granted."

Although the result in this case will apparently create certain inefficiencies for the litigants therein, and although it is unclear why the appellant, Mr. Ruffin, would have an incentive to continue litigating this case if his mother had moved away from the condominium and died assuming he did not intend to return, it is submitted that the court's decision is technically correct if the arbitrator indeed lacked "subject matter jurisdiction." Curiously, however, the fourth district in Ruffin does not consider the decision of its sister court in the third district case of Sterling Condominium Ass'n v. Herrera. Although Sterling arose in a slightly different procedural setting, the third district held "that the statute is not jurisdictional and that, therefore, the circuit court did not lack subject matter jurisdiction to hear this dispute."

The third district in Sterling also noted that the unit owner waived her right to compel arbitration by filing an answer and otherwise actively participating in circuit court litigation. It is unclear from the Ruffin case why the same waiver arguments would not apply to Mr. Ruffin's conduct, unless section 718.1255 of the Condominium Act does invoke "subject matter jurisdiction." It is arguable that a conflict now exists between the third and fourth districts as to this issue.

In Clark v. England, the unit owner, England, filed a complaint in circuit court against the condominium association and certain individual directors for malicious prosecution, negligence, breach of fiduciary duty, slander, and conspiracy. The Association and its directors filed a motion

252. Id.
253. Id. at *3.
254. The Association presumably still has standing under section 718.303(1)(e) of the Florida Statutes to pursue court action against a tenant, although the action may be moot. FLA. STAT. § 718.303(1)(e) (1997).
255. The prospect of exposure to the Association's attorney's fees seems to be a plausible theory.
256. 690 So. 2d 703 (Fla. 3d Dist. Ct. App. 1997).
257. Id. at 704-05.
258. Id. at 705.
260. 715 So. 2d 365 (Fla. 5th Dist. Ct. App. 1998).
261. Id. at 366.
to stay in the circuit court action and to compel arbitration. The circuit court denied the motion to refer the matter to arbitration. The Association and its directors appealed.

In affirming the trial court’s ruling, the Fifth District Court of Appeal, after quoting much of the statute, stated that section 718.1255 of the Florida Statutes "applies only to disputes between a unit owner and a condominium association." The court held that the "prevailing authority’s interpretation of the statute" requires that the only litigants entitled to participate in arbitration proceedings are unit owners and associations. Without providing much detail as to the underlying facts of the case, the court concluded that "[a]lthough [Mrs. England] was a unit owner when she filed [suit] in September of 1997, she was not a unit owner when [her] causes of action arose, on January 14, 1997."

The dissenting opinion sheds a little more light on the underlying facts. Apparently, the owner of the unit in question was a corporation, of which Mrs. England was a director. The core of the dispute involved the corporation’s right to assign to Mrs. England, individually, the right to run for a seat on the board of directors of the condominium association. According to the dissenting opinion, Mrs. England asserted her right to run for the board at a meeting of the board of directors, and when she refused to leave the meeting after the board’s request that she do so, she was arrested. The dissenting judge reasoned that since the corporation’s right to designate Mrs. England as its representative to run for the Board is "within the contemplation of the arbitration provision and has now replaced the corporation as the owner of the unit, it appears that only she can seek the answer."

The majority opinion establishes the principle that when a “cause of action arises” is the benchmark for determining whether a party is entitled to, or required to, submit to the statutorily mandated arbitration process. Although this case can be somewhat limited to its own unique facts, the establishment of a “when the cause of action accrues” standard could have

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262. Id.
263. Id.
264. Id.
265. Clark, 715 So. 2d at 367.
266. Id. (citing Blum v. Tamarac Fairways Ass’n, 684 So. 2d 826 (Fla. 4th Dist. Ct. App. 1996)).
267. Clark, 715 So. 2d at 367.
268. Id. (Harris J., dissenting).
269. Id.
270. Id.
271. Id.
significance in future arbitration decisions, particularly those where a unit owner sells a unit during the pendency of an arbitration proceeding.

B. Community Association Assessment Cases

After its third trip through the appellate courts, it is perhaps likely that the dispute over charges for bus rides from the Sheffield and Greenbrier Condominiums in Palm Beach County has generated enough attorneys' fees to provide all of the litigants with chauffeured limousine trips to their shopping excursions for the rest of their lives. In Sheffield B Condominium Ass'n, v. Scudder, the Fourth District Court of Appeal held that the trial court misinterpreted its mandate in Scudder v. Greenbrier C Condominium Ass'n, referred to as "Greenbrier II" in the opinion. "In Greenbrier II, [the appellate court] reversed the trial court's holding that the 'one-rider rule' imposed by the Association was reasonable." The appellate opinion in Greenbrier II stated that "while the 'one-rider rule' was unreasonable, . . . the balance of the transportation assessments imposed by the Association was valid." The mandate in Greenbrier II was "for the trial court to determine the amount of the improper assessment, which would have been the amount charged pursuant to the 'one-rider' rule, and [for the trial court to] adjust the accounting on the transportation assessment accordingly."

Apparently, "however, on remand the Unit Owners convinced the trial court that the entire transportation assessment was invalid simply because [the fourth district had] determined the 'one-rider' surcharge to be unreasonable" in Greenbrier II. The trial court's order was thus reversed, with instructions "to enter judgment in favor of the Association on all issues except the 'one-rider' surcharge."

The fourth district also reversed the trial court's order assessing prevailing party attorney's fees against the association. On remand the trial court was directed to "determine the prevailing party of [the] litigation,"

272. 698 So. 2d 1270 (Fla. 4th Dist. Ct. App. 1997).
273. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1995).
275. Sheffield, 698 So. 2d at 1271.
276. Id.
277. Id.
278. Id.
279. Id.
280. Sheffield, 698 So. 2d at 1271.
while “being mindful that the Association has prevailed on all but one issue.”

Undoubtedly, the most significant assessment collection case for Florida’s community association practitioners is Bryan v. Clayton. In its per curiam opinion, the Fifth District Court of Appeal confronted the question of “whether maintenance assessments [for a condominium] homeowner’s association are ‘debts’ for purposes of [compliance with] the Fair Debt Collections Practices Act,” and the Florida Consumer Collection Practices Act. Relying on a series of federal district court cases, Florida’s fifth district concluded that the Fair Debt Collection Practices Act did not embrace association assessments.

Apparently, while the Bryan case was still pending on a motion for rehearing, the United States District Court of Appeals for the Seventh Circuit issued the decision of Newman v. Boehm, Pearlstein, & Bright, Ltd., which is the first federal appellate decision on the issue. In Newman, Mr. and Mrs. Newman had received a collection letter from a law firm, which had been sent on behalf of the board of directors of a condominium association. “The letter informed the Newmans that they were in default on their obligation to pay” common expenses, and sought past due maintenance fees, late fees, interest, and attorney’s fees. “The letter stated that if the amount demanded was not paid within thirty days, the association would commence [foreclosure] proceedings.” The Newmans filed suit against the law firm pursuant to the Fair Debt Collections Practices Act (“FDCPA”), alleging that the law firm failed to provide a “validation notice” and specifically alleging that the letters did not disclose that the “defendants were attempting to collect a debt and that any information obtained would be used for that purpose.” The unit owners also “asked the district court to certify a class comprised of all individuals who had

281. Id.
282. 698 So. 2d 1236 (Fla. 5th Dist. Ct. App. 1997).
283. Id. at 1237 (citing 15 U.S.C. § 1692 (1994)).
284. Bryan, 698 So. 2d at 1237 (citing FLA. STAT. § 559.55 (1997)).
285. Id. (citing Azar v. Hayter, 874 F. Supp. 1314 (N.D. Fla. 1995) aff’d, 66 F.3d 342 (11th Cir. 1995)).
286. 119 F.3d 477 (7th Cir. 1997).
287. Id. at 480. A companion case was also consolidated in this appeal. Id. at 477.
288. Id. at 479.
289. Id.
290. Newman, 119 F.3d at 479.
292. Newman, 119 F.3d at 479 (citing Avila v. Rubin, 84 F.3d 222, 226 (7th Cir. 1996)).
293. Id.
received similar letters from the defendant law firms and to appoint plaintiffs as class representatives" (and their counsel as class counsel).294

Relying on several federal district court decisions, the trial court dismissed the action.295 Upon appeal, the Seventh Circuit Court of Appeals acknowledged that "no federal court ha[d] yet concluded that the obligation to pay a condominium assessment constitutes a 'debt' under the FDCPA," and went on to specifically hold that association assessments do constitute a "debt."296 The court noted that the "credit requirement" from the case of Zimmerman v. HBO Affiliate Group297 had been recently rejected by another Seventh Circuit panel in the case of Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.298 The Seventh Circuit, in Newman, held that the obligation to pay assessments arose upon the purchase of a unit, thereby satisfying the requirement of a "transaction" to create the "debt."299 The Court also found it undebatable that the assessments were used for "personal, family, or household purposes."300

Notwithstanding the opinion of the federal Seventh Circuit, Florida's fifth district, in Bryan, declined to change its ruling, after due consideration of the appellee's motion to stay or recall mandate.301 The fifth district noted that although "part of the text of our opinion might have been different," had it had the opportunity to consider the opinion of the federal Seventh Circuit in Newman, its "decision to affirm would not have been different."302 The Bryan court remained unconvinced, notwithstanding the opinion of the Newman court, that condominium assessments constitute a "consumer debt."303

Since the FDCPA is a federal statute, it seems reasonably clear that the opinion of the federal Seventh Circuit Court of Appeals will take precedence over a decision from a state intermediate appellate court. Although the Bryan court reaches the better decision in terms of policy,304 prudent practitioners are well-advised to comply with the FDCPA.

294. Id.
295. Id. at 479–80.
296. Id. at 480.
297. 834 F.2d 1163 (3d Cir. 1987).
298. Newman, 119 F.3d at 479 (citing Bass v. Stulper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (7th Cir. 1997)).
299. Id.
300. Id.
301. Bryan, 698 So. 2d at 1237.
302. Id.
303. Id. at 1237–38.
304. Community association interest groups should urge Congress to review this matter.
The case of *Southeast & Associates, Inc. v. Fox Run Homeowners Ass'n*, involves foreclosure of a condominium association lien, and the adequacy of constructive service of process. A $90.00 “assessment for semi-annual maintenance became due on July 1, 1995,” which Mr. and Mrs. Love, the unit owners, failed to pay. “The association sent a notice of delinquency by certified mail to the Loves’ [unit at the condominium], warning that the association could file a lien” if payment was not made. “The notice was accepted by someone on behalf of the Loves, who signed the return receipt card.”

After nonpayment, the association filed a lien, sending a thirty-day notice of intent to foreclose to the same address, which was again accepted on the Loves’ behalf. “Just before the expiration of this thirty-day period, a partial payment was sent to the association.” The association notified the Loves that full payment would be necessary to avoid foreclosure.

The association subsequently initiated a foreclosure action, and hired a process server to serve the foreclosure complaint on the Loves. The process server could not locate the Loves at the unit, and made nine attempts to serve them there. “Unbeknownst to the association, the Loves were residing at their New York address.” “The process server [also] performed two skip traces and ...” asked the neighbors on both sides of the property if they knew where the Loves had been. Other efforts, including tracing a business address, were also fruitless.

Subsequently, the association served the Loves by publication. “[A]fter filing an affidavit of diligent search by the process server and an affidavit of constructive service executed by the association’s counsel,” a default was entered in the suit. A foreclosure judgment was subsequently entered.

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305. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).
306. Id. at 695.
307. Id.
308. Id.
309. Id.
310. *Southeast & Assoc., Inc.*, 704 So. 2d at 695.
311. Id.
312. Id.
313. Id.
314. Id.
315. *Southeast & Assoc., Inc.*, 704 So. 2d at 695.
316. Id.
317. Id.
318. Id.
319. Id.
320. *Southeast & Assoc., Inc.*, 704 So. 2d at 695.
“Southeast and Associates was the successful bidder at the foreclosure sale.”

Nine days after a certificate of title was issued, the “Loves moved to set aside the sale based on an insufficient service of process.” The sale was set aside when the trial court entered an order finding lack of diligent search and inquiry by the association. The Fourth District Court of Appeal reversed, finding that the association had made a diligent search.

The court analyzed the policies served by the constructive service statute, the doctrine of void versus voidable titles, and the impact on marketability of title that uneven judicial treatment of the adequacy of constructive service can have. The court distinguished other association cases where lack of diligence was shown, concluding that the association’s process server had demonstrated “diligent search and inquiry.”

The court implicitly concluded that, at best, voidable title had passed, which by virtue of Southeast’s unquestioned status as a bona fide purchaser, would have extinguished any claim by the Loves. In concluding, the court noted that the Loves “could easily have provided the association with their New York address,” and further found it relevant that “someone on their behalf kept signing for the certified letters, sending in a partial payment.”

The case of Limner v. Country Pines Condominium Ass’n, touches upon a very important issue to many condominium associations; the relationship between the association’s assessment lien and the lien of a foreclosing mortgagee. Unfortunately, the reported decision is largely devoid of a discussion of the facts underlying the particular litigation.

The court begins its opinion by ruling that section 718.116 of the Florida Statutes “limits the mortgagee’s liability in [that] case to the lesser of six months of unpaid assessments or one per cent of the original mortgage debt.” The court goes on to state that “[t]he amendment to the statute does not apply to this lawsuit,” because the suit was filed before the effective date of the statute. The court does not specify which “amendment to the statute” it is discussing. It is presumably the 1994 amendment to section

321. Id.
322. Id. at 696.
323. Id.
324. Id. at 696–97.
325. Southeast & Assocs., Inc., 704 So. 2d at 696.
326. Id.
327. Id. at 697.
328. 709 So. 2d 154 (Fla. 4th Dist. Ct. App. 1998).
329. Id. at 154.
330. Id.
331. Id. (citing FLA. STAT. § 718.116(1)(b)(1) (1997)).
332. Id.
718.116 of the Act, because that is the only amendment to the relevant portions of the Act since the 1993 version, which the court cites as the controlling authority.

The court held that there is nothing in the statute to indicate that the provisions of section 718.116, dealing with a mortgagee's liability for six months of unpaid assessments or one percent of the original mortgage debt, do not equally apply to a former unit owner who has taken back a first mortgage as part of a sale of a unit, apparently the issue in this case. Although the opinion's failure to recite the facts hampers the ability to more thoroughly analyze the logic of the decision, it is not evident how the 1994 amendment to the Act would have benefited either party to the litigation. Further, although the court's unembellished statement that "[a]pplication of the statute does not amount to a constitutional violation" raises one's curiosity, the lack of proper recitation of facts (when the mortgage was recorded, when the foreclosure judgment was taken, who bid at the foreclosure sale or whether a deed in lieu of foreclosure was involved, the parties' theories and arguments, etc.) unfortunately render this case to one of limited precedential value for community association legal practitioners.

The case of *Gainer v. Fiddlesticks Country Club, Inc.*, involved a homeowners' association's ability to require a purchaser at a tax sale to buy an "equity certificate" in the country club/homeowners' association. The relevant declaration of covenants required every purchaser of a lot in the subdivision to purchase an equity certificate, thus becoming a member of the country club, which also served as the governing homeowners' association for the development. "On November 7, 1994 Mr. Gainer purchased a tax deed for a lot in Fiddlesticks." After the association's demand that Mr. Gainer purchase an equity certificate, and his refusal to do so, lien and foreclosure proceedings were commenced. At trial, Mr. Gainer argued that the declaration provision requiring purchase of the equity certificate did not survive the tax sale pursuant to section 197.573 of the *Florida Statutes*. This statute "has long provided that a covenant does not survive a tax sale if it requires the grantee to expend money for any purpose, except

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334. *Limmner*, 709 So. 2d at 154.
335. *Id.*
336. *Id.*
337. 710 So. 2d 76 (Fla. 2d Dist. Ct. App. 1998).
338. *Id.* at 76.
339. *Id.* at 77.
340. *Id.*
341. *Id.*
342. *Gainer*, 710 So. 2d at 77 (citing FLA. STAT. § 197.573 (1993)).

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one that may require that the premises be kept in a sanitary or slightly condition or one to abate nuisances or undesirable conditions."343 The second district concluded that there was no dispute that the purchase of an equity certificate did not fall within the quoted exception to the law.344

Section 617.312 of the Florida Statutes was enacted in 1995.345 This section provides that restrictions contained in a declaration of covenants survive a tax sale.346 The association was able to convince the court that although the 1995 amendment to the law was not binding per se, the amendment was an effort to clarify exemptions previously contained in the statute, recognizing that homeowners' associations were not commonplace when the exceptions to the statute were written into the law, and the fact that homeowners' associations were not subject to statutory regulation at all until 1992.347 Citing State Farm Mutual Auto Insurance, Inc. v. Laforet348 and Landi v. Nationwide Mutual Fire Insurance Co.,349 the second district, in Gainer,350 rejected the notion that there was an ambiguity in section 197.573 of the Florida Statutes, or that it was clarified by the subsequent enactment of section 617.312.351

Had the 1995 amendment to section 617.312352 not occurred, this decision would have a devastating impact on homeowners' associations in Florida. Purchasers at tax sales could essentially accept the benefits of the association's maintenance of their property, and the consequent enhancement of their property's value, but would not be called upon to contribute to the expenses of doing so. Fortunately, the 1995 amendment to section 617.312 of the statute for homeowners' associations should substantially limit the application of this case.

343. Id. at 76.
344. Id.
347. Although these arguments do not appear in the reported opinion, the writer is familiar with the arguments made to the court both at trial and on appeal, as a consequence of having served as general corporate counsel to Fiddlesticks Country Club, Inc. during the period of the litigation.
348. 658 So. 2d 55 (Fla. 1995).
349. 529 So. 2d 1170 (Fla. 2d Dist. Ct. App. 1988).
C. **Community Association Litigation Pleading Cases; Class Actions**

The case of *Concerned Class Members v. Sailfish Point, Inc.* presented an issue of first impression for the Florida state courts: whether individual, non-named class members who have not formally intervened in a class action have standing to appeal a final judgment binding on all class members. The court announced:

Prior to approval of a settlement agreement ending the underlying class action litigation between the 524 residents of the Sailfish Point development and the developer, Mobil Land Development Corporation, a group of fourteen class members calling themselves “Concerned Class Members” sought to be named as additional party plaintiffs and to intervene in the litigation as a subclass.

The trial court denied the “Concerned Class Members” motion to intervene and be named as party plaintiffs, but did allow them to be heard on a separate motion which would require a vote from the residents on the proposed settlement with Mobile Land Development Corporation. The residents voted, and, by majority vote, approved the settlement agreement, which was ultimately approved by the court. Twelve of the fourteen Concerned Class Members filed a notice of appeal from the order approving the settlement. The original class representatives, the Sailfish Point Owners representatives, moved to dismiss the “Concerned Class Members” appeal.

The fourth district, noting the lack of authority in Florida, found it appropriate to look at applicable federal cases as persuasive authority. The court noted that the “[f]ederal courts addressing the issue are split, with the Eleventh Circuit joining the majority of federal courts in holding [that] non-named class members must intervene formally in the class action to [have] standing to appeal.”

The fourth district found particularly persuasive the rationale of *Guthrie v. Evans*, which held, *inter alia*, that “class actions could become

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353. 704 So. 2d 200 (Fla. 4th Dist. Ct. App. 1998).
354. Id. at 201.
355. Id.
356. Id.
357. Id.
358. *Sailfish Point*, 704 So. 2d at 201.
359. Id.
360. Id.
361. Id.
362. 815 F.2d 626 (11th Cir. 1987).
unmanageable and non-productive if each member could individually decide to appeal.”

The fourth district concluded that “because the Concerned Class Members did not intervene [in the trial of the case], nor did they appeal the trial court’s denial of their motion to establish a subclass,” they lacked standing to appeal approval of the settlement agreement.

The case of Arvida/JMB Partners v. Council of Villages, Inc., dealt with the elements parties seeking class action certification in community association litigation need to establish. The Council of Villages, Inc. (Council), the Country Club Maintenance Association, Inc. (CCMA), the Master Homeowners’ Association for the [Broken Sound PUD (Planned Urban Development)], and six residents filed suit against various developer entities (Arvida) and the Broken Sound Club, a private country club. The Council is an organization formed by some of the homeowners in the Broken Sound PUD for the purpose of seeking turnover of the Club to the property owners in Broken Sound. Count I of the plaintiff’s complaint claimed that:

Arvida violated Boca Raton city ordinances by (1) not turning over ownership of certain open spaces to an organization of property owners, (2) arranging that members be charged for use of this open space, and (3) obtaining park credit for facilities that became the property of a private club, when, according to the ordinance, they should have been the property of an organization of the property owners.

Count II of the suit was for civil theft. Count III sounded in constructive trust and Count IV pled unjust enrichment. The trial court granted class certification on Count I, violation of city ordinance, denied class certification on Count II, constructive trust, while omitting to make a determination respecting Count II, civil theft and Count IV, unjust enrichment.

363. Sailfish Point, 704 So. 2d at 202 (citing Guthrie v. Evans, 815 F.2d 626, 628 (11th Cir. 1987)).
364. Id.
366. Id. at D1767.
367. Id.
368. Id.
369. Id.
370. Arvida, 23 Fla. L. Weekly at D1767.
371. Id.
372. Id.
The case was also complicated by the fact that there were certain non-defendant appellants who were given leave to intervene in the trial proceedings relative to class certification. These non-defendant appellants were the owners of apartment complexes, which might be converted into condominiums. The apartment building owners argued that the single family homeowners' interests were antagonistic to those of the apartment building owners, and so the Council should not serve as the class representative. The trial court added "to the proposed class ... [of] single family homeowners in the PUD," the apartment building owners, and all other property owners within the Broken Sound PUD to its certification of a class for Count I violation of city ordinance. "The court concluded [that] the issue was essentially whether there was violation of an ordinance requirement that all of the open space reserved for common use be owned in fee simple by an organization of property owners within the PUD." On appeal, the plaintiffs/appellees/cross-appellants sought certification of two classes: "Class A, consisting of all resident single family homeowners, to assert the objective of turnover of ownership of the Club, and Class B, consisting of equity owners in the Club, to seek recision of past Club membership purchases and [a] refund of amounts paid as membership fees." The Fourth District Court of Appeal concluded that since certain defendants in the suit, namely the developers, were also property owners within the PUD, a class of all property owners would have interests adverse to those of the other members of the class certified by the trial court, and thus these property owners should not be included in the class. The court also applied the same rationale to the Broken Sound Club, which it found would have an interest directly adverse to the interests of the individual property owner-members of the class. In attempting to sort out the various classes, the court noted that the dispute sub judice presented "the quintessential scenario for class action treatment." The court found it improbable that individual members of the class would have the resources to pursue their common interests individually, or alternatively that the courts "would be clogged ad infinitum with the individual suits." Noting that "Florida Rule of Civil Procedure 1.220(a)(2) requires only that the resolution

373. Id.
374. Id.
375. Arvida, 23 Fla. L. Weekly at D1767.
376. Id. Count I alleged a violation of Boca Raton city ordinances. Id.
377. Id.
378. Id.
379. Arvida, 23 Fla. L. Weekly at D1767.
380. Id.
381. Id.
382. Id.
of common questions of law and fact affect all or a substantial number of class members,” the court held that the adequacy of representation requirement can be met where the named representatives of the class have interests in common with the proposed class members.383

Moving to a discussion of the various counts in the complaint, the court held that the issue involving an alleged violation of a city ordinance does not sound in fraud, and was thus properly certified as a class action count.384 As to the remaining three counts, the court assumed that the two counts not certified by the trial court, Counts II and IV, were rejected for class certification, the trial court also specifically rejected count III, constructive trust for class certification.385

The fourth district ruled that Count II, sounding in civil theft, charges “willful, intentional and wrongful diversion of the golf course open space, and refusal to return the property or the proceeds obtained as a result of the diversion of the ownership rights.”386 Stating that an action for civil theft is not tantamount to an allegation of misrepresentation or fraud, the fourth district held that the civil theft count should have been certified as a class action count.387

Likewise, the appellate court held that the trial court erred in refusing to certify Count III, constructive trust, for class certification.388 The court noted that “[f]raud claims which have been considered unamenable to class action [treatment] arise from circumstances in which each defrauded party has a legally distinct claim, each depending on its own facts.”389 Notwithstanding the fact that the count in the complaint alleged that the developer failed to disclose the inadequacy of the golf facilities to accommodate the entire ultimate population of Broken Sound, the appellate court found that “a substantial number of the members of the class . . . [would] have a common interest in the remedy.”390 Thus, the court also reinstated Count III, constructive trust, as amenable to class action treatment.391 Finally, in consideration of Count IV, unjust enrichment, the court summarily held that the common interests of a substantial number of members of the class would be adequately represented in the count for compensatory damages.392

383. *Id.* at D1767 (citing FLA. R. CIV. P. 1.220(a)(2)).
385. *Id.*
386. *Id.* at D1768.
387. *Id.*
388. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
Graves v. Ciega Verde Condominium Ass'n,393 arose out of the foreclosure of a construction lien.394 "Fred Graves (Graves) was a licensed general contractor who performed repair work to the exterior siding of the" Ciega Verde Condominium buildings.395 A dispute erupted, resulting in Graves’ filing of a lien for approximately $52,000, the unpaid contract amount.396 Graves subsequently sought to foreclose the construction lien, by filing a foreclosure suit.397 "In the foreclosure action, Graves alleged that each unit owner was liable for a proportionate share of the expenses of" maintaining the common elements.398 "Graves recorded a notice of lis pendens against all of the unit owners," sued each unit owner individually, and named the association as the class representative.399 "Service of process was issued against Ciega Verde, both individually and as the class representative."400 The association answered both individually and as class representative, and discovery ensued.401 "Thereafter, the contract portion of the action was set for binding arbitration," in which the association participated.402 Graves prevailed in the arbitration, recovering his total demand.403 Graves served the association with "a motion to confirm the arbitration award and to set [the] cause for trial on the foreclosure action."404 The trial court entered a judgment foreclosing thirty of the thirty-two units because two had been released during the pendency of the litigation.

Some two years after the initial filing of the suit, the association retained new counsel, who filed a motion to set aside the foreclosure judgment, claiming that the trial court did not have jurisdiction to order foreclosure.405 The trial court granted the motion and required Graves to personally serve each individual unit owner. Graves complied with the order. "[T]he unit owners [then] moved to dismiss the amended complaint claiming that Graves filed the amended complaint on May 23, 1994, and therefore, service on the unit owners had not been accomplished within 120
days from filing the original complaint." At issue on appeal was whether the trial court obtained jurisdiction over the individual unit owners through service of process on the association. Citing Rule 1.221 of the Florida Rules of Civil Procedure, the fourth district held that the unit owners, "as members of the class, have a common interest regarding the maintenance of the common elements of the condominium property." In addressing the unit owners' arguments that they should have received individual service to satisfy "due process concerns," the Fourth District responded that the association has "a fiduciary and statutory duty to give notice of a lawsuit to the unit owners."

The result in Graves certainly seems equitable on the merits. Clearly, the association has the fiduciary duty to represent the interests of all unit owners in the litigation. Additionally, any unit owner who does not wish to subject his or her unit to a potential foreclosure action may relieve his or her condominium parcel of the lien by exercising any of the rights of a property owner under Chapter 713, or "by payment of the proportionate amount attributable to his or her condominium parcel." The courts' imposition of a new "fiduciary and statutory duty to give notice of a lawsuit to the unit owners" is cause for concern. Although most associations will routinely report on the nature and status of pending litigation, an association is only obligated by statute to "give notice" of a lawsuit if the association's liability in an action exceeds insurance coverage; when the association is contesting ad valorem taxation for all units in a condominium project; when the association is involved in litigation with exposure of more than

406. Id.; see also Fla. R. Civ. P. 1.170(I).
407. Graves, 703 So. 2d at 1111.
408. Id.
409. Id.
410. Id. at 1112 (citing Kesl, Inc. v. Racquet Club of Deer Creek II Condominium, 574 So. 2d 251 (Fla. 4th Dist Ct. App. 1991)).
411. Id.
414. Graves, 703 So. 2d at 1112.
$100,000.00,417 and when the association is named as class representative of the unit owners in an eminent domain proceeding.418

D. Community Association Litigation-Attorney's Fees

Undoubtedly, the prospect of exposure for payment of an adversary's attorney's fees serves to discourage the litigation of cases without substantial merit. The Florida Condominium Act has long evinced a prevailing party attorney's fees approach to dispute resolution.419 The case of Ares v. Cypress Park Gardens Homes I Condominium Ass'n, Inc.,420 involves a condominium unit owner's suit against his association for "production of [official] records, injunctive relief, and an accounting."421 The parties settled the unit owner's claims in mediation but apparently decided to defer resolution of entitlement to attorney's fees.422 According to the opinion, the parties agreed that a special master would be appointed to determine which party prevailed on each issue.423 "The [special] master issued a report and recommendation finding that [the unit owner] succeeded on one claim, that the Association prevailed on three claims, and that one of the claims did not support an award of fees to either party under the statute."424 Over the unit owner's objection, the trial court confirmed the master's recommendations and awarded the fees accordingly.425

After concurring (without recitation of the facts of the case) that the association prevailed on the count for production of official records, the court further held that there was no error in the trial court's ruling that section 718.303(1) of the Condominium Act does "not authorize attorney's fees in an action for an accounting."426 This aspect of the decision is curious, since section 718.303(1) confers a right of action by a unit owner against the association.427 Although a suit for accounting is typically a two-stage proceeding, first establishment of the right to an accounting and then the actual accounting itself,428 an "accounting" is essentially an equitable

417. FLA. STAT. § 718.504 (1997).
418. FLA. STAT. § 73.073(3) (1997).
420. 696 So. 2d 885 (Fla. 2d Dist. Ct. App. 1997).
421. Id. at 886.
422. Id.
423. Id.
424. Id.
425. Ares, 696 So. 2d at 886.
426. Id.
remedy\(^{429}\) that is based upon a legal relationship directly established by the Condominium Act, which establishes a fiduciary relationship between the officers and directors of an association and the unit owners.\(^{430}\)

With respect to Mr. Ares' request for injunctive relief, the second district concluded that the lower court erred in finding that the association prevailed on the unit owner's request that the trial court enjoin the association from further violations of its bylaws and the Condominium Act.\(^{431}\) While agreeing that a perpetual mandatory injunction, requiring an association to abide by its documents and comply with the law is inappropriate,\(^{432}\) the second district noted that the issue before the master was not whether Mr. Ares would have prevailed on a claim for such an injunction.\(^{433}\) Rather, the court noted that the master was called upon to determine whether the unit owner had been successful on his claim as it was resolved in the settlement agreement.\(^{434}\) The second district, noting the association's admission of various statutory and documentary violations in its answer, held that the unit owner prevailed in his endeavor to require the association's adherence to its bylaws and the Condominium Act.\(^{435}\) In apparent dicta, the court also noted that the unit owner's complaint, seeking an injunction which prohibited the association from conducting its affairs "in violation of the law and condominium documents" is distinguishable from "perpetual prohibitory injunctions," and apparently enforceable.\(^{436}\)

In Cuervo v. West Lake Village II Condominium Ass'n, Inc.,\(^{437}\) various "ousted directors" appealed the ultimate award of attorney's fees to the association.\(^{438}\) The genesis of the dispute was a contested condominium election.\(^{439}\) The appellants, claiming to be victorious, seized control of the association's bank account and transferred funds to a different bank.\(^{440}\) The association contested the validity of the election.\(^{441}\) The appellants filed for

\(^{429}\) See Manning v. Clark, 56 So. 2d 521, 524 (Fla. 1951).

\(^{430}\) FLA. STAT. § 718.111(1)(a) (1997).

\(^{431}\) Ares v. Cypress Park Garden Homes I Condominium Ass'n, 696 So. 2d 885, 887 (Fla. 2d Dist. Ct. App. 1997).

\(^{432}\) Id. See also Indian Trail Homeowners Ass'n, Inc., v. Roberts, 577 So. 2d 998 (Fla. 4th Dist. Ct. App. 1991).

\(^{433}\) Ares, 696 So. 2d at 887.

\(^{434}\) Id.

\(^{435}\) Id.

\(^{436}\) Id.

\(^{437}\) 709 So. 2d 598 (Fla. 3d Dist. Ct. App. 1998).

\(^{438}\) Id. at 598.

\(^{439}\) Id.

\(^{440}\) Id.

\(^{441}\) Cuervo, 709 So. 2d at 598.
arbitration pursuant to section 718.1255 of the Act. During the arbitration proceeding, the association was represented by [a] law firm. During the pendency of the arbitration proceedings, the same law firm "filed a three-count complaint against [the] appellants and the association's former management company," seeking return of the association's funds, damages for conversion, and damages for "breach of fiduciary duty for its role in the subject election." "The association pled an entitlement to attorney's fees" as well. The action was stayed "pending the resolution of the arbitration proceeding."

The arbitrator ruled in favor of the association. The lower court entered a temporary injunction requiring the appellants to relinquish the association's funds. The appellants also filed an answer and affirmative defenses to the complaint, as well as a counterclaim. The same law firm that had been representing the association up to this point in the proceedings filed an answer and affirmative defenses to the counterclaim. In response to the filing of a counterclaim against the association, the association's insurance carrier retained a second law firm to represent the association in the litigation. The second firm filed an answer to, and thereafter defended, the counterclaim. The two law firms continued to represent the association's interests in the matter, although "the gravamen of both the main action and the counterclaim action centered around the issue of the validity of the appellants' election as directors." Before trial, the association prevailed in obtaining partial summary judgment and was determined to be the prevailing party. The law firm initially retained by the association was awarded approximately $45,000 in fees. There is no mention of an award of fees to the firm retained by the insurance carrier.

On appeal, noting that the issues raised in the main action and counterclaim "were inextricably intertwined such that a determination of the issues in one action would necessarily be dispositive of the issues raised in the other," the court ruled that the trial court erred when it failed to

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442. Id.; see also FLA. STAT. § 718.1255 (1997).
443. Cuervo, 709 So. 2d at 599.
444. Id.
445. Id.
446. Id.
447. Id.
448. Cuervo, 709 So. 2d at 599.
449. Id.
450. Id.
451. Id.
452. Id.
453. Cuervo, 709 So. 2d at 599–600.
454. Id.
consider and reduce the attorney's fees awarded to the first firm for the duplication of their legal efforts with the second firm. Finding it undoubtable that the actions of the two firms were "duplicative" and overlapping, the court concluded that "the most appropriate way of accomplishing [the] task [would be] to reduce the fee awarded to the [first firm] by the reasonable value of all of the [second firm's] services in this cause." Although the court was undoubtedly justified in reducing the fees awarded to the extent they were duplicious or overlapping, it is submitted that it is unfair to the association to reduce the fees payable to its primary counsel by the reasonable value of services performed by insurance-appointed counsel. First, there is no suggestion in the opinion that the fees charged by the association's primary law firm were unreasonable. Second, there is no statement in the opinion that the association (or its insurance carrier) sought compensation for the fees incurred by the insurance company-appointed counsel. Therefore, recognizing that "a party has the absolute right to hire as many attorneys as it desires," there is no evidence that the appellants were called upon to compensate for overlapping efforts. The reality is that many community associations are more comfortable having their general counsel represent the association's interests in litigation matters. When insurance company-selected counsel is brought into the case through the filing of counterclaims, or in cases where the association is sued as a defendant, the association should retain the option of keeping its general counsel in the case without being penalized by an arbitrary standard that reduces fees payable to the association's general counsel by the amount reasonably incurred by the insurance company-appointed firm.

E. Covenant Enforcement

_Mora v. Karr_, involves the doctrines of waiver and estoppel. Mr. Karr wished to purchase a home in a deed restricted community. He desired to tear down the existing residence and build a "larger home with a three-car garage." The "deed restrictions [permitted] only a two-car garage and [required] a thirty-five foot setback." Prior to buying the property, Mr. Karr obtained an agreement from the original developer, "as

455. _Id._ at 599.
456. _Id._
457. _Id._ at 600.
458. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997).
459. _Id._ at 887.
460. _Id._ at 888.
461. _Id._
462. _Id._
well as the adjacent property owners on either side, the Xaviers and the Moras, waiving the two deed restrictions."\textsuperscript{463}

During construction of his new home, Mr. Karr received a letter from Mr. Mora threatening suit over violation of the restrictive covenants.\textsuperscript{464} Mora filed suit and sought a temporary injunction.\textsuperscript{465} "The day before the hearing [on the motion for temporary injunction,] the Moras moved to amend to add the Moores as additional plaintiffs, which was granted."\textsuperscript{466} Mr. Moore testified that although he was being represented in the action by the same attorney as the Moras, he was not obligated to pay any attorney’s fees to the Moras’ counsel.\textsuperscript{467}

The trial court denied the temporary injunction, holding that “the waiver, . . . the change in conditions in the neighborhood since the imposition of the restrictive covenants, and the fact that there was little likelihood that the appellants would prevail on the merits,”\textsuperscript{468} justified denial of their motion for a temporary injunction. Citing \textit{Enegren v. Marathon Country Club Condominium West Ass’n, Inc.}\textsuperscript{469} the court held that the Moras’ claim was barred by the doctrine of waiver.\textsuperscript{470} As to the Moores’ claim, the appellate court, citing a Supreme Court of Florida case from 1930,\textsuperscript{471} held that the Moores’ delay in “seeking relief until eight or nine months after construction commenced would warrant denial” of their request for injunctive relief.

\textit{Miami Lakes Civic Ass’n v. Encinosa}\textsuperscript{473} is the latest in a series of cases\textsuperscript{474} which grant associations the right to interpret or apply deed restrictions beyond the four corners of the deed restriction and its verbiage itself.\textsuperscript{475} Mr. Encinosa constructed a deck in the back yard of his home “without the prior approval of the Miami Lakes Architectural Control Committee [ACC] as required by certain restrictive covenants.”\textsuperscript{476} The

\textsuperscript{463} \textit{Mora}, 697 So. 2d at 888.
\textsuperscript{464} \textit{Id.}
\textsuperscript{465} \textit{Id.}
\textsuperscript{466} \textit{Id.}
\textsuperscript{467} \textit{Id.}
\textsuperscript{468} \textit{Mora}, 697 So. 2d at 888.
\textsuperscript{469} 525 So. 2d 488 (Fla. 3d Dist. Ct. App. 1988). The \textit{Enegren} case is actually most often cited as an estoppel case.
\textsuperscript{470} \textit{Mora}, 697 So. 2d at 888 (citing \textit{Enegren}, 525 So. 2d at 488).
\textsuperscript{471} \textit{Mercer v. Keynton}, 127 So. 859 (Fla. 1930).
\textsuperscript{472} \textit{Mora}, 697 So. 2d at 888 (citing \textit{Mercer v. Keynton}, 127 So. 859 (Fla. 1930)).
\textsuperscript{473} 699 So. 2d 271 (Fla. 3d Dist. Ct. App. 1997).
\textsuperscript{474} \textit{See, e.g.}, Europco Management Co. of Am. \textit{v. Smith}, 572 So. 2d 963 (Fla. 1st Dist. Ct. App. 1990); \textit{Coral Cables Inv., Inc. v. Graham Cos.}, 528 So. 2d 989 (Fla. 3d Dist. Ct. App. 1988).
\textsuperscript{475} \textit{Encinosa}, 699 So. 2d at 271.
\textsuperscript{476} \textit{Id.}
covenants permitted the ACC to refuse approval of plans "on any ground, including purely aesthetic grounds, which in the sole and uncontrolled discretion of said Architectural Control Committee shall seem sufficient." 477 After completion of the deck, Mr. Encinosa submitted plans to the ACC, which denied the after-the-fact submittal. 478 The ACC found that "the deck was too large and 'out of context with what was going on in the surrounding properties and on the lake as a whole.'" 479

The trial court held that the association could not enforce the covenant, as it had engaged in selective enforcement by "allow[ing] other violations to go unchecked." 480 The trial court "also determined that there was a lack of criteria or guidelines for construction of decks." 481 However, the appellate court held that once "[t]he association . . . put on a prima facie case demonstrating Encinosa's violation of the restrictive covenants, the burden shifted to Encinosa to show that the association had acted in an unreasonable or arbitrary manner." 482 On the selective enforcement issue, the appellate court held that Encinosa had not provided "competent substantial evidence to support such a finding." 483 Although no other suits had been filed against homeowners for alleged deed restriction violations, the appellate court was satisfied that the record reflected that all other disputes were resolved by voluntary compliance. 484 With respect to the homeowner's argument that the deed restrictions contained insufficient guidelines, the court held that the ACC's disapproval was based upon the fact that Encinosa's dock was "much larger in scale than the other structure on the lake." 485 Thus, the appellate court implicitly found that "the look" of the neighborhood constituted a sufficient criteria for the ACC's review of dock construction plans. Although it was certainly a challenge for the court to balance the free use of one's property with the collective aesthetic needs of a deed restricted community, it seems that the court recognized that not every conceivable construction request will be addressed through a written covenant. The general character of the neighborhood can be used as a legally valid basis by an architectural committee in reviewing construction plans and requests.

477. Id.
478. Id. at 272.
479. Id.
480. Encinosa, 699 So. 2d at 272.
481. Id.
482. Id. at 272 (citing Killlearn Acres Homeowners Ass'n v. Keever, 595 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1992)).
483. Encinosa, 699 So. 2d at 272.
484. Id.
485. Id. at 273.
F. Various Tort Liabilities

Although most community associations are not for profit corporations generally engaged in a cooperative effort to enable residents to provide for each others' health, safety, and welfare, the Florida courts have nonetheless applied premises liability duties to associations, which are similar to those of a landlord in the landlord/tenant context.\footnote{486} Lotto v. Point East Two Condominium Corp.,\footnote{487} involves a suit by a condominium resident, Mrs. Lotto, who sued the association after “[s]he tripped and fell on a portion of an exterior sidewalk which [was] cracked and partially uneven.”\footnote{488} Mrs. Lotto admitted that she had regularly “walked over [the] same stretch of sidewalk” on many occasions.\footnote{489} The association acknowledged that the sidewalk was cracked and deteriorated, but that it was not unreasonably dangerous.\footnote{490} “The association argued that it had no duty to warn [Mrs. Lotto] of the condition of the sidewalk because [its] deteriorated condition was obvious.”\footnote{491} The trial court agreed with the association and entered summary judgment in the association’s favor.\footnote{492}

On appeal, the third district agreed with the trial court, holding that the association did not have a duty to warn Mrs. Lotto.\footnote{493} However, the court went on to state that the obviousness of the condition did not relieve the association of the duty to repair the sidewalk.\footnote{494} Applying duties from the Second Restatement of Torts relative to invitees, the court held that there remained a factual issue as to “whether the association should anticipate” that residents would use the sidewalk and thus encounter the cracked and uneven concrete, “notwithstanding that the condition was obvious” and that the invitee “would be harmed thereby.”\footnote{495} Based upon the necessity of this inquiry, the court concluded that summary judgment was not appropriate.\footnote{496} The court did note that Mrs. Lotto’s familiarity with the condition of the sidewalk, and “her decision to proceed to encounter the risk,” would raise the question of “whether she was comparatively negligent.”\footnote{497}

\footnote{486} See, e.g., Czerwinski v. Sunrise Point Condominium, 540 So. 2d 199, 200-01 (Fla. 3d Dist. Ct. App. 1989).
\footnote{487} 702 So. 2d 1361 (Fla. 3d Dist. Ct. App. 1997).
\footnote{488} Id. at 1361.
\footnote{489} Id.
\footnote{490} Id.
\footnote{491} Id.
\footnote{492} Lotto, 702 So. 2d at 1361.
\footnote{493} Id. at 1362.
\footnote{494} Id.
\footnote{495} Id.
\footnote{496} Id.
\footnote{497} Lotto, 702 So. 2d at 1362.
The case of *The Ocean Ritz of Daytona Condominium v. G.G.V. Associates, Ltd.*, \(^{498}\) addresses the issue of "whether the economic loss rule bars a negligence action in the context of a third-party beneficiary of a professional consultant’s contract when the plaintiff is seeking to recover only economic [damages]."\(^{499}\)

The condominium association sued the developer, the engineering company employed by the developer, and an architectural firm employed by the engineering company "for economic damages resulting from the faulty conversion of an apartment complex into a condominium project."\(^{500}\) The asserted liability of the consultant was based on "its alleged faulty inspection and inaccurate disclosure and [the] report [it] prepared pursuant to its contract with the engineering company."\(^{501}\) It was alleged that the report was intended to meet the developer’s obligation pursuant to section 718.616 of the Condominium Act, and that the report was therefore "intended to inure to the benefit of the condominium [unit] purchasers."\(^{502}\) "The trial court granted summary judgment in favor of the consultant, holding that the association’s negligence action was barred by the economic loss rule."\(^{503}\)

In ultimately affirming the trial court’s decision, the Fifth District Court of Appeal engages in a thorough review of Florida’s "economic loss rule" case law.\(^{504}\) The court held that "purely economic expectations arising from of the relationship between a condominium association and the parties responsible for the construction of the condominium” are not the types of interests intended to be protected by tort law.\(^{505}\) Although this case is clearly consistent with the progeny of "economic loss rule" cases, it is this writer’s opinion that the denial of a remedy to innocent and often unsophisticated condominium home buyers is the single worst disservice done by Florida’s courts to Florida’s community association citizens. As most succinctly observed by former Chief Justice Barkett:

> If the allegations of the homeowners in this case are true, their homes are literally crumbling around them . . . . The courts, including this one, have said “too bad.” I find that answer unacceptable in light of the principle underlying Florida’s access to

\(^{498}\) 710 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998).

\(^{499}\) Id. at 702.

\(^{500}\) Id.

\(^{501}\) Id.

\(^{502}\) Id.

\(^{503}\) *G.G.V. Assocs.*, 710 So. 2d at 702–03.

\(^{504}\) Id. at 703–05.

\(^{505}\) Id. at 704 (quoting Sandarac Ass’n, v. W.R. Frizzell Architects, Inc., 609 So. 2d 1349 (Fla. 2d Dist. Ct. App. 1992)).
One of the most common fears expressed by potential community association volunteers is the exposure to personal liability. Fortunately, the courts have once again emphasized that individual directors of condominium associations cannot be held liable for a negligence action, even when such actions were clearly wrong. One such case involved a suit by Mr. Perlow, "individually and as the trustee for a group of condominium [unit] owners...against two directors of the condominium association, [Mr.] Goldberg and [Ms]. Leb." The alleged breach of fiduciary duty was the directors' failure to properly administer insurance proceeds from Hurricane Andrew. In considering the interplay of the Condominium Act, the Florida Business Corporation Act, and the Florida Not-for-Profit Corporation Act, the court concluded that more than simple negligence must be pled and proved before personal liability can be successfully asserted against an association director. Fraud, criminal activity, and self-dealing/unjust enrichment are the only situations in which a director of an association may be held personally liable for his or her acts or omissions emanating from service on the board. The court distinguished B & J Holding Corp v. Weiss, "where the initial directors of a condominium association were held individually liable for failure to collect maintenance payments on unsold units." The court found that B & J was distinguishable because that case involved self-dealing by a developer's appointees to the board of directors in the form of the directors not collecting assessments from the developer, to the detriment of the association, and giving greater loyalty to the director's relationship to the development entity.