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COMMENTS

HOMEOWNER ASSOCIATION STANDING IN CALIFORNIA: A PROPOSAL TO EXPAND THE ROLE OF THE UNIT OWNER

I. INTRODUCTION

In the past decade, there has been an increase in the number of suits against land developers for defective construction of dwellings. The rise in the number of these suits results primarily from the application of strict liability for defective construction and manufacture of dwellings in California.¹ Given the increase in cost of constructing a house in California over the past decade,² condominium living remains a viable option for home buyers.

Given the structure of a condominium,³ the need arises for a

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1. *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1966) (holding that a homeowner may recover on strict liability theory for defects in dwellings).

2. From 1970 to 1982 the median sales price of existing single-family homes sold in California rose from \$24,300 to \$110,000, an increase of over three hundred percent. See CALIFORNIA ALMANAC, Table 28-2 (1983); DEPARTMENT OF FINANCE, CALIFORNIA STATISTICAL ABSTRACT, Table D-8 (1983).

3. Condominium ownership brings with it a complex combination of various interests in property. The term "condominium" is defined in California Civil Code § 1351(f) as follows:

A condominium consists of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries . . . need not be physically attached to land except easements for access and, if necessary, support. . . . An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property. CAL. CIV. CODE § 1351(f) (West Supp. 1986).

Typically, an owner acquires fee title to the space inside his or her unit, as well as an undivided interest as a tenant in common areas and facilities. The term "unit" is defined as "a separate interest in space." *Id.*

The term "common areas" is defined as "the entire common interest development except the separate interests therein." *Id.* at § 1351(b) (West Supp. 1986). The common areas of a condominium project are largely defined by the deeds, declaration of restrictions, and plan governing the project. The statutory common areas definition may embrace structural components of buildings to which the unit owners have no access, as well as recreational facilities and landscaped areas. *Id.*

governing managerial body with authority and responsibility to maintain the common areas, enforce restrictive covenants, assess the unit owners for their proportionate share of the maintenance costs, and serve a myriad of other functions necessary for the efficient management of the condominium project.⁴ This management body normally takes the form of an "association."⁵

When a developer is sued in the condominium setting for common area defects, a question arises as to who should sue — the owners or the association that governs the common areas.⁶ A compelling argument for the individual owner's standing is their ownership of a fractional interest in the subject matter of the lawsuit, while a strong argument for the association's standing is its management responsibility for the common areas.⁷

Until 1976, the individual unit owners ("owners") were the only real parties in interest in a suit for injuries to property owned by those owners as tenants in common.⁸ In 1976, the California Legislature created an exception to the real party in interest rule⁹ by

4. *Id.* at §§ 1350-70 (governing common interest developments). Section 1363 governs management powers of the association, and provides for the exercise of its corporate power pursuant to section 7140 of the California Corporations Code. *See also* CAL. ADMIN. CODE tit. 10, R. 1980, § 2792.21 (1980) (enumerating a non-exclusive list of powers and duties of the governing body of the association).

5. CAL. CIV. CODE § 1363 (West Supp. 1986). "'Association' means a nonprofit or unincorporated association created for the purpose of managing a common interest development." *Id.* at § 1351(a). *See generally* CALIFORNIA CONDOMINIUM AND PLANNED DEVELOPMENT PRACTICE § 8.1, at 639 (G. Graham ed. 1984) [hereinafter cited as Graham].

Typically, an association is incorporated and is established prior to conveyance by the developer of any unit. "Most associations are incorporated as nonprofit mutual benefit corporations." *Id.*, § 8.2, at 635. *See* CAL. CORP. CODE §§ 7110-8910. For a discussion comparing the advantages and disadvantages of corporate or non-corporate form, *see* Graham, *supra*, § 8.2, at 639-40. For arguments that common areas should be conveyed to the association as an alternative to the ownership of the property by the membership, *see* Note, *Condominiums: Incorporation of the Common Elements — A Proposal*, 23 VAND. L. REV. 321 (1970); Knight, *Incorporation of Condominium Common Elements? An Alternative*, 50 N.C.L. REV. 1 (1971). As owner of those areas, the association would have the only interest in the property and undisputed standing to sue.

6. This question may be resolved in the declaration of covenants and restrictions filed prior to conveyance of a unit. *See* 1 P. ROHAN & M. RESKIN, *CONDOMINIUM LAW AND PRACTICE* § 17A.11(1) (rev. ed. 1984). *But see* *Summerhouse Condominium Ass'n v. Majestic*, 44 Colo. App. 495, 615 P.2d 71 (1980) (denial of standing despite provisions in declaration and bylaws empowering association to protect and defend common property by suit).

7. Associations incorporated under California Corporations Code sections 5000-10847 (nonprofit mutual benefit corporation law) have statutory authority to direct the activities of the corporation. *See* CAL. CORP. CODE §§ 5000-10847, 7210 (West Supp. 1984).

8. *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973) (incorporated association lacking ownership of real property could not state cause of action for damages to that property).

9. "Every action must be prosecuted in the name of the real party in interest, except as

specifically granting an owners' association standing to sue for injury to common areas.¹⁰ The provision now governing standing of homeowners' associations, section 374 of the Code of Civil Procedure, grants such standing without joinder of the owners.¹¹

The standing statute addresses the practical concerns of expediency and economy in the condominium setting. An association should be permitted to sue for its members in light of the association's duty to protect and maintain the quality of the common areas, and individual causes of action might not be pursued if the association had no standing.¹² Moreover, the modern structure of a condominium, with its separation of ownership and management, comports with the association's standing.¹³

However, the owner still retains an interest in the litigation process since he or she owns an undivided interest in the common areas in dispute. That interest may be disparate from that of the management entity, and an owner may be reluctant to accept the corporate structure which confers the association's standing, viewing the common areas as part and parcel of his or her lifetime investment.¹⁴ The owner might also object to the binding effect of the association's litigation or an assessment to pay for this litigation.¹⁵ The source of these objections is the owner's property interest in the com-

provided in Sections 369 and 374 of this code." CAL. CIV. PROC. CODE § 367 (West Supp. 1986).

10. California Civil Procedure code section 374 states:

An association established to manage a common interest development pursuant to Section 1363 of the Civil Code shall have standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following: (a) Enforcement of the governing documents, (b) Damage to the common areas, (c) Damage to the separate interests which the association is obligated to maintain or repair, (d) Damage to separate interests which arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair.

Id. at § 374.

11. *Id.*

12. See *infra* note 28 and accompanying text.

13. One of the benefits of incorporated associations is the well-established body of law surrounding corporate governance. See Graham, *supra* note 5, § 8.2, at 635. The corporate model suggests that homeowners should be limited to a derivative suit since the board is responsible for management and control of the common areas. See, e.g., CAL. CORP. CODE §§ 7210, 7710 (West Supp. 1986) (derivative actions).

14. See Comment, *Areas of Dispute in Condominium Law*, 12 WAKE FOREST L. REV. 979, 1004 (1976) (owner's interest in common areas should be subject to same protections as is his title to dwelling).

15. See *infra* notes 90-94 and accompanying text.

mon areas. While the analogy of association membership to stock ownership is strong, the owners' interest in enjoyment of the common areas does not share the economic attributes of stock ownership.

The standing provision was apparently intended to enable either the association or the owners to sue for damages to the common areas.¹⁶ Yet the case law interpreting this provision indicates that owners may be prevented from litigating without the association's approval.¹⁷ Moreover, the corporate model imposed upon the incorporated condominium project may preclude individual owners from litigation if the association declines to sue. The corporate model may also prevent condominium owners from avoiding the binding effect of the association's litigation effort and the costs assessed therefor. An examination of this area of the law reveals that the owner may not now maintain an individual suit, just as the association could not before the enactment of the standing provision.¹⁸ The standing law governing condominiums now sanctions suit by the association without provision for owner protection or participation.

Section II of this comment reviews the history of owners' association standing in California and critically analyzes the case law interpreting the current standing statute. Section III explores the potential problems regarding section 374 of the Code of Civil Procedure, focusing on an incorporated association's suit on the common areas where the individual owners may disagree with an aspect of the litigation decision. Finally, this comment proposes an amendment to California's standing statute and a more active judicial role which would attempt to strike a fairer balance between the association's authority and the individual unit owners' rights.

II. HISTORY OF THE STANDING PROBLEM

A. *The Friendly Village Case*

In *Friendly Village Community Association v. Silva & Hill Construction Co.*,¹⁹ a corporation organized for the purpose of maintaining the common areas of a condominium sued for damages, alleging that the developer was responsible for soil defects. The defendants filed general and special demurrers on the ground that the association lacked legal capacity to sue since it lacked any ownership,

16. See *infra* notes 38-39 and accompanying text.

17. See *infra* note 88 and accompanying text.

18. *Id.*

19. 31 Cal. App. 3d 220, 107 Cal Rptr. 123 (1973).

legal or equitable, in the common area property.²⁰ The general demurrer was sustained without leave to amend on the ground of lack of capacity to sue, and the case was dismissed.²¹

The appellate court, in affirming the lower court judgment, observed that the issue presented was not one of capacity to sue since a corporation clearly has capacity to sue in California.²² The court then addressed the association's standing to sue for damages to the common areas. An element of a cause of action for injuries to real property is the plaintiff's ownership, lawful possession, or right to possession of the property.²³ Since a condominium consists solely of undivided and separate interests held by the unit owners,²⁴ the association could not properly allege ownership. The court also rejected the association's argument that, as managing body of the project and the common areas, it should have "concomitant standing to sue those responsible for the damage."²⁵ The court noted that the cost of any repairs must be borne by the owners. The owners, therefore, were the parties with an actual and substantial interest in the subject matter of the action who would be affected by the judgment,²⁶ and had exclusive standing to sue for damages to the common areas.

The *Friendly Village* owners had agreed to permit the association to represent them. Precluding suit by the association where such an agreement is obtained is contrary to notions of judicial economy and avoidance of multiple lawsuits. Permitting the association to sue centralizes the legal battle, narrowing the class of plaintiffs into one entity, and invokes the association's assessment power to pay the costs of the common lawsuit. Another difficulty which the *Friendly Village* court seemed to overlook was the association's fiduciary obligations to the membership at large.²⁷ Given that the association is charged with management of the common areas, the board has an

20. *Id.* at 223, 107 Cal. Rptr. at 124-25.

21. *Id.* at 223, 107 Cal. Rptr. at 125.

22. CAL. CORP. CODE § 801(a) (repealed 1977 by CAL. CORP. CODE § 207 (West 1977)). The court distinguished between capacity to sue, which is the right to come into court, and standing to sue, which is the right to relief in court. *Friendly Village*, 31 Cal. App. 3d at 224, 107 Cal. Rptr. at 125. It is an open question whether the unincorporated association has capacity to sue since it lacks the separate status of a legal entity, unlike a corporation. *See, e.g.*, 1 P. ROHAN & M. RESKIN, *supra* note 6, § 17A.11(1). *But see* CAL. CIV. CODE § 1363 (unincorporated association has power to sue pursuant to section 3740).

23. 31 Cal. App. 3d at 224, 107 Cal. Rptr. at 126, (citing 5 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 581-82, at 2159 (3d ed. 1971)).

24. CAL. CIV. CODE §§ 783, 1350 (West 1982)

25. *Friendly Village*, 31 Cal. App. 3d at 225, 107 Cal. Rptr. at 126.

26. *Id.*

27. CAL. CORP. CODE § 5231 (West Supp. 1984).

interest in avoiding fiduciary liability which may result from failure to institute suit to recover damages to the common areas. Another unfortunate result in *Friendly Village* was that the statute of limitations had run on the plaintiffs' individual causes of action.²⁸

However, the restriction *Friendly Village* placed on standing had the beneficial result of permitting owners to control the litigation process since owners could successfully object to the propriety of the suit or representation by the association. Moreover, the association's interest in avoiding fiduciary liability is not necessarily consonant with the owners' interest in affirmative recovery or promised ability to enjoy the common areas.²⁹ Despite the existence of these duties, the owner must, as the *Friendly Village* court noted, fund the litigation whether the association acts as representative or not.³⁰ The amount recovered as a result of litigation is neither a return of capital nor income to the association since the association acts as agent of the owners in seeking damages.³¹ A persuasive argument can therefore be made that the owners have the only substantial stake in the outcome of the litigation. As to the owners' lack of remedy, nothing precluded a different group of owners in a different development

28. See Papell, *An Overview of California Condominium Law*, 6 SW. U.L. REV. 487, 539 (1974); annot., 69 A.L.R. 3d 1150, 1150 n.12 (1976); 1 P. ROHAN & M. RESKIN, *supra* note 6, § 17A.11(1). Since the action was barred by the statute of limitations, the owners had no redress against a corporate defendant with greater resources. Moreover, owners would be forced to fund the litigation if the action was not precluded without the assessment power of the association. *Raven's Cove Townhomes, Inc. v. Knuppe*, 114 Cal. App. 3d 783, 792, 171 Cal. Rptr. 334, 339 (1981); see also Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Homeowner Associations*, 12 WAKE FOREST L. REV. 915, 975 (1976). The owners might be awarded their costs for prosecution of the suit on the basis of the substantial benefit rule, a variant of the common fund doctrine under which attorney's fees are often allowed in shareholder derivative suits. See, e.g., *Fletcher v. A.J. Indus.*, 266 Cal. App. 2d 313, 320, 72 Cal. Rptr. 146, 150 (1968); *Beehan v. Lido Isle Community Association*, 70 Cal. App. 3d 858, 137 Cal. Rptr. 528 (1977).

29. See *Raven's Cove*, 114 Cal. App. 3d 799, 171 Cal. Rptr. 334 (1981). Additionally, as tenants in common, individual owners in a condominium complex are jointly and severally liable for any injuries sustained in the common areas by any person because of negligence of management. See *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).

30. The association is authorized to assess its members for expenses incurred in the discharge of its management functions. CAL. CIV. CODE § 1366 (West 1986). Whether the assessment power extends to financing litigation is an open question. See, e.g., *Spister v. Kentwood*, 24 Cal. App. 3d 215, 100 Cal. Rptr. 798 (1972) (incorporated association not entitled to assess lot owners for cost of litigation seeking to abate nuisance); *Owens v. Tiber Island*, 373 A. 2d 890 (D.C. 1977) (where unit owners agreed to assessment scheme when purchasing unit, not a violation of due process to assess owners for litigation costs). See also *Graham*, *supra* note 5, § 8.6, at 639-40 (noting that the limitation of ultra vires in California may alter the result in *Spister*).

31. 4 H. MILLER & M. STARR, *CURRENT LAW OF CALIFORNIA REAL ESTATE* § 24:81 (rev. ed. 1977 & supp. 1984).

from taking the class action route, which would protect absent class members by virtue of procedural safeguards.³² The association could coordinate the litigation effort, and the binding effect of the litigation would be more certain if the homeowners maintained suit as representative plaintiffs since no disparity of interest question would arise.

Finally, preserving the individual's involvement in litigation decisions may improve dispute resolution between owners and the association. The *Friendly Village* holding placed the individual members in the position of initiating the litigation process. Because of this emphasis, the individual owners and the association would not be placed on opposing sides of the litigation decision. This arrangement might substantially reduce the potential for later disagreement among members with the association's decision and focus the conflict on the alleged wrongdoer.

The consequences discussed above illustrate the merits of the *Friendly Village* rule as well as the unfortunate factual result thereof. The apparent harshness of that case's holding led to the passage of section 374 of the Code of Civil Procedure, which statutorily overruled the *Friendly Village* decision.³³

B. Section 374 of the Code of Civil Procedure

In 1976, the California Legislature passed a bill that specifically provided for standing of a homeowners' association to sue as the real party in interest for injury to the common areas in the com-

32. CAL. CIV. PROC. CODE § 382 (West 1973). The class action statute provides:

If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.

Id. The California trial courts are free to utilize the provisions of the federal class action rule (FED. R. CIV. P. 23) and of the California Consumer Legal Remedies Act (CAL. CIV. CODE § 1750-84 (West 1973 & Supp. 1984)) as a guide to the administration of class actions. Among the safeguards provided for absent class members under the federal rule are: allowances for opting out of the litigation; attack on the final judgment on grounds of inadequate representation; the court's inherent power to monitor the proceedings; required court approval of settlements; and notice to the class of pending litigation. See H. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 1120q, at 224-25 (1977). See generally *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P. 2d 904, 94 Cal. Rptr. 796 (1971).

33. See, e.g., *Salton City Etc. Owner's Ass'n. v. M. Penn Phillips*, 75 Cal. App. 3d 184, 187-88 n.1, 141 Cal. Rptr. 895, 897-98 n.1 (1977) (noting the Legislature's response to *Friendly Village* was the passage of the standing provision); *Review of Selected 1976 California Legislation*, 8 PAC. L.J. 165, 210 (1977) (noting that the standing statute resulted from the *Friendly Village* holding). See also *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.*, 114 Cal. App. 3d 783, 790, 171 Cal. Rptr. 334, 337 (1981).

plex.³⁴ The Legislature thus created an exception to the real party in interest rule³⁵ and added a new section 374 to the Code of Civil Procedure.³⁶ The key language of the standing provision reads: "[a]n owners' association . . . shall have standing to sue . . . without joining with it the individual owners."³⁷ The statute allows the association to bring a lawsuit for damages to common areas without joining any individual homeowner who is injured more directly.

By creating an "exception" to the real party in interest rule,³⁸ the Legislature apparently intended to grant standing to the association as a complement to the standing of the owners.³⁹ That is, individual owners are no longer the required party; the association may also maintain suit. While owners may therefore retain the legal right to relief in court, it remains unclear to what extent the individual owner can intervene in, or opt out of, the litigation which the association pursues. The corporation's management function may now extend to litigation on the common areas,⁴⁰ and since shareholders in a corporation lack management authority, the role the individual owner is likely to play becomes extremely limited.

1. *Policy Embodied in Section 374*

Since the standing statute was passed to forward policies appar-

34. For the text of section 374, see *supra* note 10.

35. See *supra* note 9.

36. The new section was added by 1976 Cal. Stat. ch. 595, at 1439, § 2. The standing provision has been amended once, in 1979, to grant standing to associations of planned developments in addition to the original grant to condominium associations, community apartment project associations, and undivided interest subdivision associations. The 1979 amendment also permits associations in any of the above categories to sue as the real party in interest for damages to individually owned areas which the association is obligated to maintain, preserve, or repair. 1979 Cal. Stat. ch. 168, at 384, § 1.

37. CAL. CIV. PROC. CODE § 374 (West Supp. 1984).

38. Section 367 provides: "every action must be prosecuted in the name of the real party in interest, except as provided in sections 369 and 374 of [the Code of Civil Procedure]." *Id.* at § 367. Section 369 governs executors, administrators, and trustees who may sue without joinder of the beneficiary. *Id.* at § 369.

39. See, e.g., *Lash v. Lion Property Corp.*, 128 Cal. App. 3d 925, 180 Cal. Rptr. 722 (1982) (association as well as individual owners has standing to sue as representative plaintiff in class action for damages to individual units), *reh'g. granted, opinion on reh'g. unpublished*. California Rule of Court 977 provides that "[a]n opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding. . . ." CAL. R. CT. 977 (West Supp. 1985). The case is cited here to illustrate that owners may still serve as representative plaintiffs.

40. See, e.g., *Beehan v. Lido Isle Community Ass'n*, 70 Cal. App. 3d 858, 137 Cal. Rptr. 528 (1977) (homeowners who successfully enforced restrictive covenant in absence of board litigation could not, because of the business judgment rule, recover fees incurred in litigation).

ently thwarted by the *Friendly Village* holding,⁴¹ an examination of these policies is important for an analysis of the standing law.

The standing statute permits an association to sue for its members, avoiding a multiplicity of suits on what may be identical factual and legal claims. Since the association now sues for its members, the cost of prosecuting the action is a common expense, alleviating what was perceived as the prohibitive cost of individual suits. If this policy is to be served, however, the doctrine of *res judicata* must bind each individual unit owner; if the association's litigation has no binding effect, the benefits of standing of the association would largely vanish, since owners could relitigate claims which were purportedly decided by the association's litigation.

Despite these commendable goals, many questions arise surrounding the owner's role in the litigation. Specifically, what role may the owners play in the litigation if they express dissatisfaction, hostility, or doubt regarding the association's representation? Can an owner sue on the common areas if the association does not? What barriers is the homeowner likely to face in this attempt to sue over the association's objection? Will the litigation bind the homeowner if he or she objects to the decision to litigate? An analysis of interpretations of the standing provision may provide some answer to these questions.

2. *Judicial Examination of Section 374*

a. *The Raven's Cove Townhomes Case*

In *Raven's Cove Townhomes, Inc. v. Knappe Development Co.*,⁴² an incorporated association representing a common interest subdivision⁴³ and owning the common areas⁴⁴ sought damages for defects in common area landscaping. The trial court granted the developer's motion for nonsuit on the basis of lack of standing,⁴⁵ and the association appealed.

The appellate court cited the general rule that without an ownership interest in property, an owners' association had no standing to

41. See *supra* note 33.

42. 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981).

43. CAL. BUS. & PROF. CODE § 11000.1 (West Supp. 1986) (defines common interest subdivisions).

44. A major distinction between *Raven's Cove* and *Friendly Village* immediately appears in that the association in *Raven's Cove* held title to the common areas, unlike the association in the *Friendly Village*. *Raven's Cove*, 114 Cal. App. 3d at 788, 171 Cal. Rptr. at 337.

45. *Id.* at 790, 171 Cal. Rptr. at 337. The other reasons given for nonsuit were the absence of loss and duty. *Id.*

sue.⁴⁶ The court then noted that since the Raven's Cove association owned the common areas, the *Friendly Village* rule was inapposite. Hence, the rule of section 374 applied, and the association had standing to sue for damages to the common areas.⁴⁷ It is important to note that the association in *Raven's Cove* had standing independently of any owner, since this would completely exclude the individual homeowner from the decision to litigate and perhaps the litigation process itself.

The court then discussed the association's standing to sue for defects in the individual units. Since section 374 was not amended to allow for standing of the association regarding the individual units until after the entry of final judgment in the trial court, the amendment did not apply.⁴⁸ However, pursuant to the California class action statute,⁴⁹ the association nevertheless had standing to maintain a representative action on behalf of its members.⁵⁰

Several points emerge from *Raven's Cove*. First, the association had standing to maintain an action under section 374 independently of any owner since the association sought to recover capital owed to the association. Second, the effect of ownership of the property by the association is unclear. While the court relied on the association's ownership of the property in ruling that section 374 applied, ownership of the common areas is unnecessary to application of that section. Indeed, section 374 explicitly sanctions suit where the association does not own the common areas. Hence, the same result may obtain in the condominium setting as in *Raven's Cove*: a limitation on the unit owner's involvement.

The condominium association is merely acting as agent of the owners to recover what would be the individual owner's repair costs.⁵¹ In contrast, since the association in *Raven's Cove* owned the common areas, the association arguably was seeking to defray its own costs. The individual owners might be indifferent to involvement in the suit if the association owns the subject of the litigation. Conversely, the same owners may desire involvement in the suit if they own the subject of the litigation.

46. The court found that although the complaint was filed prior to the effective date of the statute, the parties conceded that the statute was retroactively applied. *Id.* at 790 n.2, 171 Cal. Rptr. at 337 n.2.

47. *Id.*

48. *Id.* at 792 n.6, 171 Cal. Rptr. at 338 n.6.

49. CAL. CIV. PROC. CODE § 382 (West 1973). See *supra* note 32 for the text of this provision.

50. 114 Cal. App. 3d at 793, 171 Cal. Rptr. at 339.

51. See *supra* note 31 and accompanying text.

b. *The Salton City Case*

*Salton City Property Owner's Ass'n. v. M. Penn Phillips Co.*⁵² also illustrates the potential restrictions on owner involvement in common area litigation. *Salton City* did not involve common area defects but was a representative action for fraudulent inducement of property purchases. At the trial court level, the defendant relied on *Friendly Village* in arguing that the association lacked standing where it retained no ownership interest in the property. The trial court subsequently dismissed the claims on the basis of lack of standing. The appellate court reversed, holding that the association could represent the owners under the class action statute.⁵³ In dicta, the court clarified the scope of section 374.

The *Salton City* court noted that *Friendly Village* was not a representative action,⁵⁴ and hence its holding was not relevant to the standing question in such an action, but was relevant to the ability of the association to maintain an independent action without joinder of the homeowners. The court then characterized the *Salton City* association's suit not as a representative action but a class action which the association had standing to maintain under section 382 of the Code of Civil Procedure.⁵⁵

Salton City reaffirms the nature of the association's action under *Friendly Village* as a separate, independent one without homeowner involvement. *Friendly Village* was not a class action but rather an independent suit by the association for damages. The standing statute sought to permit an independent action by the association without joinder of owners, and now authorizes such suits to the exclusion of the owner.

In a later case, *Citizens Against Forced Annexation v. County of Santa Clara*,⁵⁶ the court referred to *Salton City*, noting that "a condominium owner's association . . . has independent standing to maintain an action for damages to common areas in condominium complexes."⁵⁷ Thus, *Citizens* affirms that individual actions by the board without owner involvement are permitted.⁵⁸

52. 75 Cal. App. 3d 184, 141 Cal. Rptr. 895 (1977).

53. See *supra* note 32.

54. 75 Cal. App. 3d at 187-88, n.1, 141 Cal. Rptr. at 897-98, n.1.

55. *Id.* at 189, 141 Cal. Rptr. at 898.

56. 153 Cal. App. 3d 89, 200 Cal. Rptr. 166 (1984).

57. *Id.* at 97 n.7, 200 Cal. Rptr. at 170 n.7 (citing *Salton City*, 75 Cal. App. 3d 184, 141 Cal. Rptr. 895).

58. See also *Brickyard Homeowner's Ass'n v. Gibbons Realty*, 668 P.2d 535 (Utah 1983) (actions may be brought by association without class action certification and without

c. *The Role of the Owner After Section 374*

The foregoing cases interpret section 374 as a sanction for association lawsuits without joinder or participation of owners. While associations can clearly represent their members with such participation, the most feasible device being the class action,⁵⁹ associations are apparently free to choose between participation and non-participation of members by independently trying an action. An independent action avoids the costly and time consuming but protective devices of a class action.⁶⁰

If the association opts for non-participation of owners, the decision to initiate suits on the common areas may reside within the managerial discretion of the board. A failure to sue by the association may leave wronged individual owners to attempt a potentially costly derivative suit. Moreover, an objection based on the lack of adequate representation casts potential doubt on the res judicata effect of the judgment or settlement, which may erode the certainty of the judgment and lead to a multiplicity of suits. Finally, individual homeowners may be forced to fund litigation without an opportunity to opt out. A resolution of these potential problems requires an analysis of the interests of the association and the owner, as well as an examination of corporate devices affecting the individual owner.

III. CURRENT PROBLEMS ATTENDING STANDING OF OWNERS' ASSOCIATIONS

A. *Framework for Problems Arising From Standing of Owners' Associations*

The procedural grant of standing to owners' associations must be viewed in conjunction with other legal characteristics of such associations. Specifically, the business judgment rule⁶¹ and the shareholder's derivative device apply to incorporated associations.⁶² The combination of standing and these substantive corporate law devices results in restriction of the owners' role. Moreover, the doctrine of

joinder of unit owners); 4 H. MILLER & M. STARR, *supra* note 31, § 24:82 (Supp. 1984).

59. See, e.g., *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973) (class action with association as representative); *Del Mar Beach Club Owner's Ass'n v. Imperial Contracting Co.*, 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (1981) (representative action); *Salton City*, 75 Cal. App. 3d at 184, 141 Cal. Rptr. at 895 (class action).

60. See *supra* note 32 and accompanying text.

61. See *infra* note 73 and accompanying text.

62. See *infra* note 82 and accompanying text.

res judicata continues to pose difficulties for owners attempting to opt out of association litigation or challenge the assessment levied to pay for this litigation.

Many of these problems are solved by consensual association representation, as well as by provisions in the articles of incorporation, declaration of restrictions, bylaws, and other governing documents which contractually bind owners.⁶³ However, the problems above may arise where the association is incorporated,⁶⁴ where the association makes a litigation decision regarding the common areas⁶⁵ without owner participation,⁶⁶ and the owner objects to a facet of the litigation decision. The owner's objection may take the form of disagreement with the association's decision not to litigate, disagreement with the binding effect of the litigation, claims of inadequate representation, or challenges of the assessment for litigation costs.

B. *The Association as Governmental, Regulatory Entity*

The owners' association functions as a binding authority, empowered by covenant⁶⁷ to enforce various restrictions and regulations. Dispute resolution within a condominium association can be an emotional and delicate process since the disputes arise "between neighbors who jointly own or use property and typically pi[t] the member association against one of its members."⁶⁸ There has been a recent surge in litigation between members and associations within communal living projects, including condominiums.⁶⁹ Observers have noted that the association's powers resemble administrative action⁷⁰

63. CAL. CIV. CODE § 1354 (West Supp. 1986). While the owner may enforce a covenant or equitable servitude, it may be difficult for the owners to secure recompense for the lawsuit. *See, e.g.,* Beehan v. Lido Isle Community Ass'n, 70 Cal. App. 3d 858, 137 Cal. Rptr. 528 (1977) (homeowners who successfully enforced restrictive covenant in absence of board litigation could not, because of the business judgment rule, recover fees incurred in litigation).

64. *See supra* note 3.

65. Since the common areas pit the board directly against the owners because of the board's management function, the author has focused on those areas. It should be noted, however, that California Civil Procedure Code section 374 is applicable to individual areas which the association is obligated to maintain or repair, and that the arguments which follow are also applicable to those areas. *See supra* note 10.

66. *See supra* notes 42-59 and accompanying text.

67. CAL. CIV. CODE § 1354 (West & Supp. 1986).

68. Scavo, *Dispute Resolution in a Community Association*, 17 URB. L. ANN. 295 (1979).

69. *Id.* at 296.

70. *See, e.g.,* Note, *Condominium Rule-Making — Presumptions, Burdens, and Abuses: A Call for Substantive Judicial Review in Florida*, 34 U. FLA. L. REV. 219, 221 (1982); Note, *Judicial Review of Condominium Rule-Making*, 94 HARV. L. REV. 647 (1981) [hereinafter cited as *Judicial Review*]. At least one California court has held that the quasi-

in substance and procedure, recognizing the intrusive functions the association routinely performs.

The association is therefore likely to be viewed as a potential obstacle to a member's unrestricted use and enjoyment of the property. Owners frequently do not interact with the association until a restriction is violated or an owner seeks a deviation from guidelines; the result is that hostility towards the association's management function is easily bred.⁷¹ Owners may be inclined to jealously guard what rights remain after the reality of the association's management function is recognized. One such right is the undivided interest in the common areas that the owner shares as tenant in common with all other owners, a right which is compromised by both the corporate mechanism of the business judgment rule and the standing provision.

C. *Litigation on the Common Areas as An Exercise of the Association's Business Judgment*

1. *The Business Judgment Rule*

One advantage of incorporating an association is the body of corporate law which attends incorporation.⁷² One tenet of corporate law is the so-called "business judgment rule." This rule protects corporate directors from liability for harms to the corporation resulting from good faith errors of business judgment.⁷³ The application of the rule to incorporated associations is supported by compelling reasoning. Since the rule does not apply to decisions not made in good

governmental status of an association gives rise to the requirements of due process and equal protection. See *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (1983). But see *Laguna Royale Owner's Ass'n v. Darger*, 119 Cal. App. 3d 670, 683, 174 Cal. Rptr. 136, 144 (1981) (expressing doubt regarding invocation of due process). See generally *Graham*, *supra* note 5, § 8.50, at 673, for a discussion of potential barriers to enforceability of restrictions.

71. This observation cuts both for and against the association. On the one hand, the association may be the only entity with the requisite impartiality to make the litigation decision. On the other hand, the potential for hostility by the association towards recalcitrant homeowners may improperly influence the litigation decision, and the association may be unlikely to allow an inexperienced homeowner to make what it perceives to be sophisticated business decisions.

72. For an extended discussion of the advantages of incorporation by the association, see generally *Graham*, *supra* note 5, §§ 8.2-8.8, at 635-42. Unincorporated associations do not enjoy the degree of certainty which incorporated associations do in terms of application of corporate law principles. *Id.*

73. 3A W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1039 (rev. ed. 1975). For an argument that the business judgment rule is appropriately applied to the homeowners' association in determining the propriety of restrictive covenants, see *Judicial Review*, *supra* note 70, at 666.

faith,⁷⁴ it does not penalize board members where they have acted within the authority of the association⁷⁵ reasonably believing their decision to be in the best interests of the corporation. Moreover, the rule allows management to direct the affairs of the corporation without fear of meritless litigation.

2. *Application of the Business Judgment Rule to Incorporated Associations: Beehan v. Lido Isle*

*Beehan v. Lido Isle Community Association*⁷⁶ established that the business judgment rule is properly applied to incorporated associations. In *Beehan*, an incorporated association which had been alerted to an owner's possible violation of a setback restriction in the association's recorded declaration refused to seek an injunction against that member. Another member sought the injunction and reimbursement by the association for the attorneys' fees incurred in seeking the injunction. The owner secured a stipulation from the violating owner whereby the violator agreed to modify his unit to conform to the setback restriction. The case proceeded against the association for reimbursement of the plaintiff's attorney's fees and costs.

The court recited plaintiff's theory of recovery, the "substantial benefit rule," which permits recovery of attorney's fees in shareholder derivative actions.⁷⁷ Since the association had opted not to sue,⁷⁸ the owner's cause of action was in the nature of a derivative claim. The court cited the business judgment rule as the applicable rule, noting that "neither a court nor minority shareholders can substitute their business judgment for that of a corporation where its board of directors has acted in good faith and with a view to the best interests of the corporation."⁷⁹ Since the board had, in the court's

74. 3A W. FLETCHER, *supra* note 73 at § 1039.

75. Clearly the association has authority to bring suit or veto litigation, since it now has standing to sue independently, pursuant to section 374 of the Code of Civil Procedure. CAL. CIV. PROC. CODE § 374 (West Supp. 1986).

76. 70 Cal. App. 3d 858, 137 Cal. Rptr. 528 (1977).

77. *Id.* at 864, 137 Cal. Rptr. at 531 (citing *Fletcher v. A.J. Indus.*, 266 Cal. App. 2d at 320, 72 Cal. Rptr. at 150). The substantial benefit rule permits the award of fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a substantial benefit of a pecuniary or non-pecuniary nature. *See Serrano v. Priest*, 20 Cal. 3d 25, 38, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 320 (1977).

78. In *Beehan*, it was not at all clear that board litigation would be successful. Eighteen of twenty-one homes in the complex violated the setback restriction. 70 Cal. App. at 866, 137 Cal. Rptr. at 532. The association's funds were otherwise committed to essential management functions. *Id.* It seemed clear that one owner wished to enjoin others without clear support from more than two other owners in the association.

79. *Id.* at 865, 137 Cal. Rptr. at 531.

view, acted in such a manner, the plaintiff's claim was without merit.⁸⁰

The *Beehan* holding illustrates several points which indicate the limited involvement of individual owners in litigation decisions regarding the common areas. First, when an owner attempts to enforce a restriction,⁸¹ he may not be able to recover the costs of the enforcement without the association's approval. Secondly, the nature of the individual's action is that of a shareholder derivative suit in the absence of litigation by the association.⁸² This indicates that the owner may face significant obstacles in maintaining the lawsuit.⁸³ Finally, *Beehan* indicates that the board has managerial discretion to institute litigation, and its decision made within that discretion will be presumed as valid and having been exercised in good faith.⁸⁴ Despite likely recovery from alleged wrongdoers, the board is permitted to weigh "the advantages of a probable recovery against the costs in money, time and disruption of the business."⁸⁵ All three of these points illustrate the restricted nature of individual involvement in litigation decisions in the incorporated association.⁸⁶

If, as the *Beehan* court asserted, the owner's action in absence of association litigation is derivative in nature, the individual owner's ability to sue is extremely restricted. The mere fact of a derivative right indicates that the plaintiff acts to enforce the *corporation's* right, not the individual owner's right. Further, the derivative device invokes numerous obstacles to maintenance of an individual suit; these obstacles are contained in California Corporation Code section 7710,⁸⁷ the derivative statute for Nonprofit Mutual Benefit Corporations. Applicable restrictions contained within section 7710 include a

80. *Id.* at 867, 137 Cal. Rptr. at 532.

81. The California Civil Code provides that any restrictions in recorded declaration "may be enforced by any owner of a separate interest, or by the association or both." CAL. CIV. CODE § 1354 (West Supp. 1986).

82. The *Beehan* court relied on California Corporations Code section 800, the shareholder derivative provision. *See* CAL. CORP. CODE § 7710 (West Supp. 1986).

83. *See infra* text accompanying note 88.

84. 70 Cal. App. 3d at 865, 137 Cal. Rptr. at 531.

85. *Id.* at 866, 137 Cal. Rptr. at 532.

86. The *Beehan* case is not squarely on point regarding board discretion in common area litigation. For instance, the owner in *Beehan* was attempting to enforce a setback restriction, technically not a common area problem. However, the owner was arguable suing to protect the enjoyment of the common areas, making the *Beehan* holding applicable by analogy to those areas. If the business judgment rule applies to the litigation of restrictive covenants, which the owner is statutorily permitted to enforce, it applies *a fortiori* to the common areas, which the association is required to maintain, repair, and protect. CAL. CIV. CODE § 1354 (West Supp. 1986).

87. CAL. CORP. CODE § 7710 (West Supp. 1986).

required demand on the board, a maximum bond amount of \$50,000 to be furnished by the plaintiff, and a motion procedure whereby the association may move to impose the bond.⁸⁸

Moreover, even if the plaintiff is successful in posting any bond the court requires, the business judgment rule may preclude the suit or the award of the plaintiff's costs. The derivative device also places the owner in the position of opposing the association's decision rather than the alleged wrongdoer whose acts gave rise to common area damage.

D. *Res Judicata Precludes the Homeowner From Relitigating Issues the Association Litigates*

When the association litigates on the common areas, it is representative of all the owner's claims with respect to those areas. Yet, as already noted, the association has independent standing to maintain an action, and may do so without class action certification.⁸⁹ The class action device provides absent owners with many protections.⁹⁰ When the association sues without the class action device, it seeks to bind the absent owners without the procedural mechanisms protective of absent members. What potential barriers does the owner face in seeking to avoid the binding effect of the association's litigation?

The major obstacle to such avoidance is the doctrine of res judicata, which forbids relitigation of a final judgment rendered on the merits in a court of competent jurisdiction.⁹¹ The issues decided in the prior adjudication must have been identical to issues presented in the action in question, there must have been a final judgment on the merits, and the party against whom the plea is asserted must have been a party or in privity with a party to the prior litigation.⁹²

The application of res judicata to a second litigation by an owner is clear since the issues will be substantially identical where the homeowner seeks to relitigate defects or damages issues which the association litigated in the first action. Assuming a final judgment on the merits, it would seem that the owner is bound, given the broad interpretation of privity in California as a relationship "sufficiently close" so as to justify preclusion.⁹³ Moreover, owners need

88. *Id.*

89. *See supra* notes 57-59 and accompanying text.

90. *See supra* note 32.

91. *Rynsburger v. Dairyman's Fertilizer Cooperative*, 266 Cal. App. 2d 269, 275, 72 Cal. Rptr. 102, 106 (1968).

92. *Id.* at 276, 72 Cal. Rptr. at 106.

93. *Clemmer v. Hartford Insurance Co.*, 22 Cal. 3d 865, 875, 587 P.2d 1098, 1102, 151

not be parties under section 374 in suits by the association which purport to bind them.

What complicates the binding effect of the association's action is its quasi-class representation and the potential for settlement. In the context of class actions, due process requires adequate representation by the representative class member, or the absent class members will not be precluded by *res judicata* from relitigating.⁹⁴ The question becomes whether due process similarly requires an adequate representation determination in the independent action by the association without joinder of the owners. Certainly if owners are excluded from participation in the lawsuit there is less chance that such an adequate representation determination will ever be sought. The more sound interpretation of the association's action would compel adequate representation in light of the desired binding effect of the litigation.⁹⁵

Many associations opt for the class action route, arguably for the benefits of binding the individual owners and providing absent owners with the protections of that procedural device.⁹⁶ Individual involvement may protect the association and the defendant from subsequent relitigation of claims by assuring a ruling on the adequate representation question.

Cal. Rptr. 285, 289 (1978) (stating policy of expansive privity interpretation and necessity of adequate representation for due process satisfaction). In a New Jersey Supreme Court case, *Siller v. Hartz Mountain Associates*, 93 N.J. 370, 461 A.2d 568, *cert. denied*, 464 U.S. 961 (1983), plaintiff owners brought an action to contest settlement negotiations between the association and the developer regarding defects in the common areas. In dismissing the plaintiffs' challenge, the court interpreted the New Jersey standing statute (N. J. STAT. ANN. §§ 48:8B-1 to 48:8B-38 (West 1981)) as granting the association exclusive standing to sue on the common areas. Any claim by the independent owner would be a derivative claim. The owners could sue the association for breach of fiduciary duty owed to the owners regarding the settlement process. But the individual owners were bound by the settlement negotiations. The result in this case is indicative of the probable result in California, since the rationale largely parallels California's increasing application of corporate principles to condominium associations. *See also* Note, *Condominiums — Standing to Sue — Owners' Association has Exclusive Right to Sue for Defects in Common Areas*, 14 SETON HALL L. REV. 465 (1984). Finally, since a settlement is not a final judgment on the merits, difficult questions regarding the binding nature of the settlement arise where the association negotiates for the owners.

94. *Vasquez v. Superior Court of San Joaquin County*, 4 Cal. 3d 800, 484 P.2d 964, 97 Cal. Rptr. 796 (1971).

95. No reported California appellate court decisions address this issue. However, the answer to the adequate representation question is at least uncertain, and the attendant uncertainty of the *res judicata* effect of the association's judgment provides an additional justification for homeowner involvement. Involvement of the owners would have as its goal a more certain *res judicata* effect.

96. *See supra* note 59.

E. *The Owner May Not Successfully Challenge the Litigation Assessment*

Since the association cannot fund litigation without the assessment power,⁹⁷ a question arises as to whether the owner may successfully challenge the assessment levied to fund the litigation.⁹⁸ It seems all but a foregone conclusion that such an assessment will be enforced if the association maintains an action on the common areas. The litigation costs are a common expense, arguably related to the board's management functions after the passage of the standing statute; thus, the board has statutory authority to assess for litigation purposes.⁹⁹ Moreover, if the authority for such an assessment is contained in the declaration of restrictions, the owner becomes contractually bound to honor such a provision.¹⁰⁰

Further, a persuasive argument can be made that the business judgment rule should and would apply to such an assessment challenge given the management functions of the association. The result of this application would render the owner's success unlikely in contesting the assessment. The owner who objects to the assessment faces a lien on his or her unit.¹⁰¹ Despite the constant recognition of the economy created by the standing statute,¹⁰² an assessment may be a significant amount of money.

The California Administrative Code may provide one challenge mechanism. The code prohibits assessments to defray the costs of any action or undertaking on behalf of the association which exceed in the aggregate 5% of the budgeted gross expenses of the association for that fiscal year.¹⁰³ However, a majority of the membership of the association may agree to such an assessment within this provision. Hence, a minority owner who disputes the propriety of the assessment has no effective recourse except a derivative suit.

If the individual owners are involved in the litigation process, the likelihood of an assessment challenge appears to be diminished. An owner who participates in the litigation decision may be less

97. The association may create an enforceable covenant in the declaration of restrictions concerning litigation fees should they arise. See CAL. CIV. CODE § 1354 (West Supp. 1986) (covenants, where reasonable, will be enforced).

98. See *supra* note 30.

99. CAL. CIV. CODE § 1354 (West Supp. 1986).

100. *Id.*

101. *Id.* at § 1356.

102. See, e.g., *Raven's Cove*, 114 Cal. App. 3d at 792, 171 Cal. Rptr. at 338; Hyatt & Roads, *Concepts of Liability in the Development and Administration of Condominium and Homeowners' Associations*, 12 WAKE FOREST L. REV. 915, 975 (1976).

103. CAL. ADMIN. CODE tit. 10, R. 80, § 2762.16(e)(1) (1980).

likely to contest what would otherwise seem to be an unwarranted assessment. Individual owner participation advances the policy of effective dispute resolution in the condominium setting.

The owner in an incorporated association who disagrees with an association's decision regarding common area litigation may have no effective legal avenue to vent that disagreement or determine its validity. The standing provision has ironically imposed many restrictions on individual involvement in the litigation process. There is no question that the policy concerns of economy, convenience and efficient condominium management are well-served by permitting an association to sue for its membership. A question does arise as to whether these concerns should displace homeowner standing and involvement. In the absence of contractual solutions,¹⁰⁴ two specific areas deserve attention in attempting to forge a compromise between individual involvement and the corporate management goals of the condominium association. First, an amendment to the standing provision is necessary. Second, judicial evaluation of the adequacy of the association's representation is necessary.

IV. A PROPOSED RESOLUTION OF THE STANDING PROBLEMS BY LEGISLATION AND JUDICIAL SCRUTINY

The problems discussed above, manifested in restricted individual involvement in the litigation decision-making process, stem from several sources. The nature of the action by the association is one such source; since the action is not necessarily a class action, the alternative of independent action by the association may exclude the owner. Another source of restricted involvement is the corporate mechanism of the business judgment rule and the derivative suit. A third source is the managerial discretion of the association to initiate suit to the exclusion of owners.

To alleviate the restrictiveness placed on owner involvement resulting from this combination of corporate and procedural rules, an amendment to section 374 is necessary.¹⁰⁵ This proposed amendment contemplates individual involvement in the lawsuit. First, the statute should be amended to read "no individual owner's action shall be limited by the association's standing;" similar language appears in

104. There is no inherent unfairness in allowing an association which owns the common areas to litigate damage claims regarding those areas. The potential unfairness arises from the ownership of the property by the owners as tenants in common. This problem can be resolved effectively by conveyance of the common areas to the association.

105. The full text of the proposed amendment is attached hereto as Exhibit A.

many standing provisions in other jurisdictions,¹⁰⁶ and prevents the potential ouster of owners from the litigation decision. Second, language specifically retaining standing by the owners is included. This formulation also eliminates the provision in the current statute which allows for non-joinder of owners in all cases. The statute also provides that the owners could agree to permit representation by the association, but that joinder of owners would be required if a threshold number of owners object.

Requiring a threshold amount of opposition permits the management function to embrace litigation decisions up to a limited, protecting the individual interests and management interests at stake. The threshold number of opposing owners is defined in the corporation's governing documents, which enables the owners to amend the documents at a later date. The amendment also subjects the issue of whether a class action or independent action will be stated to a vote of the owners. The class action route is pursued upon a majority vote, insuring that the protections afforded absent class members would apply.¹⁰⁷

The business judgment rule should remain applicable to the incorporated association, primarily because the suggested procedural changes above, such as permitting definition of the deciding number of owners, would foster individual involvement. The derivative mechanism, however, should not be the only avenue of individual suit on the common areas, given the established problem of inadequate funding for litigation purposes on the part of individual owners. In short, the owners should be able to decide the extent of their own involvement in what will still be litigation by the association. The association's role cannot be wholly eliminated because of the assessment power and the necessity for common funding of the lawsuit.

An amendment to section 374 should address the problems raised above and, by so doing, enhance the res judicata effect of the association's judgment. The owners could be joined with the association for efficient management of the litigation and enhanced res judicata effect. The attendant certainty of the judgment would protect the association and absent members and would avoid a multiplicity of suits; the avoidance of suits would also alleviate crowded court

106. See, e.g., ALASKA STAT. § 34.07.260 (1984) ("without limiting the rights of any apartment owner"); IDAHO CODE § 55-1513 (1979); IND. CODE ANN. § 32-1-6-30 (West 1979); KAN. STAT. ANN. § 58-3127 (1983); N.H. REV. STAT. ANN. § 979-A:26 (1983); UTAH CODE ANN. § 57-8-33 (1953); WASH. REV. CODE ANN. § 64.32.240 (1966).

107. See *supra* note 32.

dockets. The amendment permits definition of appropriate numbers of objecting owners within the corporate documents defining the association, leaving the avenue of later decision regarding the scope of litigation involvement for later amendment of the governing documents. More productive decision making would be achieved, since the association and owners would work together toward relief from the alleged wrongdoer rather than focusing on internal disputes regarding the propriety of the board's action.

Judges presented with actions by the association can also contribute to individual involvement in suits for common area damages. Where the association sues independently, the court should critically examine the nature of the action and inquire as to the nature of the owners' agreement with the association's action. An effective judicial evaluation of the adequacy of the association's representation is necessary to protect the homeowners and enhance the binding effect of the association's litigation. For example, the court might characterize the action as a class action if disagreement or inadequacy of representation is evident.¹⁰⁸ The certainty of the judgment as final could also be protected by judicial scrutiny whether an amendment to section 374 is adopted or not.

These proposed measures do not seek to usurp the association's legitimate management authority but rather attempt to strike a fair balance between management authority and the owner's interests in the property subject to that authority. Efficiency and expediency are not thwarted by compelling owner involvement if limits on that involvement, such as a threshold amount of opposition by owners, also exist. Joinder of the owners will diminish the potential uncertainty of later *res judicata* effects of the litigation. Owner involvement would allow the persons responsible for funding the litigation and bound by its outcome to participate without displacement of the association's management function. The proposal recognizes that individual owners may oppose decisions made by the association regarding owners' undivided interests and litigation concerning those interests. Permitting or requiring owner involvement may circumvent this opposition and redirect it towards the alleged wrongdoer, the defendant developer. The proposal therefore is intended to serve as an effective dispute resolution device.

108. See *supra* note 55 and accompanying text. The court also has inherent power to monitor its own proceedings in class action suits. See *supra* note 32.

V. CONCLUSION

There is no dispute over the propriety of permitting condominium associations to represent individuals which comprise their membership. The action by the association serves the laudable purposes of economy, efficiency, and simplification of the litigation process. Section 374 of the Code of Civil Procedure advances all of these policies. The provision was intended to remedy the restrictiveness upon association representation. Ironically, a similarly restrictive rule now obtains to preclude owners from litigation decisions, as a result of a combination of procedural and corporate rules.

A compromise is necessary between the corporate model, which vests vast discretion in the association, and the owner's tenancy in common interest in the common areas. While common areas in a condominium are analogous to stock interests in a corporation, the enjoyment and use of the common areas elevates those areas to a more personal level of interest than mere security ownership or membership in an organization. This personal interest cannot be overlooked by removing owners from the decision to litigate or the litigation which purports to bind them.

One form of compromise between these competing policies is represented in the proposed amendment to section 374. The amendment would permit individual involvement in litigation on the common areas without substituting owner's judgment for that of the association. This proposal would serve the interests of both management and the owner by reducing opposition to litigation decisions, avoiding disputes between the association and its members, and retaining the use of the assessment power to fund the litigation.

The question should not be whether the association or the individual owner has standing, but rather under what circumstances and terms the two groups should coordinate their disparate but related interests into a single, more efficient litigation decision. Standing of owners and their concomitant participation in the litigation process can exist consistently with standing of the association. An amendment to section 374 would be an initial step toward achieving this balance.

Matthew T. Powers

APPENDIX A

Section 374. Owners and Associations of Condominiums, Community Apartment Projects, Undivided Interest Subdivision Projects or Planned Development Projects; Standing.

(a) Without limiting the rights of any unit owner to bring an action, an owners' association in a project consisting of condominiums, as defined in Section 783 of the Civil Code, or of a community apartment project, as defined in Section 11004 of the Business and Professions Code, and undivided interest subdivision project, as defined in Section 11000.1 of the Business and Professions Code, or a planned development, as defined in Section 11003 of the Business and Professions Code, shall have standing to sue as a real party in interest for any damages to commonly owned lots, parcels, or areas or individually owned lots, parcels or premises which the owners' association is obligated to maintain, preserve or repair occasioned by the acts or omissions of others.

(b) The individual owners of condominiums within a project consisting of condominiums as defined in Section 783 of the Civil Code shall also have standing to sue as a real party in interest for such lots, parcels or premises described in subdivision (a) of this section where the association is incorporated pursuant to Sections 5000 to 10847 of the Corporations Code. The following procedures shall be followed in bringing any action under this section:

1. If the number of individual owners disputing representation by the association exceed an amount defined in the association's articles of incorporation, individual homeowners shall be permitted to join in the association's suit.

2. If a majority of the voting power of the individual owners so decide, the association shall state a class action.

3. If either of the conditions in subdivisions (b)(1) or (b)(2) of this section are satisfied, the shareholder derivative provision of Section 7710 of the Corporations Code shall not apply. In all other cases that provision shall apply.

4. Upon motion of any individual owner in a suit by a homeowner or homeowners under subdivision (b) of this section, the court shall determine the propriety of joinder according to the provisions of Section 389 of the Code of Civil Procedure. [Section 389 governs joinder of necessary parties.]