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Ohio Condominium Law Reform: A Comparative Critique

John D. Blackburn

Nancy J. Melia

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Ohio Condominium Law Reform: A Comparative Critique

*John D. Blackburn**
*Nancy J. Melia***

Substantial amendments to the Ohio Condominium Property Act have recently become effective. To improve consumer protection, the amendments impose written disclosure requirements upon the developer, provide penalties for noncompliance, create certain warranties, and establish a timetable for the developer to relinquish control over the unit owners association. The amendments also regulate condominium conversions and expandable and leasehold condominiums. Comparing the revised Ohio statute to other condominium legislation, the authors examine the scope of the amended statute, review the recent changes, explore their possible applications, and evaluate their impact on the rights and liabilities of individual unit owners.

TABLE OF CONTENTS

INTRODUCTION.....	147
I. GENERAL SCOPE OF THE STATUTE	149
II. CONSUMER PROTECTION	152
A. <i>Restrictions on Developer Marketing Practices</i>	152
1. <i>Presale Disclosure</i>	152
2. <i>Conversions from Apartment Buildings</i>	163
a. <i>Problems Facing Tenants</i>	164
b. <i>Problems Confronting Prospective Purchasers</i>	168
3. <i>Deposits and Downpayments</i>	170
4. <i>Warranties</i>	175
B. <i>Restrictions on Developer Retention of Control</i> ...	180
1. <i>Prolonged Control of the Owners Association</i> .	181
2. <i>Sweetheart Contracts</i>	185

* Assistant Professor of Finance and of Labor and Human Resources, Ohio State University. B.S. (1971), Indiana State University; J.D. (1974), University of Cincinnati.

** Assistant Professor of Finance, Ohio State University. B.A. (1968), J.D. (1973), Ohio State University.

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3.	<i>Developer Rental of Unsold Units</i>	187
III.	INDIVIDUAL AND COLLECTIVE RIGHTS AND LIABILITIES	190
A.	<i>Rights and Obligations of Unit Owners Inter Se.</i> ..	190
1.	<i>Common Areas</i>	190
a.	<i>Assignment of Interest</i>	191
b.	<i>Collection of Common Expenses and Assessments</i>	194
2.	<i>Internal Governance</i>	198
a.	<i>Condominium Governance Structure</i>	198
i.	<i>Bylaw Provisions</i>	199
ii.	<i>Powers and Duties of Directors and Officers</i>	201
iii.	<i>Voting Rights</i>	203
b.	<i>Unit Use and Alienation Restrictions</i>	204
i.	<i>Use Restrictions</i>	204
ii.	<i>Alienation Restrictions</i>	206
c.	<i>Removal from the Statute</i>	208
B.	<i>Liability of Unit Owners</i>	211
1.	<i>Tort Liability</i>	211
2.	<i>Mechanic's and Materialman's Liens</i>	214
IV.	RECOGNITION OF PROGRESSIVE FORMS OF CONDOMINIUMS	216
A.	<i>Expandable Condominiums</i>	216
B.	<i>Leasehold Condominiums</i>	220
V.	CONCLUSION	226

Ohio Condominium Law Reform: A Comparative Critique

INTRODUCTION

MANY PEOPLE DESCRIBE the future of housing in the United States in terms of clustered living communities where people can enjoy certain amenities that will be too expensive for the single homeowner. Even today apartment complexes offer tennis courts, lawn care services, and swimming pools for a small monthly charge incorporated into a rent payment. Americans seem to prefer, however, to purchase their own residences, and condominiums provide a method by which they can live in apartment-type communities while building equity in their homes.¹

The word condominium refers to a residential or office complex in which individuals possess their own units in fee and own an undivided interest in the common areas in proportion to their share in the ownership of the entire project.² Ohio statutorily sanctioned the creation of condominiums in 1963 by enacting the Condominium Property Act.³ The Act was passed in response to the increasing cost and scarcity of land and, was a direct result of a 1961 amendment to the National Housing Act which authorized the Federal Housing Administration to insure condominium mortgages.⁴ The 1963 Act addressed (1) the creation of a condominium form of cooperative ownership,⁵ (2) the respective interests each unit owner possessed in the common areas,⁶ (3) the

1. The condominium is not an altogether new concept. The idea of owning an individual unit dwelling in a multiunit housing structure dates back to the Romans and flourished within the walled cities of Europe during the Middle Ages. Bucknall, *Leasehold Condominiums: The Further Flight of the Fee*, 14 OSGOOD HALL L.J. 29 (1976).

2. Seikel, *Condominium Property*, 35 CLEV. B.J. 101 (1964).

3. OHIO REV. CODE ANN. §§ 5311.01-.22 (Page 1970).

4. Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149 (codified at 12 U.S.C. § 1715y (1976)).

5. OHIO REV. CODE ANN. §§ 5311.02, .06 (Page 1970). According to these sections, chapter 5311 applies to a piece of property only if (1) the property is a fee simple estate or a 99-year leasehold estate and (2) the property owner files a declaration, drawings, and by-laws with the county recorder and the county auditor.

6. *Id.* § 5311.04. Each unit owner has an undivided interest in the common areas

condominium administration,⁷ (4) the rights of lienors,⁸ and (5) the removal of the property from the Act's provisions.⁹

The accelerating use of condominium ownership revealed many deficiencies in Ohio's condominium legislation. For example, the 1963 Act lacked any consumer protection provisions regulating such areas of developer abuse as the nondisclosure of fees and expenses, the misuse of purchaser deposits, and the practice of converting apartment buildings into condominiums without informing purchasers that they were buying older, used housing. Like legislatures in other states,¹⁰ most notably those of Virginia¹¹ and Florida,¹² the Ohio General Assembly recognized the need for modernization and improvement in its condominium statute and recently enacted substantial amendments to the original Act.¹³ Effective October 1, 1978, the amended statute adds several new dimensions to Ohio condominium law. For residential condominiums the amendments enlarge the amount of information required to be included in the declaration¹⁴ (the master document which submits the property to the provisions of the statute), impose additional disclosure requirements upon developers,¹⁵ provide for certain warranties,¹⁶ and establish a specific timetable for the assumption of control of the unit owners association by owners other than the developer.¹⁷ In addition to the consumer protection provisions for residential condominiums, the amended statute authorizes expandable condominiums¹⁸— developments which are constructed in phases to allow for test marketing of the project and the use of proceeds from initial sales to finance future

and facilities in the proportion that the fair market value of his unit bears to the total value of all the units. Such percentage may be altered only by the owners' unanimous approval of an amendment to the declaration.

7. *Id.* §§ 5311.08, .19.

8. *Id.* §§ 5311.13, .18.

9. *Id.* § 5311.17. To effect removal all unit owners must vote affirmatively to remove the property. Upon removal, the property becomes owned in common by the unit owners, whose interest is the percentage of interest in the common areas previously owned.

10. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 47-67 to 90c (West 1978); GA. CODE ANN. §§ 85-1601e to 1645e (1978); HAW. REV. STAT. §§ 514A-1 to 70 (Supp. 1977); LA. REV. STAT. ANN. §§ 9:1121-1142 (West Supp. 1978).

11. VA. CODE §§ 55-79.38 to .103 (Supp. 1978).

12. FLA. STAT. ANN. §§ 718.101-508 (West Supp. 1978).

13. Am. Sub. H.B. 404, 112th Cong., Reg. Sess. (1977-78) (codified at OHIO REV. CODE ANN. §§ 5311.01-.09, .11, .13, .18, .21-.27 (Page Supp. 1978)).

14. *Id.* § 5311.05(B)(6), .05(C), .05(D).

15. *Id.* § 5311.26.

16. *Id.* § 5311.25(E).

17. *Id.* § 5311.08(C), .08(D).

18. *Id.* § 5311.01(Q), .01(R).

development. Among other miscellaneous changes, the amended statute regulates the conversion of apartment complexes into condominium developments.¹⁹ The purpose of this article is to review the recent changes in Ohio condominium law and to explore their possible applications. It examines the scope of the amended statute and the restrictions placed on various developer practices, and evaluates the impact on the rights and liabilities of unit owners. The article concludes with an examination of two innovative forms of condominium development permitted by the Act—expandable and leasehold condominiums.

I. GENERAL SCOPE OF THE STATUTE

Innovation has expanded the usefulness of condominiums. As a result, the condominium concept is being extended into new areas of application: shopping centers, industrial plants, agricultural properties, cemeteries, mobile home parks, recreational centers, camping areas, and fractional time-period ownerships.²⁰ It is clear that the legislature intended both the 1963 and the amended statute to cover nonresidential condominiums. The legislature adopted the term "unit"²¹ to describe the basic component of condominium ownership, instead of the term "apartment" as in other statutes,²² and thus avoided the residential connotations of the latter term. Further, specific references to commercial facilities are made throughout the statute.²³

However, the definition of "unit" under the Ohio statute remains quite narrow in scope and should be broadened to cover a wider range of possible applications. As defined in section 5311.01 of the 1963 Act and left essentially unchanged by the recent amendments, a condominium unit is a "part of the condominium property consisting of one or more rooms on one or more floors of a building . . ." ²⁴ Section 5311.03 establishes the boundaries of a unit as the interior surfaces of its perimeter floors,

19. *Id.* §§ 5311.25(G), .26(G).

20. Note, *Building on the Horizontal Property Act: Condominiums in Iowa*, 59 IOWA L. REV. 291, 293 (1973); Comment, *Missouri's Condominium Property Act: Time for a Change*, 42 MO. L. REV. 271, 271-72 (1977).

21. OHIO REV. CODE ANN. § 5311.01(G) (Page 1970); *id.* § 5311.01(I) (Page Supp. 1978).

22. 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 5.01, at 5-1 (1973).

23. *E.g.*, OHIO REV. CODE ANN. § 5311.01(B)(1)(f) (Page 1970); *id.* 5311.05 (B)(3) (Page Supp. 1978).

24. *Id.* § 5311.01(G) (Page 1970); *id.* § 5311.01(I) (Page Supp. 1978).

ceilings, and walls, including windows and doors.²⁵ The Ohio Attorney General has further restricted the possible utilization of the condominium concept by noting that "units" are generally understood to consist of "interior walls and air space"²⁶ and are "defined restrictively as 'rooms.'"²⁷ He also ruled that property cannot qualify as a condominium when it consists of a group of lots intended for the private, exclusive ownership of some project owners and when common areas consist primarily of roads and similar types of commonly used property.²⁸ The retained narrow definition of a unit will make it difficult to use the condominium concept in more innovative areas.

Illustrative of some approaches which encourage a less restrictive application of the condominium concept are those taken by Utah and Florida. Utah's legislation not only specifically covers commercial and industrial condominiums but also defines a unit as a "separate physical part of the property intended for any type of independent use."²⁹ Florida similarly provides latitude for innovative use of the condominium concept simply by defining a unit as a "part of the condominium property which is subject to exclusive ownership."³⁰ These definitions allow developers to experiment with the condominium concept in a wide variety of situations, unhampered by the restrictions of the terms "room" and "building."

It is also uncertain under the Ohio Act whether the statute applies to residential condominiums where units are rented out to vacationers during a good portion of the year by unit owners or the unit owners association.³¹ Such a situation may be covered by the Ohio Securities Act.³² If the purchaser of a condominium unit shares in the gross proceeds or net profits of an enterprise managed by the seller, then the interests of the purchaser will constitute investment contracts. If, however, the purchaser occupies the unit and conducts the enterprise, then the interest is not a secur-

25. *Id.* § 5311.03(D) (Page 1970).

26. 71-031 OP. OHIO ATT'Y GEN. 2-100 (1971).

27. *Id.* at 2-101.

28. *Id.* at 2-98.

29. UTAH CODE ANN. § 57-8-3(2), -3(7) (Supp. 1977).

30. FLA. STAT. ANN. § 718.103(16) (West Supp. 1978).

31. See generally Romney & Rohan, *Resort Condominiums: The Housing Industry's Prescription for Relaxation, Retirement, and Real Estate Investment*, 2 CONN. L. REV. 50 (1969).

32. OHIO REV. CODE ANN. § 1707 (Page Supp. 1977).

ity.³³ Thus, if a buyer does not live in the unit or lives in it only for a short time and participates in some type of pooling arrangement whereby the developer rents out the units and then distributes the proceeds or profits to the unit owners, the developer may be subject to the securities law.

A similar concept, fractional time-period ownership, in which different buyers own the unit for a part of a year, also has not been specifically addressed by the Ohio legislature. Section 5311.01 of the amended statute, however, changed the definition of "unit owner" from "a person or persons" to "a person."³⁴ The change casts doubt on the legality of fractional time ownership. Utah specifically permits time-period units,³⁵ and there seems to be no persuasive reason why the Ohio statute should exclude this form of ownership.

The new provisions sanctioning expandable development³⁶ and the division and combination of units³⁷ add new flexibility for developers wishing to construct commercial and industrial condominiums.³⁸ Ohio, like Florida³⁹ and Georgia,⁴⁰ applies its disclosure and consumer protection sections to residential condominiums only.⁴¹ This is presumably because the commercial or industrial buyer will have more expertise in dealing with the developer and thus need less protection. To what extent this is true, especially in the lesser known areas of condominium application, deserves careful examination. If developers take advan-

33. In *State v. Silberburg*, 166 Ohio St. 101, 139 N.E.2d 342 (1956), the owner of an improved real estate project made up of multiple residence units sold undivided but specifically designated units to purchasers for their personal use. There was a provision in each contract of sale for title to the entire project to be taken in the name of a corporation, in which the unit owner was to have stock according to the value of his ownership in the project, and another for the cooperative management of the project. The court held that the contracts were for the sale of real estate and were not securities under the Ohio Securities Act.

34. OHIO REV. CODE ANN. § 5311.01(J) (Page Supp. 1978).

35. UTAH CODE ANN. § 57-8-3(20) (Supp. 1977).

36. OHIO REV. CODE ANN. §§ 5311.01(R), .05(C) (Page Supp. 1978). See notes 446-78 *infra* and accompanying text.

37. OHIO REV. CODE ANN. § 5311.03(G) (Page Supp. 1978).

38. The Ohio statutory scheme could become even more flexible if future amendments would (1) permit conversion of common areas to limited common areas, (2) provide for convertible space, and (3) provide for contractible condominiums. See Comment, *The Georgia Condominium Act of 1975: A Sound Basis for Innovative Condominium Practice*, 24 EMORY L.J. 891, 900-05 (1975). See notes 474-77 *infra* and accompanying text.

39. FLA. STAT. ANN. §§ 718.502, .504 (West Supp. 1978). Section 718.103(18) of this statute specifically defines residential condominium.

40. GA. CODE ANN. § 85-1643e(a) (1978).

41. OHIO REV. CODE ANN. §§ 5311.24-26 (Page Supp. 1978).

tage of these nonresidential buyers, protection now afforded residential buyers should be extended to them.⁴²

II. CONSUMER PROTECTION

A. *Restrictions on Developer Marketing Practices*

1. *Presale Disclosure*

Like a prospective purchaser of any product, the prospective purchaser of a condominium is subjected to advertising and promotion. The buyer learns that he is entitled not only to the same tax benefits, equity, and ownership as a single family homeowner, but also to recreational amenities and maintenance services not available to most single home purchasers. He rarely learns, however, that in many instances he has heard only half the story and none of the possible drawbacks.

To bolster sales the developer or his agent may gloss over or misinform the purchaser about negative factors quite relevant to his decision whether to buy. For example, developers may underestimate monthly maintenance charges and costs, omit mention of the likelihood of increases,⁴³ or fail to itemize the charges and costs.⁴⁴ Thus, the buyer may not know whether expenses are common or individual⁴⁵ or whether a sweetheart contract is hidden in the monthly charge.⁴⁶ Not only may excessive charges be imposed on unit owners who transfer or lease⁴⁷ their units, but they also may be forced to contribute for improvements.⁴⁸

In addition, the typical prospective purchaser is unsophisticated in condominium law and consequently unaware of the potential for developer abuse. For example, the developer may use the purchaser's deposit to finance construction of other units⁴⁹ or he may exempt himself, as owner of the unsold units, from those

42. See LA. REV. STAT. ANN. § 9:1140 (West Supp. 1978) (no distinction between residential and nonresidential units).

43. Note, *Full Disclosure to Massachusetts Condominium Buyers: A Proposed Statute*, 10 NEW ENG. L. REV. 325, 327 (1974); Comment, *Condominium Regulation: Beyond Disclosure*, 123 U. PA. L. REV. 639, 642 n.19 (1975).

44. Comment, *supra* note 43, at 642 n.19.

45. Rohan, *Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser*, 48 ST. JOHN'S L. REV. 1028, 1060 (1974).

46. Comment, *supra* note 38, at 895; Comment, *supra* note 43, at 644-45. For a discussion of sweetheart contracts, see notes 231-48 *infra* and accompanying text.

47. Comment, *Legal Protection for Florida Condominium and Cooperative Buyers and Owners*, 27 U. MIAMI L. REV. 451, 462 (1973).

48. *Legislative Symposium, Condominiums*, 35 LA. L. REV. 653, 657 (1975).

49. Comment, *supra* note 38, at 906 n.100; Comment, *supra* note 43, at 643-44.

units' share of the common expenses⁵⁰ while still reserving the right to rent the unsold units.⁵¹ The developer may possibly reserve the right to amend unilaterally the declaration or bylaws,⁵² alter the projected layout,⁵³ cancel the offering if an insufficient number of purchase commitments are obtained,⁵⁴ or retain extended control of the unit owners association.⁵⁵

Thus, the prospective purchaser may be both misled and uninformed about the nature of the interest that he is buying—ordinarily the single most expensive purchase a consumer makes.⁵⁶ Finally, because condominium instruments are lengthy and complex, the purchaser may often find it difficult to ascertain his rights and remedies under the declaration and bylaws⁵⁷ and may be unaware of any legal rights he may have. Since currently available nonstatutory remedies provide inadequate protection for the prospective purchaser,⁵⁸ the recent amendments add extensive

50. Comment, *supra* note 38, at 895; Comment, *supra* note 43, at 646.

51. Note, *supra* note 43, at 327.

52. Note, *Real Property: Oklahoma Condominiums—Prevention of Abuse*, 28 OKLA. L. REV. 189, 191 (1975).

53. I P. ROHAN & M. RESKIN, *supra* note 22, § 13.02[3], at 13-10.1.

54. *Id.*

55. Rohan, *supra* note 45, at 1037.

56. *Id.* at 1034.

57. THE NATIONAL ASSOC. OF ATTORNEYS GENERAL, LAND AND CONDOMINIUM SALES REGULATION 4 (1975).

58. The original Ohio Condominium Act, OHIO REV. CODE ANN. §§ 5311.01-22 (Page 1970), was an enabling statute with no consumer protection provisions. However, under Ohio common law, purchasers who are able to prove deceit and misrepresentation can seek relief from a developer. To prove deceit, the buyer must demonstrate: (1) that there was a representation as to existing or past fact, material to the transaction; (2) that the representation was false at the time it was made; (3) that it was made in bad faith with the knowledge it was false; (4) that it was made with the intent of misleading the other party into relying upon it; (5) that the buyer relied on the misrepresentation, with a right to so rely; (6) and that injury occurred. *See, e.g., Lucke v. Robinson*, 56 Ohio App. 242, 10 N.E.2d 283 (6th Dist. 1937). The Ohio common law action is a difficult burden for condominium purchasers. A failure to disclose information may or may not constitute fraud. Courts distinguish between concealment, which implies an intent to injure, and simple failure to disclose. *See, e.g., Talcott v. Henderson*, 31 Ohio St. 162 (1877). Courts require a duty to speak, as well as an intention to deceive as to a material fact, and the buyer-seller relationship does not alone give rise to such a duty. *See, e.g., Schubert v. Neyer*, 12 Ohio Op. 2d 231, 165 N.E.2d 226 (1st Dist. Ct. App. 1959). In addition, courts generally still apply the rule of caveat emptor in the sale of real estate. *See, e.g., Traverse v. Long*, 165 Ohio St. 249, 135 N.E.2d 256 (1956).

The only exception applies when there is a material defect of a dangerous nature. If the defect was known to the seller and unknown to the buyer, or if the buyer could not have discovered the defect upon reasonable observation, then the courts may find a duty in the seller. *See, e.g., Klott v. Associates Real Estate*, 41 Ohio App. 2d 118, 322 N.E.2d 690 (10th Dist. 1974). However, buyers are under a duty to inspect the premises, and no fraud will be found as to conditions which are discoverable and open to observation. *See, e.g., Traverse*

consumer disclosure requirements. In so doing, Ohio has joined the growing number of states mandating some form of pre-sale protection to the purchaser of a residential condominium.⁵⁹

The new amendments require disclosure of information in the declaration and in a written offering statement which must be furnished to all prospective and actual purchasers.⁶⁰ Section 5311.25 provides that a developer or his agent may not offer to sell or sell a condominium ownership interest unless the condominium instruments provide detailed information concerning the rights of both purchaser and developer.⁶¹ The statute fails, however, to require that the developer actually furnish copies of the instruments to the

v. Long, 165 Ohio St. at 252, 135 N.E.2d at 259. One court has held that even if the subject matter is inaccessible, the buyer has no right to rely on the seller's representation. *See, e.g., Schubert v. Neyer*, 12 Ohio Op.2d at 235, 165 N.E.2d at 231. A common pleas court has adopted a contrary view and imposed an absolute duty of complete disclosure on sellers as to anything not visible. *See, e.g., Gilbey v. Cooper*, 37 Ohio Misc. 119, 310 N.E.2d 268 (C.P. Columbiana County 1973).

The common law remedy may prove inadequate for condominium purchasers. Where the buyer can prove deceit, he has an election of remedies. He may affirm the transaction and sue in tort for damages for fraud and deceit. *See, e.g., Frederickson v. Nye*, 110 Ohio St., 459, 144 N.E. 299 (1924). If the buyer can show malicious intent, he may recover exemplary damages, but not otherwise. *See, e.g., Waters v. Novak*, 94 Ohio App. 347, 115 N.E.2d 420 (9th Dist. 1953); *Crum v. McCoy*, 41 Ohio Misc. 34, 322 N.E.2d 161 (Franklin County Mun. Ct. 1974). In the alternative, the buyer may rescind the contract, recover money paid, and have any other consistent remedial relief. *See, e.g., Frederickson v. Nye*, 110 Ohio St. at 467, 144 N.E.2d at 301. The period of the statute of limitations does not begin until the discovery of the fraud. *See, e.g., Christ v. Dice*, 18 Ohio St. 536 (1869). The right to recover may be barred by waiver of laches if the transaction is not rescinded promptly upon discovery of the fraud. *See, e.g., Meyers v. Hoops*, 12 Ohio Op. 2d 481, 140 N.E.2d 65 (2d Dist. Ct. App. 1955); *Kaufman v. Cornell*, 7 Ohio L. Abs. 670 (9th Dist. Ct. App. 1929).

59. Other states take different approaches to the consumer protection issue. Besides the "pure" disclosure approach taken by states such as Illinois, ILL. ANN. STAT. ch. 30, § 322 (Smith-Hurd Supp. 1975), and Connecticut, CONN. GEN. STAT. ANN. § 47-71b (West 1978), other states require important provisions to be flagged or set out in bold face type. *See, e.g., FLA. STAT. ANN. § 718.504* (West Supp. 1978); *GA. CODE ANN. § 85-1643e(c), -1643e(e), -1643e(g), -1643e(h)* (1978). Other states maintain a regulatory agency in addition to requiring disclosure. *CAL. BUS. & PROF. CODE § 11018* (West Supp. 1978); *FLA. STAT. ANN. §§ 718.504-.510* (West Supp. 1978); *HAW. REV. STAT. §§ 514A-31 to 70* (Supp. 1977); *N.Y. REAL PROP. ACTS LAW § 339-ee* (McKinney Supp. 1977); *N.Y. GEN. BUS. LAW § 352-e* (McKinney Supp. 1977).

60. OHIO REV. CODE ANN. §§ 5311.06(B), .26 (Page Supp. 1978). Section 5311.01(O) defines "purchaser" to include both actual and prospective purchasers of condominium ownership interests. However, the statute uses both "purchaser" and "prospective purchaser." For example, § 5311.25(A) refers to a purchaser's deposit, § 5311.26(J) refers to the rights of purchasers, yet § 5311.26 requires disclosure to a prospective purchaser.

61. Section 5311.25 requires that the following appear in the condominium instruments:

(1) The legal rights of the buyer and developer regarding use of the buyer's deposit or downpayment;

purchaser and exacts only that the developer inform the purchaser of his right to review them.⁶²

The major disclosure provision of the new Act requires the developer to provide each prospective purchaser with a readable and understandable written statement that discloses fully and accurately all material circumstances affecting the development.⁶³ An

(2) The extent to which the law permits the developer to retain control of either the unit owners association or a property interest in the condominium development;

(3) The unit owners' rights regarding management contracts entered into prior to their assumption of control of the association;

(4) A description of the warranties given in the transaction and when they begin and end;

(5) A notification that the developer will have the rights of a unit owner with respect to unsold units;

(6) A statement that all tenants in a conversion condominium were given the requisite notice; and,

(7) A limitation that the deposits and downpayments shall not be subject to attachment by creditors of a developer or a purchaser.

Id. § 5311.25.

62. *Id.* § 5311.26(J). *See* note 63 *infra*.

63. The written statement to the purchaser must include the following information:

(1) The name and address of the development and the developer;

(2) A general description of the development including the types of units, prices, and total number possible through expansion or merger;

(3) A general disclosure of the status of construction, zoning, and other approvals and compliance or noncompliance with statutes and regulations, and the actual or scheduled dates of completion;

(4) The significant terms of any financing offered by or through the developer;

(5) A description of warranties for structural elements and mechanical and other systems, stated separately for units and common areas and facilities;

(6) A two-year projection, to be updated every six months, of annual expenditures per unit for the common areas including the formula for determining each unit's share, the amount of tax, insurance, operating and maintenance expenses, the monthly cost of utilities, and any others costs and fees reasonably ascertainable by the developer;

(7) A special report as to conversion condominiums;

(8) Significant condominium management provisions including conditions for forming a unit owners association, the apportionment of voting rights, the contractual rights and responsibilities of the association, a statement that the condominium instruments are binding legal documents, and the method for amending them by the association;

(9) A facsimile of any management contract and a statement of its effect and any relationship between the developer and managing agent;

(10) A statement in 20-point, boldface type of the purchaser's right to review the condominium instruments and to void the contract, any conditions for the return of deposit, and rights to take legal action;

(11) The existence or requirement of a reserve fund to finance repairs or replacement of the common areas and facilities;

(12) The significant terms of any title encumbrances affecting the development;

(13) A statement of the requirement for escrow of deposits;

(14) A statement of any restraints on the free alienability of the development; and,

(15) A statement describing any present litigation concerning the condominium development.

Id. § 5311.26.

intentional omission or misstatement of a material fact is a violation of the statute.⁶⁴ A purchaser who discovers that his purchase agreement is in violation of the disclosure provisions has a right to rescind. This right must be exercised within fifteen days from the date of the execution of the agreement or receipt of the written statement, whichever is later. Upon a purchaser's exercise of his right, the developer must refund monies paid by the buyer and pay all closing costs. This remedy is in addition to any other available remedy. The purchaser may also obtain damages and collect no less than five hundred dollars for each violation plus attorneys' fees and costs. However, if the purchaser brings an action he knew to be groundless or in bad faith and the developer prevails, the court may require the purchaser to pay the developer's attorneys' fees.⁶⁵

In addition to private remedies, section 5311.27 provides also for public enforcement. The Ohio Attorney General is empowered (1) to bring an action to obtain a declaratory judgment that an act or practice of a developer is violative of the Code, (2) to pray for an injunction to prevent a threatened action, (3) to institute a class action for damages on behalf of persons injured by a violation, and (4) to request the court to appoint a receiver or master.⁶⁶ The prerequisite for such action is that the Attorney General have reason to believe that substantial numbers of citizens are being affected, that substantial harm is occurring, or that enforcement will be serving a substantial public interest.⁶⁷ The statute of limitations for the Attorney General's action is two years after the occurrence of the violation. In addition, the Attorney General may, with court approval, enter into a consent judgment with the developer. The consent judgment, however, cannot

64. *Id.* Except for a two-year statute applicable to the Attorney General's remedy, see notes 66-68 *infra* and accompanying text, no statute of limitations is provided for in § 5311.27. If the general statute of limitations, OHIO REV. CODE ANN. § 2305.14 (Page Supp. 1977), applies, it is not clear whether the statute begins to run from the occurrence of the violation or from its discovery. Section 2305.14 merely states that the cause of action be brought within 10 years "after the cause thereof accrued." *Id.*

65. *Id.* § 5311.27(B)(3) (Page Supp. 1978).

66. *Id.* § 5311.27.

67. The public remedies supplement the purely private remedies. It is noteworthy that the legislature saw fit to provide public remedies without first requiring the filing of a complaint or the resort to a state agency lacking enforcement powers. For examples of recent legislation requiring notification of a government agency, see Consumer Sales Practices Act, OHIO REV. CODE ANN. §§ 1345.06, .07 (Page Supp. 1977); Civil Rights Commission Act, *id.* §§ 4112.05, .10 (Page 1973).

be used as evidence of a prior violation.⁶⁸

The objective of disclosure "is to provide the prospective purchaser with understandable information concerning problem areas which past experience has shown are likely to escape consideration by the purchaser"⁶⁹ The underlying assumptions are that disclosure requirements will force developers to proceed more carefully in planning and selling units and that buyers will be able to make an informed⁷⁰ decision before entering into a purchase.⁷¹ These important objectives, however, may be stunted by the length and complexity of the disclosure statement.⁷² The burdens of protection and enforcement remain on the buyer, who must hire an attorney to evaluate the statement in order to decide if the condominium terms are fair. The buyer must also bear the initial costs of suit.⁷³ For these reasons, the utility of the pure disclosure approach has been questioned, particularly as the sole method of protecting the consumer.⁷⁴ The developer may inform the buyer fully and accurately without any materially misleading statements or omissions.⁷⁵ Yet the unsophisticated purchaser may know little more about the condominium than he did prior to reading the statement.⁷⁶

Some obfuscation may continue under the amendments. While section 5311.26 requires that the developer furnish the prospective purchaser with a full, accurate, readable, and understandable written statement alerting him to his right to review the condominium instruments,⁷⁷ the section does not require that the *instruments* be readable and understandable.⁷⁸ This anomaly

68. Presumably the consent judgment could not be used by a private party as a prima facie violation.

69. Comment, *supra* note 38, at 908.

70. Comment, *To Tell the Truth, the Whole Truth, and Nothing But the Truth—Help for Florida's Frazzled Condominium Buyers?*, 8 U. MICH. J.L. REF. 387, 396 (1975).

71. Note, *New York Regulation of Condominiums*, 48 ST. JOHN'S L. REV. 964, 965 (1974).

72. See Comment, *supra* note 70, at 396-97.

73. Comment, *supra* note 20, at 282; Comment, *supra* note 70, at 397.

74. See, e.g., Comment, *supra* note 43, at 667-68. The effectiveness of the disclosure approach has been questioned in the securities field where generally investors are fairly sophisticated. *Id.* at 666-68. In the condominium area, where many buyers may be of middle- or lower-income, *id.* at 639-68, the effectiveness of disclosure becomes even more doubtful. *Id.* at 667.

75. This is required by OHIO REV. CODE ANN. § 5311.26 (Page Supp. 1978).

76. Comment, *supra* note 43, at 668.

77. OHIO REV. CODE ANN. § 5311.26(J) (Page Supp. 1978). See notes 62-63 *supra* and accompanying text.

78. Presumably to obviate much of this problem, § 5311.26 provides that the written

makes possible a situation in which the purchaser, exercising his right to review the instruments, is apprised of his rights in a form that may be unintelligible to him. Several states have enhanced consumer protection by adopting some form of regulation.⁷⁹ Florida, apparently dissatisfied with the consumer protection offered by its pure disclosure statute, recently provided for presale regulation of condominium sales through the Department of Business Regulation.⁸⁰ However, unlike Florida and other states, Ohio has not been the victim of widespread developer abuses.⁸¹ Experience may demonstrate that the additional requirements, in conjunction with the amendments' other substantive provisions, will afford the Ohio condominium purchaser sufficient protection.

Without resorting to regulation, Ohio could enhance consumer protection by simply requiring that certain information be more conspicuously displayed on the written statement. Florida, for example, requires that the first page of the purchase contract inform the buyer of the documents which the developer must give him and also that the first page of the prospectus alert the buyer to the importance of information inside.⁸² Within the prospectus, provi-

statement be "readable and understandable." Such a standard is so vague as to be unworkable and in this statute appears to be rendered nugatory by the imposition of liability for only intentionally misleading material statements and omissions. For a discussion of liability, see notes 89-91 *infra* and accompanying text.

79. See HAW. REV. STAT. §§ 514A-31 to 50 (Supp. 1977); MICH. COMP. LAWS ANN. § 559.24 (West Supp. 1978); *id.* § 559.26 (West 1967); VA. CODE §§ 55-79.86 to .93, .99 to .101 (Supp. 1978).

80. FLA. STAT. ANN. § 718.501 (West Supp. 1978).

81. See generally Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 U. FLA. L. REV. 350 (1973); Comment, *supra* note 47, at 451.

82. FLA. STAT. ANN. § 718.503(1) (West Supp. 1978). The following caveat must appear conspicuously on the first page of the contract: "ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 718.503, FLORIDA STATUTES, TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE."

Id. Section 718.504(1) requires that the front cover of the first page must contain only the name of the condominium and the following statements in conspicuous type:

1. THIS PROSPECTUS (OFFERING CIRCULAR) CONTAINS IMPORTANT MATTERS TO BE CONSIDERED IN ACQUIRING A CONDOMINIUM UNIT.
2. THE STATEMENTS CONTAINED HEREIN ARE ONLY SUMMARY IN NATURE. A PROSPECTIVE PURCHASER SHOULD REFER TO ALL REFERENCES, ALL EXHIBITS HERETO, THE CONTRACT DOCUMENTS, AND SALES MATERIALS.
3. ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. REFER TO THIS

sions guarding against potential developer abuse must be set out in conspicuous type.⁸³ To further inform the Ohio condominium purchaser and to alert him to factors weighing against a decision to purchase, Ohio law should provide that the notification of buyers' rights⁸⁴ appear either on the front page of the written statement or near the purchaser's signature.⁸⁵ Placing that provision in either location would emphasize the need to review attendant documents, alert the buyer to their importance, and inform him of his right to rescind the purchase contract before his fifteen days expire. As an added protection the first page of the written statement should warn that the condominium instruments and the written statement involve complex legal rights and that a full understanding requires legal consultation.⁸⁶ Finally, the information contained in the condominium instruments, to the extent that it is not duplicative, should be provided to the prospective purchaser in the written statement.⁸⁷ This would be consistent with the disclosure philosophy and would amplify the information available to potential consumers about their rights concerning deposits, management contracts, and developer control of the association.⁸⁸

PROSPECTUS (OFFERING CIRCULAR) AND ITS EXHIBITS FOR CORRECT REPRESENTATIONS.

Id. at § 718.504(1).

83. The provisions relate to recreational facilities leases, *id.* § 718.504 (8); units transferred subject to a lease, *id.* § 718.504(10); management contracts, *id.* § 718.504(11); developer control of the association, *id.* § 718.504(12); and restrictions on the sale, lease, or transfer of units, *id.* § 718.504(13).

84. Section 5311.26(J) requires that the written offering statement contain "a statement in twenty-point, boldface type of the purchaser's right to review the condominium instruments, to void the contract, any conditions to the return of any deposit, and a statement of the rights of purchasers. . . ." OHIO REV. CODE ANN. § 5311.26(J) (Page Supp. 1978). See notes 63-64 *supra* and accompanying text.

85. The Ohio Home Solicitation Sale Act, OHIO REV. CODE ANN. § 1345.23 (Page Supp. 1977), contains the following provisions:

(B) In connection with every home solicitation sale:

(1) The following statement shall appear clearly and conspicuously on the copy of the contract left with the buyer in boldface type of the minimum size of ten points, in substantially the following form and in immediate proximity to the space reserved in the contract for the signature of the buyer: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right."

86. Where, as in Ohio, developer practices have not been particularly abusive, a condominium consumer protection statute strikes a good balance between the needs of the parties by alerting the purchaser to certain information but placing the onus on him to seek expert counselling to determine its impact.

87. See notes 61-64 *supra* and accompanying text.

88. See OHIO REV. CODE ANN. § 5311.25(A)-.25(D), .25(G) (Page Supp. 1978). See also note 61 *supra* and accompanying text.

There are several other areas of consumer protection which should have been addressed

The standard of liability to be applied for violation of the present disclosure provisions is unclear.⁸⁹ Section 5311.26 is essentially an antifraud provision placing on the developer several affirmative duties of disclosure⁹⁰ and prescribing that the written statement "shall not intentionally omit any material fact or contain any untrue statement of a material fact"⁹¹ Thus the

by the amendments. First, neither § 5311.25 nor § 5311.26 is applicable to resale by the purchaser. *Compare* VA. CODE § 55-79.97 (Supp. 1978) (requiring unit owners to make certain disclosures to subsequent purchasers on resale). The subsequent purchaser may need to know information concerning the initial purchase (e.g., management contracts, maintenance costs projection, warranty coverage), particularly where the developer still retains some control over the condominium development. As a practical matter the purchaser may be unable to sell his unit until the developer sells his because the developer often is able to offer more attractive financing. Second, the statute omits the disclosure requirement and does not impose liability for some well recognized areas of developer abuse. For example, no liability exists under the statute for publishing false and misleading advertising and promotional materials. *Contra*, FLA. STAT. ANN. § 718.506(1) (West Supp. 1978). Third, the statute does not impose liability for oral misstatements. *Compare* FLA. STAT. ANN. §§ 718.503(1)(b), .503(3), .504(1) (West Supp. 1978) (requiring that purchaser be told that he cannot rely on oral representations). Finally, the statute apparently permits the developer to lease the recreational facilities to the unit owners, but it does not require this fact to be disclosed in the written statement.

89. Condominium disclosure laws are patterned after the Securities Act of 1933, § 11, 15 U.S.C. § 77k(a) (1976), and the Securities Exchange Act of 1934, § 10, 15 U.S.C. § 78(j)(b) (1976). Section 11 of the 1933 Securities Act grants a cause of action to the purchaser of a security if any part of the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading" Section 10(b) of the 1934 Securities Exchange Act prohibits the use of "any manipulative or deceptive device" in connection with the purchase or sale of any security. Rule 10b-5 prohibits fraud in connection with the purchase or sale of securities and deems it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" 17 C.F.R. § 204.10b-5 (1977).

90. OHIO REV. CODE ANN. § 5311.26(A)-26(O) (Page Supp. 1978). *See* notes 63-64 *supra* and accompanying text.

91. It is also unclear what is meant by the word "intentionally." Several other states making the developer liable for materially false or misleading statements or omissions do not require that the developer do so intentionally. *See, e.g.*, FLA. STAT. ANN. § 718.506(1) (West Supp. 1978) (the developer is liable for any published, material, false, or misleading statement upon which the purchaser reasonably relied). *But see* CONN. GEN. STAT. ANN. § 47-90a(a) (West 1978) (developer is liable unless the declarant "did not know and in the exercise of reasonable care could not have known of the untruth or omission"); HAW. REV. STAT. § 514-68 (Supp. 1977) (no person "may knowingly authorize, direct or aid in the publication . . . of any false statement or representation . . . and no person may issue . . . any advertisement, pamphlet, prospectus, or letter . . . which contains any written statement that is false . . ."). Construing this as an antifraud statute effectively negates the "readable and understandable" requirement except in the event that a failure to make the written statement "readable" results in a material misstatement or omission. It is also possible to read the section as requiring the statement to be both intelligible and not materially misleading. Such a construction would not be redundant since an honest statement can be presented in an incomprehensible manner and a dishonest one in a compre-

developer may not be liable for negligent misstatement or omission of the information required in the written statement. Section 5311.25, on the other hand, seems to impose absolute liability upon the developer.⁹² This distinction has some rational basis. Section 5311.25 details the information that the condominium instruments must contain. Compliance requires no exercise of discretion on the developer's part. Section 5311.26, however, calls for a great deal of judgment on the part of the developer. For example, he must determine significant financing terms, date of completion, maintenance expense projections, and significant management provisions.⁹³ Absolute liability in such an instance would deter not only deceptive presale marketing practices but condominium construction as well.

The private damage remedies provided by section 5311.27 are quite harsh.⁹⁴ A purchaser may bring a suit against a developer or agent who sells a condominium ownership interest in violation of the statute's disclosure provisions.⁹⁵ Although the term "purchaser" is defined in the statute to include a "prospective purchaser," the section's requirement that the developer actually have sold the interest to the purchaser indicates that these private remedies are not available to a prospective purchaser.⁹⁶ Conversely, the "purchaser" who actually enters into a contract of sale and pays the purchase price may receive a windfall. The statute does not specifically require the purchaser to prove actual loss or to elect between rescission and damages.⁹⁷ Arguably, the purchaser

hensible manner. However, even assuming a court were to apply a reasonably prudent man test to determine what is "readable and understandable," it is doubtful that the legislature intended that the developer should pay at least \$500 to every purchaser receiving the written statement whether that purchaser incurred an actual loss or not.

92. OHIO REV. CODE ANN. § 5311.25 (Page Supp. 1978) ("No developer or agent, directly or indirectly, shall sell or offer to sell a condominium ownership interest in a condominium development unless the condominium instruments pertaining to the development provide" the information set out in note 61 *supra*).

93. *Id.* § 5311.26(C), .26(D), .26(F), .26(H).

94. *See id.* § 5311.27(B). The damage remedy under § 5311.27(B)(1)–27(B)(3) provides for a compensatory measure of damages to be computed by taking the difference between the amount paid for the interest and the least of (1) the fair market value of the interest as of the time the suit is brought, (2) the price at which the interest is disposed of before suit in a bona fide market transaction, or (3) the price at which the unit is disposed of after suit in a bona fide market transaction before judgment. Section 5311.27(B)(3) also provides for a mandatory measure of damages of \$500 for each violation against each purchaser regardless of loss or reliance.

95. *Id.*

96. *Id.* ("Any developer or agent *who sells* a condominium ownership interest in violation . . ." (emphasis added)).

97. *Id.*

may rescind the contract, obtain restitution of amounts paid to the developer, require the developer to pay all closing costs, and apparently still obtain the minimum five hundred dollars for each violation, court costs, and reasonable attorneys' fees.⁹⁸ Section 5311.27(A) provides that the remedy of rescission be in addition to any other remedy.⁹⁹ This could be read to imply that both common law and statutory remedies provided by other legislation remain available as well as the remedies provided by section 5311.27(B). Therefore, even assuming that 5311.27(B) requires the purchaser to have paid the purchase price, the purchaser may rescind his contract after doing so as long as the fifteen days have not expired.¹⁰⁰ It seems more likely, however, that 5311.27(B) is intended as a damage remedy when rescission is not exercised.

Subsection (B)(3) of section 5311.27 further provides that the amount recoverable under this division cannot be less than five hundred dollars for each violation. The use of the word "division" rather than "section" indicates that the legislature intended that this provision apply only to actions brought under subdivision (B) of section 5311.27. If subsection (B) is construed as a remedy only for the nonrescinding purchaser, the statute is more consistent with the usual compensatory civil remedies. However, if the legislature had intended election of remedies, it should have so provided to avoid the statute's present ambiguity. Section 5311.27(B) still permits recovery of five hundred dollars for each violation even if the purchaser cannot prove a loss.¹⁰¹ Since this

98. It is possible for a court to analogize §§ 5311.26 and 5311.27 to their common law counterparts. Thus a court could allow rescission for innocent misrepresentation, require election of remedies, and provide the full measure of remedies available under common law fraud. In a recent action under the Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345 (Page Supp. 1977), an Ohio court refused to do so. *Brown v. Bredenbeck*, 2 Ohio Op. 3d 286, 287 (C.P. Franklin County 1975).

99. Common law fraud would permit rescission and run the statute of limitations from the discovery of the fraud. See note 58 *supra*. Though this statute increases the number of violations for which rescission is possible, it sharply limits the time for rescission to 15 days whether the violation has been discovered by that time or not. However, if the purchasers can prove common law fraud, then rescission, in addition to other remedies, would presumably be available on that basis.

100. OHIO REV. CODE ANN. § 5311.27(A) (Page Supp. 1978).

101. A violation of § 5311.25 would appear to impose liability for the failure to place the requisite information in the condominium instruments rather than for the failure to perform any substantive obligation (as required for a violation of § 5311.23). If, for example, a warranty is breached by the developer, the appropriate action would be for breach of warranty rather than for the remedy under § 5311.27. Thus a developer may neglect to include in the legend that deposits and downpayments held in escrow are not subject to attachment by creditors of the developer or a purchaser. If he sells units to 300 people who cannot demonstrate loss due to the absence of this information from the condominium

remedy may be imposed for each violation of section 5311.25 or 5311.26 by each suing purchaser, irrespective of actual loss, the amount of damages for which the developer is liable could well be disproportionate to the harm caused.

One particularly troublesome area in section 5311.27 is that dealing with the right of the prevailing developer or agent to recover attorneys' fees from a purchaser who brought an action knowing it to be "groundless or in bad faith."¹⁰² The chilling effect of this provision on potential lawsuits in which the nature of the violation is not firmly established is compounded further by the use of the disjunctive. Reasonable statutory construction would seem to imply that where the purchaser had adequate grounds for suit, his motive should be irrelevant since the purpose of the provision is to deter frivolous suits.

2. *Conversions from Apartment Buildings*

As the cost of construction rises the cost of building new condominiums is becoming prohibitive. However, the increased con-

instruments and if all these purchasers sue, the developer will eventually be liable for \$150,000 in attorneys' fees plus costs for that error.

The present statutory scheme may also present a hardship to the purchaser. For example, assume that the developer omits the required warranty provision from the condominium instruments and that the buyer suffers some loss ordinarily covered by warranty. If the buyer's loss is greater than \$500, he is met with the obstacle of proving a causal connection between failure to include the provision and the loss he suffered. Under traditional theories of law, his loss resulted from a defect in materials or workmanship rather than from the failure to include provisions in the instruments. Possibly the statute would permit the purchaser to show a loss suffered as the result of not having warranty theory available as a basis of recovery. In that event his loss would be measured by the damages he would have received under traditional theories, such as negligence and breach of duty to construct in workmanlike manner. Such a reading would certainly introduce a novel measure of damages into Ohio law. Courts may, however, be reluctant to embrace this novelty. To eradicate such interpretive difficulties a better approach would be for the legislature to enact a statutory warranty of merchantability in the sale of a condominium and to prohibit its disclaimer. Such an approach would not put the onus on the developer to provide the warranty and would be supported by analogous case law available for interpretation of the provisions. *See Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966). Florida law provides that the developer will be deemed to have granted to the purchaser an implied warranty of fitness and merchantability. However, the plaintiff must still prove causation and damage or injury. FLA. STAT. ANN. § 718.203 (West Supp. 1978).

102. This statutory remedy is somewhat analogous to the common law action for malicious prosecution. *See, e.g., Davis v. Tunison*, 168 Ohio St. 471, 155 N.E.2d 904 (1959); *Pope v. Pollock*, 46 Ohio St. 367, 21 N.E. 356 (1889); *Barnes v. Continental Acceptance Corp.*, 4 Ohio Op. 3d 232 (8th Dist. Ct. App. 1977); *Avco Delta Corp. v. Walker*, 22 Ohio App. 2d 61, 258 N.E.2d 254 (10th Dist. 1969). However, in contrast to the statutory remedy, the common law tort in Ohio requires actual malice, lack of probable cause, and precedent arrest of the plaintiff or seizure of his property. *Id.* at 66, 258 N.E.2d at 257.

struction of apartment buildings over the past twenty years coupled with the falling rate of return in the early seventies has been an impetus for the conversion of apartment buildings into condominiums. Landlords may find it more profitable to convert rental property and sell it as units than to repair and improve the property or to sell it to another landlord or investor.¹⁰³ This conversion of rental units to condominiums can create difficulties for the former tenants and for prospective purchasers of the condominium units.

a. *Problems Facing Tenants.* When landlords convert their apartment buildings into condominiums, tenants face displacement. Landlords may provide in their leases for the termination of the tenancy upon the conversion to a condominium¹⁰⁴ or they may give the tenant an option in the lease to either buy or vacate the unit upon conversion.¹⁰⁵ Even with this option, tenants unwilling or unable to buy are forced from their homes. Especially in urban areas, this displacement affects disproportionately the middle- and lower-income dwellers and the elderly on fixed incomes.¹⁰⁶ Section 5311.25(G) attempts to protect tenants of apartment buildings about to be converted to condominiums by requiring that they be given an option to purchase an interest in the condominium and 120 days' written notice before being required to vacate.¹⁰⁷

The nature of the tenant's option under section 5311.25 is uncertain. The section provides that no conversion condominium¹⁰⁸ may be offered for sale or sold unless "all tenants were offered an option, exercisable within not less than ninety days after notice, to purchase a condominium ownership interest in the development

103. The pressure to convert becomes stronger in cities where rent control is in effect. Note, *Tenant Protection in Condominium Conversions: The New York Experience*, 48 ST. JOHN'S L. REV. 978, 978-81 (1974).

104. Note, *Conversion of Apartments to Condominiums and Cooperatives: Protecting the Tenants in New York*, 8 U. MICH. J.L. REF. 705, 708 n.26 (1975); Note, *supra* note 43, at 328.

105. Note, *supra* note 103, at 983.

106. *Id.* at 984, 991.

107. OHIO REV. CODE ANN. § 5311.25(G) (Page Supp. 1978).

108. Section 5311.01(X) defines a "conversion condominium development" as "a condominium development that was originally operated as a rental property occupied by tenants" before it was offered for sale as condominium property. *Id.* § 5311.01(X). The inclusion of the words "occupied by tenants" is commendable. The Council of State Governments' Model Condominium Act definition uses only "occupied," which might cause a condominium development to come within the conversion provision unnecessarily if a developer had used part of a new condominium for storage or for an office. MODEL CONDOMINIUM ACT § 6 (1977) [hereinafter cited as MODEL ACT].

. . . .”¹⁰⁹ Exactly what notice is required by this section is unclear. A literal reading of the language suggests that it refers to notice of the tenant’s option to buy. A tenant would thus be entitled to a ninety-day option commencing upon notification of the option by the developer. Such an interpretation is supported by the different notice requirements provided in the section. The section requires written notice of vacation¹¹⁰ but makes no mention of a required written notice regarding the tenant’s option. Conceivably this distinction is based on the nature of an option as an interest in land under the Statute of Frauds,¹¹¹ thus obviating the need to mention a required written notice for the option. Further, reading the notice provision as referring to the option would serve the presumed statutory purpose of protecting potentially displaced tenants by giving them sufficient time to consider the opportunity and to procure any available financing.

However, a Senate Judiciary Committee report suggests that the legislature intended that the notice referred to in section 5311.25 be notice “of the conversion.”¹¹² This interpretation would require only that the developer offer the tenant an option to purchase sometime during the ninety-day period following notice of conversion.¹¹³ Since such notice would not have to be in writing, under this approach a tenant with constructive notice of the conversion would have the option period reduced to ninety days after learning of the fact. Similarly, even if written notice of the conversion were provided, the tenant’s option period might be reduced by the developer withholding the option until later in the

109. OHIO REV. CODE ANN. § 5311.25(G) (Page Supp. 1978). A “condominium ownership interest” is defined under the amendments as “a fee simple estate or a ninety-nine year leasehold estate, renewable forever, in a unit, together with an appurtenant undivided interest in the common areas and facilities.” *Id.* § 5311.01(M). Thus, a developer need not grant the tenant an option to purchase the particular unit previously occupied by the tenant. Other statutes specifically provide that the tenant shall have the exclusive right to buy the unit that he occupied as a tenant. CONN. GEN. STAT. ANN. § 47-88b(b) (West 1978); *accord*, FLA. STAT. ANN. § 718.402(3)(a)(2) (West Supp. 1978).

110. OHIO REV. CODE ANN. § 5311.25(G) (Page Supp. 1978).

111. *See Holtz v. Lovejoy*, 30 Ohio L. Rep. 114, 7 Ohio L. Abs. 675 (8th Dist. Ct. App. 1929) (holding that an option for the purchase of land constituted a sufficient memorandum in writing under the Statute of Frauds upon which to order specific performance); 2 A. CORBIN, CONTRACTS § 418 (2d ed. 1950); 3 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 449 (3d ed. 1960).

112. SENATE JUDICIARY COMM., REPORT ON AM. SUB. H.B. 404, 112th Gen. Assem., Reg. Sess. 3 (1977-78) [hereinafter cited as COMMITTEE REPORT].

113. “[I]n the case of a conversion condominium development, all tenants have been given an option to purchase an interest *within 90 days after notice of the conversion . . .*” (emphasis added). *Id.*

ninety-day period.¹¹⁴ Thus, under the Judiciary Committee's interpretation, if a developer notified a tenant of the conversion and provided the tenant with an option eighty nine days later, the tenant would receive only a one-day option that would still bring the developer into compliance with the statute. Such a constrained reading of the statute certainly would not offer tenants much protection against displacement. Other statutes, recognizing a developer's interest in an early option period, explicitly limit the option to a specified period following written notice of the conversion¹¹⁵ or of an intent to convert¹¹⁶ and grant the option as a matter of law.¹¹⁷

Under section 5311.25 nonpurchasing tenants who entered into their leases after October 1, 1978,¹¹⁸ may be evicted from their premises in order to facilitate conversion if they have been given written notice at least 120 days before being required to vacate.¹¹⁹ Once again it is unclear what notice is required by the section. Both a literal reading of the section and the Judiciary Committee report support an interpretation requiring notice to vacate the premises.¹²⁰ There is no reason why notice to vacate cannot be given after the developer has the tenant's negative response regarding the option to purchase as long as an additional 120-day period is given to the tenant before vacation of the premises. However, since the tenant's decision may well depend on the mistaken belief that he may stay for the remainder of the lease period, it is submitted that the tenant should be informed of the 120-day provision at the same time he is informed of the conversion and the option to buy.

Although section 5311.25 is an attempt to balance the competing interests of developers and tenants, it nevertheless now places the developer's interest in facilitating conversion above the ten-

114. The statute does not require that notice of the conversion and notice of the option to buy be given at the same time.

115. MODEL ACT, *supra* note 108, § 11(b).

116. CONN GEN. STAT. ANN. § 47-88b(b) (West 1978).

117. *Id.*; MODEL ACT, *supra* note 108, § 11(b).

118. OHIO REV. CODE ANN. § 5311.25(G) (Page Supp. 1978).

119. *Id.* Developers will have to resort to the Ohio forcible entry and detainer statute, OHIO REV. CODE ANN. § 1923 (Page Supp. 1977), to evict nonpurchasing tenants from the premises 120 days after notice to vacate has been given. Under § 1923.02(E), .02(F) an action may be brought "[w]hen the defendant is an occupier of lands or tenements, without color of title, and to which the complainant has the right of possession" or "[i]n any other case of their unlawful detention."

120. "[A]ll tenants . . . have been given at least 120 days notice to vacate the premises." COMMITTEE REPORT, *supra* note 112, at 3.

ant's interest in securing stable housing.¹²¹ Perhaps a better approach toward reconciling developer and tenant interests would be that taken by the Council of State Governments' Model Condominium Act. The Model Act permits tenants to remain until the end of any written lease and avoids hardships for developers by imposing a two-year limitation on the time a tenant may stay.¹²² The Model Act also gives tenants thirty days after notice of conversion to terminate their lease if they so wish, although they in turn must give the developer ninety days notice prior to termination.¹²³ This would be particularly beneficial to tenants with leases extending beyond the two-year limitation. Further, to prevent tenants from mistakenly relying on the possibility of a lease renewal, the section should retain the present requirement that the tenant be notified at least 120 days before being required to vacate. It is submitted that recognition of these offsetting rights to possession and the mutual duties of notification would provide a better balance of the competing interests of developers and tenants than does the present approach of section 5311.25.¹²⁴

121. Absent § 5311.25(G), a tenant cannot be evicted upon conversion before the expiration of the lease period since at common law a transfer of the lessor's interest does not terminate the tenancy nor deprive the lessee of any rights. *See Olds v. Morse*, 98 Ohio App. 382, 129 N.E.2d 644 (9th Dist. 1954); *Parsons v. Weinstein*, 19 Ohio App. 52 (1st Dist. 1924); *Dunkel v. Hedges*, 15 Ohio App. 259 (4th Dist. 1921).

122. MODEL ACT, *supra* note 108, § 11(b). The Model Act, however, provides less protection for tenants occupying the premises under an oral lease. The developer may terminate the tenancy upon 90 days' notice of conversion and termination. In Ohio a rental agreement may be written or oral under § 5321.01(D). OHIO REV. CODE ANN. § 5321.01(D) (Page Supp. 1977). It is submitted that all tenants should be granted the same notice provisions since the tenant under an oral lease, if he can prove the existence and terms of such lease, deserves no less protection than the tenant under a written lease.

123. MODEL ACT, *supra* note 108, § 11(b).

124. There are other approaches Ohio might also wish to consider. Until July 1, 1977, New York provided that 35% of the tenants in occupancy had to agree to purchase their units before conversion could take place. N.Y. GEN. BUS. LAW § 352-e(1-a)(1)(i) (McKinney Supp. 1977). However, tenants were still subject to misrepresentation and harassment by landlords and developers to either leave or buy their units. Note, *supra* note 104, at 711. Considerable case law has developed in New York over these practices. *See* 1 P. ROHAN & M. RESKIN, *supra* note 22, § 3A.06, at 3A-16. In addition, a minority could still dictate its decision to the majority, Note, *supra* note 103, at 984, and tenants could be evicted once the 35% approval was obtained if they were unwilling or unable to buy.

Florida uses a combination of the notice and consent approaches, which provides for added flexibility. A developer must provide 120 days' notice before a lease can be terminated, unless the tenants of at least 60% of the units agree to the conversion. FLA. STAT. ANN. § 718.402(2), 402(3)(a)(3) (West Supp. 1978). This higher figure would seem to make conversion much more difficult, but it must be noted that (1) the tenants do not have to agree to purchase the unit, but merely to agree to the conversion; (2) the developer can vote empty units as he pleases; and (3) he may provide less than 120 days' notice and avoid the 60% requirement if he grants a 90-day option to buy at the same or lower price offered to

b. *Problems Confronting Prospective Purchasers.* Buyers of conversion condominiums also face difficulties. They are buying older buildings, which are more likely to have structural defects or require the replacement of entire electrical, heating, or plumbing systems.¹²⁵ Purchasers may be unaware of these defects.¹²⁶ While implied warranties of fitness and habitability have been judicially recognized in sales of residential premises,¹²⁷ such warranties have been limited to the sales of new buildings to the original buyer and have not yet been extended to resales of the property.¹²⁸ Similarly, warranty protection provided by most condominium legislation has been limited to newly constructed condominiums.¹²⁹

Maintenance and repair costs is another problem that confronts the purchasers of conversion condominiums. The seller may underestimate these costs,¹³⁰ and the purchaser cannot gauge

nontenants or if the term of the lease has less than 150 days left after the notice of conversion is given. *Id.* § 718.402(3)(a)(1), .402(3)(a)(2).

Connecticut provides that no eviction proceedings may be brought for failure to purchase, CONN. GEN. STAT. ANN. § 47-88b(f) (West 1978), although the necessity of this provision is open to debate.

One commentator has suggested, as an alternative to the notice and consent or agreement to purchase schemes, that eviction be permitted only if the tenant has been provided with substitute accommodations. Note, *supra* note 104, at 718. This probably would decrease the number of conversions and has yet to be adopted by any state.

125. Note, *supra* note 43, at 327.

126. *Id.*

127. See *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972) (implied warranties of fitness and merchantability extend to the purchase of new condominiums from builders).

128. *Gable* expressly left open the issue of subsequent purchasers. "We ponder, but do not decide, what result would occur if more remote purchasers were involved. We recognize that liability must have an end but question the creation of any artificial limits of either time or remoteness to the original purchaser." *Id.* at 18.

It has been suggested that both original and subsequent owners within multiple-family buildings should have standing to sue for breach of an implied warranty that harms every owner. 25 U. FLA. L. REV. 619, 623 (1973). Some courts have been willing to dispense with a strict privity requirement. See *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) (entertaining purchaser's lessee's action against the lender-builder); *Gay v. Cornwall*, 6 Wash. App. 595, 494 P.2d 1371 (1972) (entertaining an action by the first occupier who was a subsequent purchaser).

129. Florida extends the implied warranty of fitness and merchantability to each unit and its roof and structural components for three years commencing with the completion of construction of each building or improvement. FLA. STAT. ANN. § 718.202(1)(a)(c) (West Supp. 1978). Hawaii requires the developer to provide a one-year warranty against structural and appliance defects. The developer must also give notice to the owners and board of directors that the warranty will expire in 90 days and must notify the owners of the specific methods they may pursue in seeking remedies for any defect prior to the expiration of the warranty. HAW. REV. STAT. § 514A-70 (Supp. 1977).

130. Note, *Cooperative Housing Corporations and the Federal Securities Laws*, 7 COLUM. L. REV. 118, 121 (1971).

them since he has never been responsible, as a prior tenant or as a homeowner, for an entire multiunit building or complex. The result is that buyers eventually pay unexpected and increased costs¹³¹ which were often foreseen or delayed by sellers and which may represent the seller's motivation for conversion.

Section 5311.26(G)¹³² addresses the problems facing prospective purchasers of converted condominium units and is part of the disclosure approach of the amendments.¹³³ The section requires the developer to tell the age and condition of the property and to give his opinion of the useful life of the structure and the mechanical and supporting systems. The developer must also project repair and replacement costs five years into the future. In order to determine all this information the developer must inspect any relevant drawings and records as well as the structural elements and the mechanical and supporting systems. Any limitations on this inspection imposed by the site's physical limits must also be disclosed. The developer must make a reasonable effort to ascertain the required information since an intentional failure to do so will subject him to the penalties of section 5311.27.¹³⁴

In contrast to the disclosures required by other state statutes, section 5311.26 has several notable omissions. For example, there is no provision for an independent expert opinion, such as the report of an engineer or architect, as provided by two other statutes.¹³⁵ Such a provision would safeguard the buyer against a dishonest developer. The section also fails to provide for a report of any termite infestation,¹³⁶ or the disclosure of the installation and construction dates of the structural systems along with a report of their repairs.¹³⁷ A further inadequacy of the Act is its failure to define supporting systems. The roof, plumbing, and electrical system should be included in any definition since the content of the developer's report will no doubt depend on the stat-

131. Note, *supra* note 43, at 327.

132. OHIO REV. CODE ANN. § 5311.26(G) (Page Supp. 1978).

133. The disclosure required of conversion condominium developers is in addition to that required of developers of newly constructed residential condominiums pursuant to § 5311.26.

134. Section 5311.26 speaks only in terms of an intentional omission of any material fact or of any untrue statement. See notes 89-93 *supra* and accompanying text.

135. Compare FLA. STAT. ANN. § 718.504(15)(c) (West Supp. 1978); UNIFORM CONDOMINIUM ACT § 4-104(a)(1) (1978).

136. Compare FLA. STAT. ANN. § 718.504(15)(d) (West Supp. 1978).

137. Compare CONN. GEN. STAT. ANN. § 47-88b(a)(4) (West 1978); VA. CODE § 55-79.94(a)(4) (Supp. 1978).

ute's requirements.¹³⁸

Section 5311.26 requires a five-year projection of estimated repair and replacement costs rather than a report of recent costs. The objective of this requirement is to protect the prospective buyer from relying on recent costs which may be deceptively low because the seller has delayed repair and replacement in anticipation of conversion. However, figures reflecting actual expenditures can be helpful to prospective purchasers and should be required. Three statutes require a report of actual expenditures, on a per unit basis, for repairs and maintenance for the previous three years.¹³⁹ Such a requirement would avoid any understatement of costs and would supplement the projections.

3. *Deposits and Downpayments*

Prospective purchasers of condominium units are often required to make a deposit or downpayment to the developer in order to secure their interest in a unit. The deposit is credited toward the purchase price; if the buyer cannot fulfill his part of the agreement, he forfeits the deposit to the developer as liquidated damages.¹⁴⁰ The main problem for purchasers is the loss of their deposits through developer misuse and bankruptcy. The developer often will use the money to further finance development of the condominium—to pay construction costs or such ongoing expenses as wages and advertising.¹⁴¹ If the developer goes bankrupt and construction is uncompleted, the buyer risks losing his deposit since mechanic's and materialman's liens or other creditors' claims may attach to any remaining funds, or the buyer's claim may be subordinated to a construction lender's preferred blanket mortgage.¹⁴² Even if the deposit is eventually returned, the developer may retain any income earned by the money.¹⁴³ In fact, developers have been known to collect deposits merely to use them to earn income, with no intention of ever constructing a con-

138. The Council of State Governments' Model Condominium Act is quite specific regarding what must be inspected and reported, expressly covering the roofs, foundations, external and supporting walls, mechanical, electrical, plumbing, and structural elements, as well as any other related facilities. MODEL ACT, *supra* note 108, § 11(a)(3).

139. CONN. GEN. STAT. ANN. § 47-88b(a)(2) (West 1978); VA. CODE § 55-79.94(a)(2) (Supp. 1978); MODEL ACT, *supra* note 108, § 11(a)(2).

140. R. SEMENOW, QUESTIONS AND ANSWERS ON REAL ESTATE 143 (8th ed. 1975).

141. Comment, *supra* note 20, at 271.

142. Crockett, *Protecting the Deposit of the 'Consumer' Who Purchases a New Condominium Apartment*, 8 HAW. B.J. 103, 104-05 (1972).

143. Comment, *supra* note 20, at 278.

dominium.¹⁴⁴ On the other hand, there are policy justifications for developers' use of deposits. Developers, especially those engaged in small-scale construction, may need the purchasers' deposits to help finance the development of the condominium.¹⁴⁵ Construction lenders may require that a certain percentage of units be presold and deposits be taken.¹⁴⁶ Purchasers may even benefit from developer access to their deposits since interest charges paid by the developer on alternative forms of financing will be passed on to the purchaser.¹⁴⁷

Section 5311.25(A)¹⁴⁸ of the amended Ohio statute fills a void left by the 1963 Act,¹⁴⁹ which was silent on the use of deposits by developers. This section now requires that the deposit or down-payment be held in trust or be put in escrow until the settlement of the transaction or until its return to the buyer or forfeiture to the developer. If a deposit of two thousand dollars or more is held for more than ninety days, interest must be paid at an annual rate of four percent, starting on the ninetieth day, to the purchaser upon the settlement or return of the deposit or to the developer upon forfeiture.¹⁵⁰ The section further provides that such deposits are

144. Note, *supra* note 81, at 350.

145. Note, *Recent Innovations in State Condominium Legislation*, 48 ST. JOHN'S L. REV. 994, 1000 (1974).

146. Crockett, *supra* note 142, at 103.

147. *Id.* at 104.

148. OHIO REV. CODE ANN. § 5311.25(A) (Page Supp. 1978)

149. Although the 1963 Act did not specifically address the issue of deposit protection, various alternative remedies were available. Ohio holds promoters of stock to a fiduciary duty both to the corporation and to those whom they induce to buy stock. *See* *Yeiser v. United States Bd. & Paper Co.*, 107 F. 340, 344 (6th Cir. 1901); *Commonwealth S.S. Co. v. American Shipbuilding Co.*, 197 F. 797, 805 (N.D. Ohio 1912), *modified on other grounds*, 215 F. 296 (6th Cir. 1914). Condominium developers have never been held to such a duty in Ohio. However, considering the similarity in structure of a corporation and a unit owners association and the analogous functions of a stock promoter and developer, the argument could have been made that developers should occupy a fiduciary relationship with the unit owners and their association. If a developer were held to a fiduciary duty, he would be required to deposit the funds he received in that capacity in a bank or savings and loan association to gather interest. *See* OHIO REV. CODE ANN. § 2109.41 (Page 1976). He would be unable to make any personal use of the funds. *See id.* § 2109.43. Holding the developer to such a responsibility would certainly protect the purchaser's deposit. However, some less stringent method of deposit protection would be more appropriate considering the developer's need to make at least limited use of the funds in order to successfully complete construction.

150. Section 5311.25 is progressive in providing for the payment of interest to the buyer after 90 days on deposits of \$2,000 or more, assuming there is no forfeiture, which would usually take the form of the buyer's default or breach of the purchase agreement. This is unusual; even the most protective statutes provide that interest be paid to the developer upon closing. FLA. STAT. ANN. § 718.202(1)(c) (West Supp. 1978). The section also protects both the purchaser and the developer by providing that the creditors of either party

not subject to attachment by the developer's or purchaser's creditors.¹⁵¹ Section 5311.26 provides that the statute's requirement for the escrow of deposits be disclosed to each prospective purchaser in writing.¹⁵²

Section 5311.25 gives the developer and purchaser much freedom in selecting the escrow agent or trustee. There is no requirement, for example, that the funds be deposited in an institution where they will be insured by a state or federal agency, as required by the Council of State Governments' Model Condominium Act.¹⁵³ Where an escrow account is established, however, the depository necessarily will be a separate party who shall act as the

may not attach the deposits. In this way, the developer cannot indirectly spend the buyer's money, and the money will not be lost in the event of bankruptcy. Hawaii is a good example of how a state that follows a regulatory approach handles the deposit problem. See Crockett, *supra* note 142, at 103-04. The developer must submit an escrow agreement, along with other documents and plans, to the state Real Estate Commission. HAW. REV. STAT. § 514A-39 (Supp. 1977). Units may then be sold, but deposits must be held in escrow and cannot be disbursed until the Commission issues a final public report. HAW. REV. STAT. § 514A-65 (Supp. 1977). A final report will be issued only if, among other things, there are sufficient funds to complete construction and an escrow agreement is filed. The agreement must provide that no disbursement from the balance of the escrow funds, after payment of construction costs, will be allowed unless all mechanic's and materialman's liens have been cleared. HAW. REV. STAT. § 514A-40(3), -40(6)(B) (Supp. 1977). Disbursements may be made, after the final report for construction costs, in proportion to the work completed and may be used to pay various fees and other incidental costs. HAW. REV. STAT. § 514A-67 (Supp. 1977). Thus, consumers are protected from unscrupulous or unsound developers. Although more protection would be afforded if the use of purchaser funds were more restricted, see Crockett, *supra* note 142, at 107, as long as the developer follows certain procedures, he may use funds as they are needed to help finish the project.

151. OHIO REV. CODE ANN. § 5311.25(G) (Page Supp. 1978).

152. *Id.* § 5311.26(M).

153. MODEL ACT, *supra* note 108, § 14. Connecticut requires the declarant to establish an escrow account with a bank, trust company with trust powers, an attorney, or title company. CONN. GEN. STAT. ANN. § 47-74d(b) (West 1978). Florida includes a registered real estate broker in that list. FLA. STAT. ANN. § 718.202(1) (West Supp. 1978).

Even if an Ohio developer were to establish an escrow account with a real estate broker, the funds would ultimately end up in a special or trust bank account which the broker must maintain. OHIO REV. CODE ANN. § 4735.18(Z) (Page 1977). Failure to maintain such an account could result in the suspension or revocation of the broker's license. *Id.* In addition, Ohio real estate brokers are held to a fiduciary duty to both the purchaser and seller and must hold any deposit or downpayment in trust. See *Quinn v. State Bd. of Real Estate Examiners*, 104 Ohio App. 316, 321, 137 N.E.2d 777, 780 (8th Dist. 1956); *Schoch v. Bloom*, 5 Ohio Misc. 155, 158, 212 N.E.2d 428, 430 (C.P. Hamilton County 1965). Similarly, an attorney must deposit funds of clients in an identifiable bank account maintained in the same state as the law office. No funds of the lawyer may be deposited in the account except to pay bank charges or unless the funds belong in part to the client and in part to the attorney. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102A, 23 Ohio St.2d 1, 55 (1970). The attorney must also maintain complete records of all funds coming into his possession, account to his client regarding them, and promptly pay or deliver such funds to the client as he requests them. *Id.* 9-102(B)(3), -102(B)(4), 23 Ohio St.2d at 56.

agent of both the developer and purchaser.¹⁵⁴ Thus, the developer may not act as an escrow agent. Usually the depository will be a real estate broker, a bank, or a savings and loan association. Although the depository may be the developer's lawyer, the typical escrow agent is not an attorney.¹⁵⁵

Since, in addition to the escrow arrangement, section 5311.25 permits deposits to be held in trust,¹⁵⁶ a developer may become the depository by having the purchaser appoint him as trustee.¹⁵⁷ Although merger problems prevent the creation of a trust where a single beneficiary is the sole trustee, it is possible to establish a trust where one of several beneficiaries is the sole trustee.¹⁵⁸ Thus, a developer may maintain a trust account, similar to those maintained by many attorneys, in which to place purchaser deposits. This approach, specifically adopted by two other states,¹⁵⁹ adds flexibility and convenience to the handling of deposits. It may be argued, however, that the practical convenience is outweighed by the danger of self-dealing by the developer-trustee. A better approach would be to permit deposits to be held by developers under bond.¹⁶⁰ This would introduce a measure of purchaser protection to the practical advantages of developer-held deposits.

The section's requirement that developers place all the deposits in escrow or trust, not to be used for any purpose until the

154. An escrow agent or depository must be a third party, *Squire v. Branciforti*, 131 Ohio St. 344, 353, 2 N.E.2d 878, 882 (1936); *McGriff v. McGriff*, 48 Ohio L. Abs. 218, 223, 74 N.E.2d 619, 622 (2d Dist. Ct. App. 1947), who is considered an agent and trustee of both parties. 131 Ohio St. at 353, 2 N.E. at 882.

155. G. LEFCOE, *LAND DEVELOPMENT LAW* 544 (2d ed. 1974). Compare M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* 10 (3d ed. 1975).

156. Virginia provides only for escrow, not trust accounts. VA. CODE § 55-79.95 (Supp. 1978). Hawaii does allow deposits in trust under escrow arrangements but prohibits disbursement from that trust. HAW. REV. STAT. § 514A-65 (Supp. 1977).

157. Where both the legal title and equitable interest are in the same person, the two interests are said to merge, defeating the trust and conferring a fee simple interest upon that person. *Hill v. Irons*, 160 Ohio St. 21, 27, 113 N.E.2d 243, 247 (1953); *In re Bicknell's Estate*, 108 Ohio App. 51, 54, 160 N.E.2d 550, 553 (3d Dist. 1958); 2 A. SCOTT, *THE LAW OF TRUSTS* § 99, at 795 (3d ed. 1967).

158. Where a person is a trustee for himself and others, there is no merger of the separate interests. *Burbach v. Burbach*, 217 Ill. 547, 550, 75 N.E. 519, 520 (1905); *Fisher v. Evatt*, 18 Ohio Op. 34, 37 (B.T.A. 1943); SCOTT, *supra* note 157, § 99.3, at 800-01.

159. Connecticut, Florida, and Louisiana provide for a "special account" which presumably would cover a trust as well as an escrow account. CONN. GEN. STAT. ANN. § 47-74d(b)(3) (West 1978); FLA. STAT. ANN. § 718.202(2) (West Supp. 1978); LA. REV. STAT. § 9:1139(A) (West Supp. 1978).

160. The Model Condominium Act requires the deposit to be held in escrow or guaranteed by surety bond. MODEL ACT, *supra* note 108, § 14. See, e.g., CONN. GEN. STAT. ANN. § 47-74d(b) (West Supp. 1978) ("one-half of such [escrow] funds shall be held by the escrow agent as security for completion of the common elements . . .").

settlement or its return or forfeiture, is similar to the approaches taken by Virginia¹⁶¹ and the Council of State Governments.¹⁶² This approach may be too restrictive. Although it protects the buyer, the developer cannot contract to use the money for construction, which may be essential to complete the project. Although this encourages developers to seek sound and complete financing from other sources, it discourages smaller enterprises from starting up. Further, it may prevent a relatively stable developer from finishing construction. Three states provide a more flexible approach to the problem. Connecticut,¹⁶³ Florida,¹⁶⁴ and Louisiana¹⁶⁵ require that deposits be held in escrow, to be paid to the seller at closing. The parties, however, are free to contract otherwise. This permits the developer to make use of the deposit or some portion of it in financing construction of the condominium. To prevent developers who are unable to complete construction from using deposits to pay incidental costs, Florida and Louisiana further provide that deposits may not be used for the salaries, commissions, or expenses of salesmen or for advertising.¹⁶⁶ These states also provide that any contract that permits developer use of deposits must advise the prospective purchaser of this provision in boldface type just above the buyer's signature line.¹⁶⁷ Failure of the developer to comply with these provisions allows the buyer to void the contract and may, in Florida and Connecticut, subject the developer to criminal penalties.¹⁶⁸ Thus, the purchaser is protected by these statutes, yet the buyer and developer are free to contract, if necessary, to allow the developer access to the funds.

By permitting the release of the entire deposit upon settlement, section 5311.25 fails to protect the purchaser of a condominium

161. VA. CODE § 55-79.95 (Supp. 1978).

162. MODEL ACT, *supra* note 108, § 14.

163. CONN. GEN. STAT. ANN. § 47-74d(b)(1) (West Supp. 1978) (half of all escrowed deposit to be paid to seller at closing).

164. FLA. STAT. ANN. § 718.202(3) (West Supp. 1978).

165. LA. REV. STAT. § 9:1139(B) (West Supp. 1978).

166. FLA. STAT. ANN. § 718.202(3) (West Supp. 1978) (for escrow funds exceeding 10% of purchase price); LA. REV. STAT. § 9:1139(B) (West Supp. 1978).

167. FLA. STAT. ANN. § 718.202(3) (West Supp. 1978); LA. REV. STAT. § 9:1139(B) (West Supp. 1978).

168. Florida provides that any developer who willfully fails to pay the funds into escrow is guilty of a third degree felony. FLA. STAT. ANN. § 718.202(b) (West Supp. 1978). Connecticut provides that if the developer fails to establish the escrow or if he or anyone acting on his behalf wrongfully releases any of the funds to the developer with intent to defraud the purchaser, he is guilty of embezzlement. CONN. GEN. STAT. ANN. § 47-74d(c) (West Supp. 1978).

unit that has not been completed, equipped, or landscaped or in which construction of the common elements has not been finished. More protection could be provided if only partial release of the deposit to the developer were permitted upon closing and the remainder reserved until completion of the project. One state that follows this approach further provides that if the developer fails to complete the common elements within five years of the first occupancy, the balance of the deposits will be refunded to the unit owners association.¹⁶⁹

4. *Warranties*

Prior to the recent amendments, Ohio, unlike the majority of states, provided no implied warranty protection for the purchaser of a home, condominium, or other completed dwelling.¹⁷⁰ Rather, Ohio relegated the home purchaser to a cause of action in fraud,¹⁷¹ breach of contract¹⁷² or breach of express warranty if one was given,¹⁷³ or tort.¹⁷⁴ The net result was that the Ohio home

169. CONN. GEN. STAT. ANN. § 47-74d(b) (West 1978).

170. In *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966), the Ohio Supreme Court held that a contract to furnish labor and materials is not a sale if the finished product is not personal property and thus refused to imply a warranty that an uncompleted real property structure would be suitable for the intended purpose when finished. The court distinguished *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (8th Dist. 1957), which had held that if a house not yet completed was sold, there would be an implied warranty that the house would be finished in a reasonably efficient, workmanlike manner and would be reasonably fit for its intended use, on the grounds that the parties in *Vanderschrier* had an implied bargain as to uncompleted work that extended beyond the transfer of title. Although the *Mitchem* approach was once the majority rule, see *Gabel v. Silver*, 258 So. 2d 11, 14 (Fla. Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972), Ohio is now in the minority by refusing to imply a warranty that a dwelling sold by a builder has been constructed in a workmanlike manner and is fit for habitation. See *Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 957 (1976).

It has been suggested that the reluctance to hold builders liable on an implied warranty theory arises because the deed of conveyance evidencing the actual transfer of title usually purports to be the full agreement of the parties and excludes all other terms and liabilities. RESTATEMENT (SECOND) OF TORTS § 352, Comment a (1965). Florida has explicitly recognized implied warranties of fitness and merchantability against builders of condominiums for the realty and every integral part thereof. *Gabel v. Silver*, 258 So. 2d at 13.

171. See, e.g., *Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E. 2d 328 (1956); *Drew v. Christopher Constr. Co.*, 140 Ohio St. 1, 41 N.E. 2d 1018 (1942).

172. *Rapp v. Murray*, 112 Ohio App. 344, 171 N.E. 2d 374 (1st Dist. 1960); *Galvin v. Keen*, 100 Ohio App. 100, 135 N.E. 2d 769 (5th Dist. 1954); *Kissinger v. Yellow Pine Bldg. Co.*, 21 Ohio App. 165, 152 N.E. 775 (1st Dist. 1925).

173. See, e.g., *Tibbs v. National Homes Constr. Corp.*, 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1st Dist. 1977).

174. The purchaser had to prove that the builder had breached his duty to use ordinary care and skill and to perform in a workmanlike manner. See, e.g., *Lloyd v. William Fanin*

buyer had to put up with a defective product simply because the product he purchased was real estate rather than goods.¹⁷⁵

With the enactment of section 5311.25,¹⁷⁶ Ohio has statutorily granted warranty protection to the purchaser of a condominium, under certain conditions.¹⁷⁷ This section creates two warranties, one on the common areas and one on the individual unit.¹⁷⁸ First, section 5311.25 requires a developer or his agent to provide in the condominium instruments a two-year warranty on the common areas. It must cover the full cost of labor and materials for repair and replacement of the roof and structural components as well as mechanical, electrical, plumbing, and common service elements serving the condominium property or additional property as a whole.¹⁷⁹ The warranty provisions are activated when the repair or replacement of these elements is necessary because of a defect in material or workmanship.¹⁸⁰ This warranty begins to run on the date the deed is recorded for the sale of the first condominium ownership interest in the development to a good faith purchaser for value.¹⁸¹ In the case of expandable condominiums, for any additional property submitted through an amendment to the declaration, the same two-year warranty begins to run on the recording of the deed for the sale of the first condominium ownership interest in the additional property to a good faith purchaser for

Builders, Inc., 40 Ohio App. 2d 507, 320 N.E.2d 738 (10th Dist. 1973); *Hulder v. Bachman*, 12 Ohio Misc. 22, 230 N.E.2d 461 (C.P. Ashland County 1967). See generally *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

175. In the sale of goods the implied warranties of merchantability and fitness for a particular purpose apply under §§ 1302.27-28. OHIO REV. CODE ANN. §§ 1302.27-28 (Page 1962). Some states have implied a covenant of habitability running to the home purchaser. Generally the home must be rendered unfit for habitation before the covenant will be considered breached. See *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (heating and air conditioning ducts were flooded); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (water seeped into basement); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (house burned the first time a fire was lit in the fireplace).

176. OHIO REV. CODE ANN. § 5311.25(E) (Page Supp. 1978).

177. *Id.* § 5311.24(A) restricts the applicability of § 5311.25 to residential condominiums.

178. Since the warranties run for specified time periods, presumably the resale purchaser will also receive the benefit of the warranty protection.

179. OHIO REV. CODE ANN. § 5311.25(E) (Page Supp. 1978). Section 5311.01(A) defines condominium property as the "land, all buildings, improvements, and structures on the land, all easements, rights, and appurtenances belonging to the land, and all articles of personal property submitted to the provisions . . . of this chapter." Additional property is defined at § 5311.01(Q) as the "land or improvements described in the original declaration that may be added in the future to an expandable condominium property." For a discussion of expandable condominiums, see notes 446-78 *infra* and accompanying text.

180. OHIO REV. CODE ANN. § 5311.25(E) (Page Supp. 1978).

181. *Id.* § 5311.25(E)(1).

value.¹⁸² Second, the statute requires the developer to furnish a one-year warranty on elements pertaining to individual units. This one-year warranty also covers the cost of labor and materials required to repair or replace structural, mechanical, and other elements that are damaged because of a defect in materials or workmanship.¹⁸³ The one-year warranty begins to run on the date the deed is recorded following the first sale of a condominium ownership interest to a good faith purchaser for value.¹⁸⁴ If the developer assigns to the purchaser any express or implied warranty that the manufacturer has given him on appliances, he is not required to give his own one-year warranty on the appliances.¹⁸⁵ In such a case the developer need warrant only the installation of the appliances.¹⁸⁶ Finally, any warranties made to the developer that exceed the time periods required by the amendments must be assigned to the purchaser.¹⁸⁷

Generally, the warranties imposed in other states cover the same items as those in Ohio—the common and individual unit mechanical and structural elements, the electrical and plumbing systems, the roof, and any personal property or appliances conveyed. The Ohio Act, however, does not define the term “common service elements.” Since the term “common areas and facilities” was not used, the legislature must have intended warranty coverage to extend to something less than that. Section 5311.01(B)(1)(d) refers to central services such as power, light, gas, hot and cold water, refrigeration, air conditioning, and incinerating. If the term “services” includes only those functions, then common services means those services used in common. Thus, the warranty would seem not to apply to landscaping, grading, parking and road areas, or any other potentially defective portions of the condominium property. This portion of the amendment needs to be clarified since the purchaser may have broad expectations as to warranty coverage for these items and may subsequently discover his warranty protection to be quite limited.

182. *Id.* § 5311.25(E)(2).

183. *Id.* § 5311.25(E).

184. *Id.* § 5311.25(E)(3). The requirement in § 5311.25 that the first sale be to a good faith purchaser for value prevents the developer from avoiding the warranty obligations. Otherwise he could begin the running of the warranty time period simply by conveying the ownership interest to himself or to a strawman.

185. *Id.* § 5311.25(E)(4).

186. *Id.* Presumably the installation warranty will be for one year, as are other warranties regarding the unit.

187. *Id.* § 5311.25(E)(5).

Although section 5311.25 adds protection for the condominium buyer, perhaps the protection is not enough. First, the warranties cover only the costs of repair and replacement and do not cover resulting losses. The purchaser must resort to common law remedies to recover consequential damages.

Second, since the time limit for the warranties commences upon the first recording of a deed, many subsequent purchasers will receive no warranty protection. It may take several years for the developer to complete construction of the condominium development, particularly recreational facilities and landscaping. A purchaser who buys a newly constructed unit one year after the first sale will receive no warranty protection on his unit, and if the common service areas are not completed within two years following the first sale, no warranty will apply to them either. In the case of expandable condominiums, it is unlikely that any warranty protection will be provided for elements pertaining to individual units because the period of the one-year warranty begins to run upon the recording of the first sale in the initial phase.¹⁸⁸ While the time limits for the section's warranties are not atypical compared to the provisions of other states,¹⁸⁹ a few states provide more warranty protection simply by commencing the warranty period when the unit or common elements are completed or the unit conveyed.¹⁹⁰ Since Ohio has recognized the need for warranty protection, it should also require that the time period begin when the unit is conveyed or the common service areas completed.

Third, permitting the developer to satisfy his warranty requirements on appliances by assigning the manufacturer's warranties to the purchaser renders enforcement of that warranty by the purchaser more difficult. The manufacturer may reside out of state and be difficult to locate. The manufacturer's warranty may require the goods to be shipped prepaid to the point of manufacture to have the warranty honored.¹⁹¹ The appliances may be affixed

188. *Id.* § 5311.25(E)(3).

189. Compare FLA. STAT. ANN. § 718.203 (West Supp. 1978), which requires three-year warranties on each unit. Plumbing, electricity, and the common structural and mechanical components have warranties for three to five years, depending on when the owners take control of the association.

190. Connecticut uses the date of the recording of the original condominium instruments, the date of first occupancy, and the date of closing. CONN. GEN. STAT. ANN. § 47-74e (West 1978). Florida uses the completion of the building and the date when the unit owners other than the developer take control of the association. FLA. STAT. ANN. § 718.203 (West Supp. 1978). Virginia uses the date of conveyance. VA. CODE § 44-79.79 (Supp. 1978).

191. If the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (1976), were to ap-

to the real estate and difficult to move. The cost of repair or replacement of a defective appliance may be minimal compared to the cost of enforcing the warranty. Moreover, the manufacturer's warranty may provide the purchaser with less warranty protection than is provided by statute. Connecticut¹⁹² and Florida,¹⁹³ for example, impose warranties on the contractor, subcontractor, and suppliers. As additional protection the Council on State Governments' Model Condominium Act would require the developer to post a bond.¹⁹⁴ Then the costs of repair or replacement would not be imposed upon the condominium purchaser if the developer went bankrupt or enforcement of the warranty against the manufacturer proved too difficult.

Finally, the developer must assign the condominium purchaser any warranty given to him in excess of the statute's specified time periods. This seems at first glance to afford the purchaser extensive warranty protection.¹⁹⁵ However, it is unlikely that warranty protection from the developer's seller will exceed two years. Additionally, the statute does not specify how the length of the time period is to be determined. For example, the statute requires the developer to assign his seller's warranty to the purchaser if it exceeds the one-year statutory warranty. Even if the seller's warranty is for two years, eighteen months may have elapsed from the time of the transaction between the seller and developer to that between the developer and condominium purchaser. If the developer assigns his warranty, it would expire in six months. The buyer would get less warranty protection than that afforded without the assignment. In this situation the seller's warranty assigned to the purchaser may be longer than the one-year developer's warranty, but only the latter would be still effective. Such a constrained reading of the statute would be inconsistent, however, with its remedial purpose and the apparent intent of the legislature to afford some warranty coverage to the condominium pur-

ply to the appliances supplied by the developer to the unit owners, it would arguably prohibit a prepaid shipment requirement. "Consumer" is defined at § 2301(3) as "any other person who is entitled . . . under applicable State law to enforce against the warrantor . . . the obligations of the warranty . . ." Presumably this would cover the unit owner who is assigned the manufacturer's warranty by the developer under § 5311.25(E)(4) of the Ohio amendments. If so, the prepaid shipment requirement might be seen as an unreasonable duty placed upon the consumer, which is prohibited by 15 U.S.C. § 2304(b)(1).

192. CONN. GEN. STAT. ANN. § 47-74e(b)(1)(B), -74e(b)(2)(B) (West 1978).

193. FLA. STAT. ANN. § 718.203(2) (West Supp. 1978).

194. MODEL ACT, *supra* note 108, § 13(b).

195. OHIO REV. CODE ANN. § 5311.25(E)(5) (Page Supp. 1978).

chaser. The legislature most likely intended that the statute require the developer to assign his seller's warranty to the condominium purchaser if the warranty would afford him a longer period of protection than the statutory time periods of one and two years.¹⁹⁶

B. *Restrictions on Developer Retention of Control*

One of the most difficult aspects of condominium development is the transfer of control from the developer to the unit owners association. During the initial stages of construction, the developer generally owns all the units and has complete control of the condominium property. After the development is completed and unit titles have been conveyed, control passes to the unit owners association as provided by statute.¹⁹⁷ The developer's extensive power during the development period has, however, facilitated a number of abuses, which will be discussed below. These include prolonged control of the unit owners association, sweetheart contracts, and abuses in regard to the rental of unsold units.

Despite the numerous means for retention of control, the potential for abuse, and the inadequacy of judicial efforts to curb such abuse,¹⁹⁸ none of the enabling acts, as originally enacted,

196. The statute is also unclear about the purchaser's remedies should the developer fail to provide him with the necessary warranties. Section 5311.25 requires the developer to include the warranties in the condominium sales instruments. OHIO REV. CODE ANN. § 5311.25 (Page Supp. 1978). Thus they become part of the agreement between the purchaser and the developer. If the developer does not include the warranties in the instruments, the purchaser receives no warranty protection. The purchaser may, however, have remedies under § 5311.27. See notes 94-101 *supra* and accompanying text.

197. OHIO REV. CODE ANN. § 5311.08(A) (Page Supp. 1978). See notes 208-30 *infra* and accompanying text.

198. To eliminate the problems that occur during the development period, some courts have held that the developer or promoter occupies a fiduciary relationship with the future unit owners association and its members. See, e.g., *Shore Terrace Coop. Inc. v. Roche*, 25 App. Div. 2d 666, 268 N.Y.S.2d 278 (Sup. Ct. 1966), discussed in Comment, *Areas of Dispute in Condominium Law*, 12 WAKE FOREST L. REV. 979, 981 (1976). In an accounting action by a nonprofit cooperative apartment association against its promoters, the court held, by analogizing the nonprofit cooperative corporation to the typical private corporation, that the traditional fiduciary duties of a promoter to the corporation and its stockholders applied. *Accord*, *Ireland v. Wynnkoup*, 539 P.2d 1349 (Colo. Ct. App. 1975). Other courts have applied corporate law to condominium associations. See cases cited in Hyatt & Rhoads, *supra* note 170, at 975 n.260. The Florida courts, in a series of cases, have adopted corporate law for use in the condominium context. See *Point E. Management Corp. v. Point E. One Condominium Corp.*, 282 So. 2d 628 (Fla. 1973), cert. denied, 415 U.S. 921 (1974); *Riviera Condominium Apartments, Inc. v. Weinberger*, 231 So. 2d 850 (Fla. 1970); *Wechsler v. Goldman*, 214 So. 2d 741 (Fla. Dist. Ct. App. 1968); *Fountainview Ass'n, Inc. v. Bell*, 203 So. 2d 657 (Fla. Dist. Ct. App. 1967), cert. denied, 214 So. 2d 609 (Fla. 1968). These cases, however, have produced disastrous results for unit owners because the courts

specifically regulated retention of developer control. The only regulation that existed was in the form of Federal Housing Authority regulations and some state administrative regulations, which typically required that control of the board be turned over to the unit owners by a certain date.¹⁹⁹ Recent legislative enactments in several states,²⁰⁰ including the recent amendments to the Ohio Act, signal a move toward the formulation of statutory solutions to the problem of developer abuse, which will minimize the need for judicial intervention. The difficulty with drafting this legislation is that it must minimize developer abuse while permitting the control necessary to develop a condominium in its initial stages. Given this task, the approach of the recent Ohio amendments is commendable.

1. *Prolonged Control of the Owners Association*

Initial developer control is necessary to facilitate the sale of units and the commencement of operations, to insure exterior maintenance, and to protect the developer from harassment by early purchasers.²⁰¹ The developer's dual role of businessman and initial director of the unit owners association, however, gives rise to a conflict of interests, and may cause the developer to engage in practices that are not in the best interest of other unit owners.²⁰² For example, the developer may enter into, on behalf of the asso-

have denied relief on the basis of the minority rule, followed in Florida, that a promoter is *not* required to act in a fiduciary manner toward potential purchasers of stock in a corporation. Most commentators, however, regard the Florida rule as an aberration and instead favor imposing a fiduciary duty on the promoter-developer. *See, e.g.,* Hyatt & Rhoads, *supra* note 170, at 973.

Although there has been no litigation on this issue in Ohio, the application of corporate law in this area would be beneficial to unit owners because Ohio imposes on a promoter a fiduciary duty to the corporation and to his subscribers. *E.g.,* Yeiser v. United States Bd. & Paper Co., 107 F. 340 (6th Cir. 1901); Commonwealth S.S. Co. v. American Shipbuilding Co., 197 F. 797 (N.D. Ohio 1912), *modified on other grounds*, 215 F. 296 (6th Cir. 1914). Promoters may not accept secret commissions from third persons and may sell their own property to the corporation only after disclosure of all material facts, including any personal interest, to an independent board of directors. Unit owners could also ask a court to impose a fiduciary duty outside the corporate law context as well, using a trust and confidence theory. *See* Taylor v. Shields, 64 Ohio Law Abs. 193, 111 N.E.2d 595 (2d Dist. Ct. App. 1951); Federman v. Stanwyck, 63 Ohio Law Abs. 178, 108 N.E.2d 339 (8th Dist. Ct. App. 1951).

199. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 17A.02[4], at 17A-3.2.

200. *E.g.,* HAW. REV. STAT. § 514A-82(12) to 82(15) (Supp. 1977); MINN. STAT. ANN. § 515.195(1) (West Supp. 1978); UTAH CODE ANN. § 57-8-16.5(1), .5(4) (Supp. 1977).

201. *See* Hyatt & Rhoads, *supra* note 170, at 926; Rohan, *supra* note 45, at 1037.

202. Hyatt, *Condominium and Home Owners Association: Formation and Development*, 24 EMORY L.J. 977, 989 (1975).

ciation, self-dealing management contracts and recreational leases²⁰³ or engage in "lowballing," a practice in which assessments are set at a low, fixed rate in order to enhance the salability of units.²⁰⁴ Funds may not be accounted for nor books kept;²⁰⁵ the declaration, bylaws, rules, and management contracts may be kept from prospective buyers;²⁰⁶ and common facilities that are defective or not built to specification may be accepted without complaint by a developer-controlled association.²⁰⁷

Prior to the recent amendments, abuses could be perpetuated since a developer could maintain control of the association indefinitely by retaining ownership of a certain percentage of units, selling units to friendly parties or straw buyers, "packing" the association's managing board with friends and associates, or reserving the right to amend unilaterally the condominium bylaws or declaration.²⁰⁸ The amendments strike a balance between preservation of the developer's investment and the protection of unit owners from unfair management practices. This is done primarily through the establishment of a time requirement for the initial owners meeting and a timetable for the gradual transfer of control from the developer to the other unit owners.

Under section 5311.08, the developer may act in place of the association until it is established.²⁰⁹ The section requires, however, that the association be established no later than the time of the filing of the deed for the first unit sold.²¹⁰ To avoid any developer "packing," the section provides that only owners may be members.²¹¹ The association must meet no later than the time when twenty-five percent of the interests have been sold.²¹² At that time, the owners other than the developer must elect at least twenty-five percent of the board of managers. By the time that fifty percent of the interests have been sold, one-third of the board

203. Rohan, *supra* note 45, at 1037.

204. Hyatt, *supra* note 202, at 997.

205. Hyatt & Rhoads, *supra* note 170, at 976; Comment, *supra* note 47, at 455.

206. Note, *supra* note 52, at 191.

207. Hyatt & Rhoads, *supra* note 170, at 976.

208. Rohan, *supra* note 45, at 1037.

209. OHIO REV. CODE ANN. § 5311.08(C) (Page Supp. 1978).

210. *Id.*

211. *Id.*

212. *Id.*; "The interests" are the percentage interests in common areas and facilities appurtenant to each unit as computed under § 5311.04(B). When computing the percentages of interest in expandable condominiums for purposes of determining when 25% of the interests have been sold, the number of units sold is compared to the maximum number of units that may be created, as stated in the declaration. *Id.* § 5311.08(C) (Page Supp. 1978).

must be elected.²¹³

The requirement that the first owners meeting take place no later than after the sale of twenty-five percent of the interests replaces the 1963 Act's requirement that the time of the first meeting need be only specified in the bylaws.²¹⁴ Under this requirement the initial meeting was commonly held upon notification by the developer after fifty-one percent unit occupancy.²¹⁵ This made the timing of the initial meeting overly dependent upon the developer and the complications of condominium marketing and management.²¹⁶ In view of the conflicting interests between the developer and unit owners with respect to the timing of the initial meeting, the amendments offer a balanced approach by giving unit owners some voice in their affairs without sacrificing the flexibility needed for the successful development of the condominium. One state requires the first meeting to be held within 180 days after a certificate of occupancy is issued;²¹⁷ the meeting may be premature if not enough units have been sold within that time period. Another approach, suggested by a leading authority, is to require that the initial meeting be held upon seventy-five percent owner occupancy.²¹⁸ This meeting may be too late, depriving the owners of the experience in condominium management needed to assure that control is not passed before the owners are ready to assume it.

Section 5311.08 permits the declaration to authorize the developer or his designee to appoint and remove the members of the management board or other association officers and to exercise the powers otherwise assigned to the association.²¹⁹ This authorization may extend only for three years²²⁰ after the establishment of the association or thirty days after the sale of seventy-five percent of the interests to bona fide purchasers, whichever is earlier.²²¹ The section also provides that if there is a unit owner other than the developer, the declaration cannot be amended to extend the

213. OHIO REV. CODE ANN. § 5311.08(C).

214. *Id.* § 5311.08(B)(2) (Page 1970). Although this provision did not specifically require the designation of time requirements for the *initial* owners meeting, such a requirement appears to have fallen within the section's broad language requiring the bylaws to specify "the time and place for holding" unit owners meetings. *Id.*

215. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 17.02, at 17-3.

216. *Id.* § 17.02, at 17-4 to 5.

217. HAW. REV. STAT. § 514A-82(12) (Supp. 1977).

218. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 17.02, at 17-5.

219. OHIO REV. CODE ANN. § 5311.08(D) (Page Supp. 1978).

220. The period is five years for expandable condominiums. *Id.* § 5311.08(D)(1).

221. *Id.* § 5311.08(D)(1), .08(D)(2) .

scope or the period of the originally authorized developer control. This prevents the developer from unilaterally amending the declaration after units have been sold. Within thirty days after the developer's powers have expired, the association must meet and elect all of the management board and officers.²²² At this time the developer must turn over the complete and correct records that the statute requires him to have kept. Failure to do so renders the developer liable for damages.²²³

Ohio's timetable for the transfer of control, based on the percentage of units sold and with an outside time limit, is a sound solution to the problem of prolonged developer control. This approach encourages a stable transition period in which the owners can experience condominium management.²²⁴ It should be noted, however, that the three-year limit on developer control extinguishes only the developer's extraordinary appointment powers and the power to act for the association.²²⁵ The amendments permit the developer to retain the usual power of a unit owner in any unsold units after the three-year period.²²⁶ Thus, continued developer control remains a possibility. An important protection would be to prohibit the developer from purchasing a certain number of units as investments for himself²²⁷ or to grant the association an option to purchase any unsold units after three years.²²⁸

Prospective purchasers are further protected by the amendments' disclosure provisions. Presumably, the details of any developer control must be disclosed to prospective purchasers under the requirement of section 5311.26 that the written offering statement include significant provisions for management of the condominium development, including the conditions for the formation of a unit owners association.²²⁹ In the event that this section is not interpreted to require such disclosure in the written statement, a form of indirect disclosure is still effected by the requirement that the developer apprise prospective purchasers of their right to review the condominium instruments.²³⁰

222. *Id.* § 5311.08(D).

223. *Id.* § 5311.09(B).

224. See Hyatt, *supra* note 202, at 996.

225. OHIO REV. CODE ANN. § 5311.08(D) (Page Supp. 1978).

226. *Id.* at § 5311.25(F); see *id.* §§ 5311.05(B)(7), .08(C), .22(A), .25(B).

227. Note, *supra* note 52, at 197.

228. For a discussion of developer rental of unsold units, see notes 249-68 *infra* and accompanying text.

229. OHIO REV. CODE ANN. § 5311.26(H)(1) (Page Supp. 1978).

230. *Id.* § 5311.26(J).

2. *Sweetheart Contracts*

Another form of developer self-dealing occurs while the developer still controls the unit owners association. The developer causes the association to enter into long-term leases of land or recreational and other facilities or into management and maintenance arrangements with a developer-owned or -controlled company.²³¹ Developers may also award these arrangements to third parties in exchange for substantial kickbacks.²³² These agreements, generally known as sweetheart contracts, typically provide for excessive rents for recreational facilities²³³ or for excessive compensation to the developer for management services. Since these payments are common expenses, the unit owner suffers injury in the form of higher assessments.²³⁴ The cost of these leases and contracts may be buried in estimated, unitized monthly maintenance fees.²³⁵ In some situations unit owners may even be unaware that they do not own the facilities that are being leased to them.²³⁶ In addition to the increased cost involved in such contracts, there can be further abuses involved in a leased facilities arrangement. Developers may reserve rights in the facilities for themselves or other nonunit owners; furniture may be removed from recreation areas after the units are sold because it has not been included in the lease; full rent may be charged for incomplete facilities; additional units may be built subsequently without a comparable increase in the size of recreation areas; or fewer units may be built than originally anticipated, resulting in increased costs to existing unit owners.²³⁷ Management contracts not only allow the developer to receive excessive compensation for his services but also permit him to retain control over the daily

231. See Theriot, *Louisiana Condominium Act of 1974*, 35 LA. L. REV. 1203, 1227 (1975); Note, *supra* note 48, at 656 n.33; Comment, *supra* note 20, at 279.

232. Note, *supra* note 81, at 353.

233. See U.S. NEWS & WORLD REP., June 24, 1974, at 49 (condominium residents were paying \$311,000 a year to use a pool, leased on a 99-year contract with the developer, that was valued at \$82,000).

234. Comment, *supra* note 47, at 455.

235. *Id.* at 455-56.

236. Comment, *supra* note 20, at 279.

237. See *Point E. Management Corp. v. Point E. One Condominium Corp.*, 282 So. 2d 628 (Fla. 1973), *cert. denied*, 415 U.S. 921 (1974); *Riviera Condominium Apartments, Inc. v. Weinberger*, 231 So. 2d 850 (Fla. 1970); *Wechsler v. Goldman*, 214 So. 2d 741 (Fla. Dist. Ct. App. 1968); *Fountainview Ass'n, Inc. v. Bell*, 203 So.2d 657 (Fla. Dist. Ct. App. 1967), *cert. denied*, 214 So. 2d 609 (Fla. 1968); Note, *Long Term Management Contracts Between Condominium Associations and Developer-Controlled Management Corporations Held Not Violative of the Florida Condominium Act*, 28 U. MIAMI L. REV. 451, 456 (1974).

affairs of the condominium, giving rise to further opportunities for self-dealing.

The recent amendments provide some protection against sweetheart contracts by requiring that the written statement provided to each prospective purchaser disclose the existence of any contracts made with the unit owners association.²³⁸ To facilitate this disclosure facsimiles of the contracts must also be provided along with a narrative statement describing their effect on the buyer, including the services to be rendered, the charges to be assessed, and the relationship, if any, between the developer and any managing agent.²³⁹ The written statement must additionally provide a two-year projection of the costs of such contracts.²⁴⁰

In addition to disclosure, the amendments provide unit owners with a substantial degree of protection through the requirement that the recreational and management contracts be renewed by the unit owners association after the unit owners, other than the developer, have gained control of the association.²⁴¹ The section requires the renewal of management contracts one year after the developer has relinquished control.²⁴² This delayed renewal requirement may represent a legislative recognition of the economic infeasibility of having legitimate management companies provide for contract management services where the duration of the management contract is to be less than one year.

The approach taken by the amendments is commendable since it retains an option to renew, instead of a strict requirement of cancellation of all prior management contracts. There are, however, potential problems that might arise under the amendments. For example, section 5311.25 pertains only to management con-

238. OHIO REV. CODE ANN. § 5311.26(H)(3) (Page Supp. 1978).

239. *Id.* § 5311.26(I). Virginia protects the purchaser in a similar manner by allowing the unit owners association to either terminate management contracts without penalty upon 90 days' written notice or renew them for not more than two years. VA. CODE § 55-79.74(b)(1) (Supp. 1978).

240. Section 5311.26(F) requires that the written statement provide a two-year projection, to be updated at least every six months, of the annual expenditures necessary to operate and maintain the common areas and facilities. These projections must include an estimated monthly cost per unit for the two-year period, including the amount of the operating and maintenance expenses, along with any other costs, fees, and assessments that are reasonably ascertainable by the developer. OHIO REV. CODE ANN. § 5311.26(F) (Page Supp. 1978). Although it is not explicitly required that they be disclosed, it appears that this section implicitly covers expenses paid out in compensation for managing the development and for leasing recreational and other facilities.

241. *Id.* § 5311.25(B).

242. *Id.* § 5311.25(D).

tracts and fails to require renewal of maintenance and other such contracts, which may be just as vulnerable to abuse.²⁴³ Further, under this section, unit owners may remain bound for one year to a management contract entered into while the developer still controlled the association, even where the contract is unfair or unreasonable. In contrast, the Model Condominium Act does not allow the developer to enforce a contract after the owners take control.²⁴⁴ Under the Maryland statute, unit owners may cancel prior contracts at any time on thirty days' notice.²⁴⁵ Ohio should adopt a provision, similar to Florida's,²⁴⁶ requiring that the contract be fair and reasonable in order for it to be enforced. This would offer protection to unit owners during this one-year period without creating an unacceptable risk to legitimate management companies.

Although the disclosure and renewal provisions of the recent amendments should be effective against abusive management contracts, they alone will not solve the problems with recreation leases because the developer actually owns the facilities. The effectiveness of section 5311.25 could be improved by including some of the protections suggested by the Florida Condominium Commission.²⁴⁷ These include a requirement that rents be prorated according to the degree of the construction of recreational facilities, a prohibition against rent escalation clauses in leases, and a requirement that all leases of recreational facilities contain an option to purchase at certain intervals that may be exercised by a vote of seventy-five percent of the unit owners.²⁴⁸

3. *Developer Rental of Unsold Units*

There is the possibility of a considerable lag between the time the condominium development is ready for occupancy and the

243. Although the disclosure requirement under § 5311.26(I) covers "any management contract or other agreement affecting the operation, use, or maintenance of or access to all or any part of the condominium development," § 5311.25(D) applies only to "any management contract or agreement executed prior to the assumption of control . . ." It is unclear why these two sections are not coextensive. A legislative broadening of § 5311.25(D) to explicitly cover other contracts may be appropriate.

244. MODEL ACT, *supra* note 108, at § 15(a), (d).

245. MD. REAL PROP. CODE ANN. § 11-125 (Supp. 1977).

246. FLA. STAT. ANN. § 718.302(10), .302(2) (West Supp. 1978).

247. Amended Report of the Florida Condominium Commission Exhibit B (1973).

248. *Id.*, Exhibit D. These recommendations were eventually enacted by the Florida legislature. See FLA. STAT. ANN. §§ 718.401(5), .302(3), .401(2), .401(6)(a)–.401(6)(c) (West Supp. 1978).

time every unit is sold.²⁴⁹ The developer, as owner of these unsold units,²⁵⁰ is required to pay the common expenses²⁵¹ assessed to those units, and he may wish to rent them out in order to defray expenses. The developer may not want to disclose the existence of rental agreements in order not to discourage sales, and thus subsequent unit purchasers may unexpectedly find themselves surrounded by short-term tenants²⁵² or in possession of a previously rented unit. Developers may also utilize the rental of unsold units as a means to retain control over the unit owners association. If there is rental income sufficient to defray costs, the developer may indefinitely retain enough units to effectively control the association and board²⁵³ by voting the interests of the unsold units.²⁵⁴

The recent amendments contemplate that the developer will retain the unsold units²⁵⁵ and provide that he must assume the rights and obligations of a unit owner.²⁵⁶ One weakness in the amended statute is the absence of a specific requirement that developers disclose to prospective purchasers whether unsold units have been or are being rented.²⁵⁷ The rental of unsold units may arguably constitute "a material circumstance or feature affecting the development,"²⁵⁸ thus requiring disclosure of any intent to rent or the actual rental of units by the developer. A better approach, which avoids judicial resolution of this issue, would be the adoption of a specific statutory provision requiring that disclosure.²⁵⁹

249. Clothier, *The Great Condominium Mania*, 79 CASE AND COMMENT (no. 5) 3, 8 (1974).

250. See OHIO REV. CODE ANN. § 5311.25(B) (Page Supp. 1978).

251. *Id.* §§ 5311.04(F), .25(F).

252. Note, *supra* note 43, at 327-28.

253. Clothier, *supra* note 249, at 8.

254. See OHIO REV. CODE ANN. §§ 5311.05(B)(7), .08(C), .22(A), .25 (Page Supp. 1978).

255. See *id.* § 5311.25(B), .25(F).

256. *Id.* § 5311.25(F).

257. Such a policy is not covered by the disclosure requirements for conversion condominiums, see *id.* § 5311.26(G), because by definition a "conversion condominium" involves a whole development originally operated as a rental property prior to the time the condominium property was submitted to chapter 5311, see *id.* § 5311.01(X).

258. OHIO REV. CODE ANN. § 5311.26 (Page Supp. 1978). See note 63 *supra* and accompanying text.

259. Florida has such a disclosure requirement. The developer's prospectus must include:

A statement of whether the developer's plan includes a program of leasing units rather than selling them, or leasing units and selling them subject to such leases. If so, there shall be a description of the plan, including the number and identification of the units and the provisions and term of the proposed leases, and

It has been suggested that developers should also be prohibited from renting unsold units pending sale without the approval of a substantial majority of the owners in occupancy.²⁶⁰ One Ohio developer has proposed that the practice be prohibited unless the owner is an actual resident within the condominium development.²⁶¹ These limitations, however, would necessarily increase development costs,²⁶² which ultimately would be passed to subsequent purchasers. Thus, it is submitted that developers should be permitted to rent unsold units, provided that prospective purchasers are fully informed of this possibility.

As previously noted, by withholding units from sale it is possible for a developer to retain control over the unit owners association and the board of managers indefinitely.²⁶³ Although section 5311.08 contemplates the transfer of control from the developer to the other unit owners by establishing a three-year limit on the developer's authority to exercise the powers of the association,²⁶⁴ the developer can defeat this by retaining ownership of enough units to assure himself effective voting control. To avoid this, it is suggested that the association be statutorily granted an option to purchase any of the unsold units for fair value after a certain period of time, exercisable by a substantial majority of the unit owners other than the developer. For example, if the unit owners association had an option after three years²⁶⁵ to purchase any unsold units at fair value, exercisable within ninety days²⁶⁶ by a vote

a statement in boldface type that: THE UNITS MAY BE TRANSFERRED
SUBJECT TO A LEASE.

FLA. STAT. ANN. § 718.504(10) (West Supp. 1978).

260. The New York Council of Condominiums has recommended that developers be prohibited from renting unsold units unless 75% of the owners in occupancy give their approval. Rohan, *supra* note 45, at 1033.

261. Letter from John F. Brooks, Executive Vice President, Hilltop Management Co. to the House Judiciary Subcommittee, Hearings on H.B. 404, Recommendation 11 (June 28, 1977).

262. This point was recognized by the New York Council of Condominiums. Rohan, *supra* note 45, at 1033.

263. See notes 253-54 *supra* and accompanying text. By retaining such control, the developer is free to continue abusive self-dealing practices. For example, he would be able to circumvent the renewal requirements for sweetheart contracts. See OHIO REV. CODE ANN. § 5311.25(B), .25(D) (Page Supp. 1978). For a discussion of sweetheart contracts, see notes 231-48 *supra* and accompanying text.

264. OHIO REV. CODE ANN. § 5311.08(D)(1) (Page Supp. 1978).

265. *Id.* § 5311.08(D)(9) requires that after three years the developer have no interest in the development other than to sell remaining units.

266. Ninety days would be an adequate amount of time for the association to reach a decision about the purchase of units without unreasonable delay to the developer.

of seventy-five percent of the voting interests, excluding the developer's, such indefinite control could be avoided.

This approach would balance the legitimate interests of a developer in an unfinished project against the interests of the unit owners in gaining complete control of their association. After three years, the units and common areas of the project should be established, leaving the developer with no concern other than selling any remaining units.²⁶⁷ Such an option would not preclude the necessity of disclosure since prospective buyers will still need to know what the developer's rental policy is in order to make an informed purchase decision. Rather, the option should be in addition to the required disclosure, allowing owners to change rental policy after enough time has lapsed so that the developer no longer has an interest in "developing" the condominium.²⁶⁸

III. INDIVIDUAL AND COLLECTIVE RIGHTS AND LIABILITIES

A. *Rights and Obligations of Unit Owners Inter Se*

The rights and obligations of unit owners to each other involve two major areas: (1) issues relative to the common areas and (2) issues regarding the internal governance of the condominium development. Because the allocation of interest in the common areas frequently determines each unit owner's voting strength in matters of internal governance, that subject is discussed first.

1. *Common Areas*

Ownership of a condominium is both individual and collective. It is individual because a condominium owner has exclusive fee simple ownership of his individual unit; it is collective because the owner also has an undivided interest as a tenant in common in the common areas and facilities,²⁶⁹ which is inseparable from the unit interest.²⁷⁰ The common areas, which cannot be partitioned,²⁷¹ include the land, foundations, roofs, halls, gardens, ele-

267. The association should not be required to purchase units on an all-or-nothing basis. Some owners may wish to purchase only a number of units sufficient to take majority control away from the developer.

268. Compare OHIO REV. CODE ANN. §§ 5311.25(B), .25(D), .26(H)(3), .26(I) (Page Supp. 1978), which require the developer to disclose the existence and terms of sweetheart contracts and give owners the right to refuse renewal of such contracts after control of the association has passed from the developer.

269. See Note, *Living in a Condominium: Individual Needs Versus Community Interests*, 46 U. CIN. L. REV. 523 (1977).

270. OHIO REV. CODE ANN. § 5311.04(D) (Page Supp. 1978).

271. *Id.* § 5311.04(A).

vators, and other areas which are not part of any unit.²⁷² The common areas and facilities are maintained by an association of unit owners from which a board of managers is selected. Each unit is assessed, on the basis of its percentage share of the common areas, to cover the expenses of maintaining the common areas. As has been noted, "what gives rise to problems in condominium ownership . . . are the practical questions arising from the necessity of common elements . . ."²⁷³ Several issues involving common areas warrant examination.

a. *Assignment of Interest.* The first problem presented is the method of allocating each owner's interest in the common areas. The allocation determines each unit owner's voting rights, the amount that he will receive in the event of the condominium's sale or condemnation, the amount that he will be assessed to cover the expense of maintaining the common areas,²⁷⁴ and the interest in the common areas deemed conveyed upon sale.²⁷⁵ State enabling acts utilize various formulas for computing a unit owner's share in the common areas. The most common formula, which was used in Ohio before the recent amendments, establishes the owner's share in the proportion that the fair value of his individual unit bears to the aggregate fair value of all the units.²⁷⁶ Another widely used formula provides that the owner's interest must approximate the ratio of the floor area of his individual unit to the aggregate floor area of all the units.²⁷⁷ A few jurisdictions use other methods of determining the share of a unit owner in the common areas.²⁷⁸ Some states, for example, provide that the value of the interest in common areas is simply the value desig-

272. *Id.* § 5311.01(B). In addition, provision may be made for limited common areas, which are those areas reserved exclusively for a certain unit or units. *Id.* § 5311.01(K).

273. Kreider, *The Ohio Condominium Act*, 33 U. CIN. L. REV. 463, 464 (1964).

274. For a definition of common areas, see text accompanying note 272 *supra*.

275. Schreiber, *The Lateral Housing Development: Condominium or Home Owners Association*, 117 U. PA. L. REV. 1104, 1116-17 (1969). OHIO REV. CODE ANN. § 5311.04 (D) (Page Supp. 1978) provides that:

The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the deed, mortgage, lease or other instrument of conveyance or encumbrance.

276. See OHIO REV. CODE ANN. § 5311.04(B) (Page Supp. 1978); FEDERAL HOUSING ADMINISTRATION, MODEL STATUTE FOR THE CREATION OF APARTMENT OWNERSHIP § 6(a), reprinted in 1A P. ROHAN & M. RESKIN, *supra* note 22, app. B-3, at 27 (1973) [hereinafter cited as FHA MODEL ACT].

277. See, e.g., N.Y. REAL PROP. LAW § 339-i(1),-ii,-iv (McKinney Supp. 1978).

278. See Note, *supra* note 269, at 526.

nated in the declaration²⁷⁹ or that the unit owners are deemed to have equal shares unless otherwise provided for in the condominium instruments.²⁸⁰ A few states have made no provision dealing with common area ownership at all.²⁸¹

Often the allocation must be made at the time the declaration is filed and cannot be changed without unanimous approval of all affected owners.²⁸² This was the Ohio approach prior to the recent amendments.²⁸³ This combination of strict requirements concerning when interests may be created and how they can be changed creates restrictions on valuation that defeat the premise upon which the fair value formula is based and create unfairness both to the developer and the purchaser. Because fair market value usually must be determined at the time the declaration is filed²⁸⁴ and may not be changed without the unanimous approval of all affected unit owners,²⁸⁵ such statutory schemes fail to take account of later fluctuations in the value of units caused by inflation or improvements by unit owners.²⁸⁶ The developer also is restricted in offering different options or increasing the size of the development because of his earlier commitment to specific interest allocations.²⁸⁷ The owner who later pays more for his unit than earlier purchasers of comparable units or who makes extensive improvements on his unit may be at a disadvantage when insurance or condemnation proceeds are distributed, but he may come out ahead when costs are assessed.²⁸⁸

279. See I P. ROHAN & M. RESKIN, *supra* note 22, § 6.01[3], at 6-5 n.13.

280. See, e.g., CAL. CIV. CODE § 1353(b) (West Supp. 1978).

281. I P. ROHAN & M. RESKIN, *supra* note 22, § 6.01[3], at 6-5 n.13.

282. Schreiber, *supra* note 275, at 1117.

283. Several provisions in the previous Ohio Act combined to create strict requirements about when the interests had to be established and how they could be changed. Section 5311.02 of the original Ohio Act, OHIO REV. CODE ANN. § 5311.02 (Page 1970), provided that the Condominium Act applied only to property specifically submitted to its provisions by execution and filing of a declaration by the owner. Section 5311.06(C) added that no interest in a unit could be conveyed until the declaration, bylaws, and drawings had been filed. Hence, a condominium developer had to file the declaration at an early point during the life of the development. In addition, § 5311.04(B) provided that the percentage of interest in common areas had to be made at that early point as well. Furthermore, once the interests were determined and the declaration was filed, § 5311.04(C) provided that the interest could not be altered except by unanimous approval of all the unit owners affected.

284. Schreiber, *supra* note 275, at 1117.

285. I P. ROHAN & M. RESKIN, *supra* note 22, § 6.01[3], at 6-4.

286. See *id.* § 13.02[1][c], at 13-6; Schreiber, *supra* note 275, at 1117-18.

287. I P. ROHAN & M. RESKIN, *supra* note 22, § 13.02[1][c], at 13-6; Schreiber, *supra* note 275, at 1120.

288. One solution would require periodic reassessment. Schreiber, *supra* note 275, at 1119. This could prove impractical if done too often. I P. ROHAN & M. RESKIN, *supra*

The recent amendments attempt to alleviate the problems presented by the fair-value-at-the-date-of-declaration formula without requiring periodic reassessment. Under amended section 5311.04,²⁸⁹ the developer of a nonexpandable condominium is given additional flexibility in allocating percentages of interest in the common areas. The section retains the fair value ratio as an alternative but also permits common area percentages to be computed on the basis of unit size or on par value. Par value is defined as a "number expressed in dollars or points attached to a unit by a declaration."²⁹⁰ If a par value is assigned to one unit, it must be assigned to all. Substantially identical units must have the same par value. Units located at substantially different heights or with substantially different views, amenities, or other characteristics which might affect market value can, but do not have to, be considered substantially identical. Par value need not reflect sale price, fair market value, or appraised value.²⁹¹ Par value may not be used, however, to determine the common area interests in expandable condominiums unless the declaration requires additional units to be identical to the original units or unless the declaration describes the type of units that may be added and states the par value that will be assigned to new units.²⁹² Otherwise, any basis may be used for additional units that was used for the original property if it uniformly reallocates the interests of the original units when additional property is submitted.

The section does retain the requirements that the fair market value of the units must be determined on the date of filing the declaration and cannot be altered without the unanimous approval of all affected unit owners. Although the alternative methods of allocating interest in the common areas may alleviate this problem somewhat, problems remain with assigning a par value or determining size before the developer is accurately able to do so and retaining that determination to the subsequent disadvan-

note 22, § 6.01[4], at 6-7 n.20. Changing common interests at certain intervals could affect the mortgageability of units and could create frequent realty tax "assessments". Schreiber, *supra* note 275, at 1119. *Contra* I P. ROHAN & M. RESKIN, *supra* note 22, § 6.01[4], at 6-7. Only two states currently allow or require periodic assessment. ALASKA STAT. § 34.07.180(b) (1962) (bylaws shall provide for periodic reappraisal); WASH. REV. CODE ANN. § 64.32.050(2) (1966) (interests in common areas may not be changed except by utilizing procedures in the bylaws and by amending the declaration).

289. OHIO REV. CODE ANN. § 5311.04(B) (Page Supp. 1978).

290. *Id.* § 5311.01(Y).

291. *Id.* § 5311.04(B).

292. *Id.* § 5311.04(C).

tage of unit owners. It is unclear under the section whether the size and par value must be determined by the time the declaration is filed; the section speaks of only the fair market value in terms of the date of filing.²⁹³ However, since section 5311.05 requires that the declaration describe the percentage of interest appertaining to each unit, the basis of allocation,²⁹⁴ and each unit's approximate area,²⁹⁵ it is clear that the unit size and par value must be determined by the date of filing the declaration.

To some extent, the problems of early determination are minimized where unit size and par value are involved. Normally unit size is determinable before value, and when par value is used, fair market value need not be reflected. However, certain problems persist, particularly when the par value method is employed. When allocating interests in the common areas, the developer must attempt to assign the same par value to "substantially identical" units; what characteristics comprise par value is left to the developer's discretion. It is submitted that the power of discretion granted to the developer drains all meaning from the requirement that the same par value be assigned to substantially identical units. Furthermore, practical inequities among unit owners result where units are assigned the same par value even though their market values are unequal. Two owners may have identical voting rights and receive the same amount of liquidation proceeds even though one paid more for his unit. The same inequity will result in the situation of an owner who has made improvements on his unit that increased its value or who buys after the sale price has risen. As useful as these more flexible methods may seem, they are preferable only as long as the unit owner's interest approximates the value of his investment.

b. *Collection of Common Expenses and Assessments.* The success of a condominium project depends upon the board's or association's ability to collect from the unit owners money that will maintain common areas and provide other benefits for special or common purposes.²⁹⁶ A unit owner's proportionate interest in the common areas typically determines the amount of his assessment for common expenses. If a unit owner cannot or will not pay

293. *Id.* § 5311.04(B).

294. *Id.* § 5311.05(B)(6).

295. *Id.* § 5311.05(B)(5).

296. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1010 (1963); Theriot, *supra* note 231, at 1221.

his share of the common costs, the law must determine what method of inducement is best and also what should happen when a unit is sold by an owner who has an outstanding debt for common expenses. Under some statutes the association or board may bring a personal action to collect the assessment. The board usually is also empowered by statute to impose a lien on the delinquent owner's unit and interest in the common areas. This is generally considered to be the most effective remedy.²⁹⁷ Summary dispossession is inconsistent with the fee status of condominium ownership,²⁹⁸ and extrajudicial remedies²⁹⁹ are effective only against those owners who are late in their payments, not against those who steadfastly refuse to pay.³⁰⁰

The FHA Model Act and the majority of states, including Ohio, employ the lien technique. The unpaid expenses constitute a lien upon the unit, prior to all but certain designated liens.³⁰¹ Such a lien may be foreclosed and the unit and common area interest sold.³⁰² However, the time period necessary to accomplish foreclosure may be substantial; meanwhile, the burden of extra expenses is placed on the other unit owners.³⁰³ A minority of states³⁰⁴ use the trust and lien-upon-sale technique. Upon the sale of the condominium interest all unpaid expenses are first paid out of the sale price or by the purchaser of the unit.³⁰⁵ A trust is imposed upon the seller for the amount of unpaid assessments, and the association is usually given a cause of action against the buyer for a money judgment that is enforceable as a lien against the unit.³⁰⁶ As mentioned, the association's lien may have priority over all but certain other liens specified in the statute, typically tax

297. Theriot, *supra* note 231, at 1221.

298. Berger, *supra* note 296, at 1011.

299. See ALASKA STAT. § 34.07.220 (1975) (permitting utilities to be severed after 10 days' notice); WASH. REV. CODE ANN. § 64.32.200 (1)(a) (1966).

300. I P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[1], at 6-25.

301. FHA MODEL ACT, *supra* note 276, § 23(a); accord, HAW. REV. STAT. § 514A-90(A) (Supp. 1977); states cited in I P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[2] at 6-25 to 26 n.6; OHIO REV. CODE ANN § 5311.18 (Page 1970). *Contra*, ILL. ANN. STAT. ch. 30, § 309 (Smith-Hurd 1969), discussed in note 307 *infra*.

302. I P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[2], at 6-26 to 27.

303. *Id.* at 6-28.

304. See, e.g., N.Y. REAL PROP. LAW § 339-2 (McKinney Cum. Supp. 1978).

305. I P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[2][b], at 6-28.

306. *Id.* at 6-28 to 29. This procedure allows a delinquent to live in a unit without paying assessments, mortgage the unit to almost its full value, and then sell it for the value of whatever small equity remains. Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 204 n.31 (1963), see, e.g., FHA MODEL ACT, *supra* note 276, § 23(a).

liens and the first mortgages of record.³⁰⁷ While beneficial to the association, the lien technique may present problems for the individual unit owner since secondary borrowing is discouraged, harsher terms are imposed on subordinated loans, and financing for home improvements may become more difficult because mechanic's and materialman's liens are subordinated.³⁰⁸

Section 5311.18,³⁰⁹ left relatively unaltered by the recent amendments, authorizes the unit owners association to have a lien on the interest in the unit and appurtenant common area of any unit owner who has failed to pay his portion of the common expenses for ten days after they become due, unless otherwise provided in the declaration or bylaws. A certificate must be filed with the county recorder, pursuant to authorization given by the board of managers. This certificate must contain a description of the unit, the name of the record owner, and the amount of the unpaid portion of common expenses, and it must be subscribed by the chief officer of the association. The lien remains valid for five years unless released, satisfied, or discharged before that time. The section also gives priority to such a lien over any subsequently created encumbrance, except real estate tax and assessment liens and liens of first mortgages of record. Liens obtained under section 5311.18 may be foreclosed, as is a mortgage on real property, by an action brought on behalf of the association by the chief officer so authorized by the board. During a foreclosure action the owner must pay reasonable rent for his unit, and a receiver may be appointed to collect it. The association, if authorized by the board, may become a purchaser at the sale, unless prohibited by the declaration or bylaws.³¹⁰ In addition, section 5311.23 allows greater flexibility in the collection of common expenses by permitting the association to sue for damages to recover unpaid assessments.³¹¹ The delinquent owner, under section 5311.18, has a ten-day grace period and an action to

307. See, e.g., FHA MODEL ACT, *supra* note 276, § 23(a); HAW. REV. STAT. § 514A-90(A) (Supp. 1977). But see ILL. ANN. STAT. ch. 30, § 309 (Smith-Hurd 1969), where if the board sends the mortgagee notice of the owner's default, the mortgage is subject to liens due within 90 days. The mortgagee may pay the delinquent expenses and have the lien on the unit rank equal to his mortgage.

308. Berger, *supra* note 296, at 1011.

309. OHIO REV. CODE ANN. § 5311.18 (Page Supp. 1978).

310. *Id.* § 5311.18(B).

311. *Id.* § 5311.23.

discharge the lien if he feels it has been improperly imposed.³¹² Thus Ohio law strikes a balance between the interests of the unit owner and the association.

The Ohio statute, however, remains silent in two significant areas. First, additional changes could be made in the statute to improve the association's position when it attempts to impose a lien. The board or association should have the power to sell, as provided in California,³¹³ and to charge interest on the amount due, as provided in Georgia.³¹⁴ Second, the statute is also silent on the liability of grantees who purchase a unit with unpaid assessments either at a voluntary or involuntary sale.³¹⁵ Since the association is required to file a certificate of the lien, grantees are

312. *Id.* § 5311.18(C). The court may discharge all or part of an improperly imposed lien. *Id.*

313. CAL. CIV. CODE § 1356 (West Cum. Supp. 1978).

314. GA. CODE ANN. § 85-1641e(b) (1978). Some statutes explicitly authorize the unit owners association to sue for money damages without waiving the right to its lien. *See, e.g.*, FHA MODEL ACT, *supra* note 276, § 23(a); FLA. STAT. ANN. § 718.116(5)(a) (West Supp. 1978). In Ohio it has been held that where a new remedy is provided by statute for an existing common law right, it is cumulative (unless denied expressly or by implication), and the plaintiff may pursue either the statutory or common law remedy. *Phillips Sheet & Tin Plate Co. v. Griffith*, 98 Ohio St. 73, 120 N.E. 207 (1918). Under OHIO R. CIV. P. 8(E)(2), a party may set forth two or more claims in the alternative, and may state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or equitable grounds. Thus, the association could plead the damages claim and lien simultaneously; once the case came to judgment, the association would have to elect which remedy to enforce. *See* 98 Ohio St. 73, 120 N.E. 207. Ohio case law has also held that a lienor does not waive his right to foreclose the lien by obtaining a judgment and levying on the property. *Sun Fin. & Loan Co. v. Hadlock*, 171 Ohio St. 89, 167 N.E.2d 780 (1960); *Economy Sav. & Loan Co. v. Lindsey*, 96 Ohio App. 400, 122 N.E.2d 36 (10th Dist. 1954). If the association prevailed on the damages claim, it could not thereafter foreclose the lien; if, however, the unit owner prevailed or the association's recovery was for less than the full amount of the lien, the association could then maintain an action based on the lien. *See Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943). Thus, a provision explicitly authorizing suit for damages without waiving a foreclosure action, as provided in Florida and the FHA Model Act, does not appear necessary in Ohio.

315. Whichever lien technique is used, in most states the grantor and grantee upon a voluntary sale are held jointly and severally liable for remaining unpaid assessments, and the grantee is given a right to proceed against the grantor for any amount paid. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[3], at 6-31; *see, e.g.*, FLA. STAT. ANN. § 718.116(1) (West Supp. 1978). In the case of foreclosure, however, many states do not hold the first mortgagee or other purchaser solely liable for unpaid assessments. Rather, the assessments become common expenses. FHA MODEL ACT, *supra* note 276, § 23(b); *see, e.g.*, FLA. STAT. ANN. § 718.116(b) (West Supp. 1978). This distinction between voluntary and involuntary sales is meant to encourage financing, even at the association's expense. Note, *The Alabama Condominium Ownership Act: How to Stand a House Divided*, 27 ALA. L. REV. 177, 202 (1975). A problem may arise either if the association refuses to pay to the former owner any excess from the proceeds over what was owed or, more commonly, if the association and owner disagree on the amount owed to the owner after costs and charges. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 6.04[3], at 6-36.

provided notice of the lien,³¹⁶ and it, therefore, would not be inequitable to hold them liable for the unpaid assessments. The liability of purchasers at a foreclosure sale would seem to depend upon whether the mortgage being foreclosed was superior to the association's lien.³¹⁷ The Ohio statute should answer these issues explicitly. The legislature might also adopt a provision found in some statutes that gives the owner, purchaser, and lienors the right to request from the association information regarding the amount of unpaid assessments and then binds the association to the amount it reports.³¹⁸

2. *Internal Governance*

Although the recent amendments leave the 1963 Act's provisions regarding condominium internal governance and administration relatively unaltered,³¹⁹ the structure and method of condominium governance is nevertheless a fundamental aspect of condominium ownership which deserves analysis. Three areas warrant specific attention: (1) condominium governance structure, (2) unit use and alienation restrictions, and (3) removal of the condominium from the operation of the statute.

a. *Condominium Governance Structure.* As provided by statute in all states, the unit owners association bears the primary responsibility for the administration and management of the condominium.³²⁰ State condominium enabling acts typically provide that the declaration require that each unit owner be a member of the association.³²¹ The association is governed by the bylaws, which is essentially a code of operating rules and regulations.³²² The association plays a dual role as business and finance manager

316. Some state statutes provide that recording of the declaration constitutes record notice of the lien. *See, e.g.*, GA. CODE ANN. § 85-1641e(a) (1978); UNIFORM CONDOMINIUM ACT, § 3-115(c), *reprinted in* 1 P. ROHAN & M. RESKIN, *supra* note 22, § 6.05, at 6-37.

317. If the mortgage is superior to the lien for common expenses, foreclosure should cut off the common expenses lien. Zinman, *Condominium Investments and the Institutional Lender—A Review*, 48 ST. JOHN'S L. REV. 749, 753 (1974).

318. *See, e.g.*, ALA. CODE tit. 35, § 35-8-17(2) (1975).

319. The amendments do, however, add detailed requirements for the establishment of the unit owners association and the relinquishment of developer control of the association to unit owners. *See* notes 197-230 *supra* and accompanying text.

320. *See* 1 P. ROHAN & M. RESKIN, *supra* note 22, § 5.04, at 5-21; Hyatt, *supra* note 202, at 978.

321. *See, e.g.*, OHIO REV. CODE ANN. § 5311.05(B)(7) (Page Supp. 1978).

322. 1 P. ROHAN & M. RESKIN, *supra* note 22, §§ 3.03, 7.03[1], .03[2]; *see, e.g.*, OHIO REV. CODE ANN. § 5311.08(B) (Page Supp. 1978).

of the development and as a minigovernment dealing with public safety, assessments, rulemaking, and enforcement. The association's power to regulate the use and enjoyment of property has constitutional implications, requiring at least a minimal observance of the dictates of due process.³²³ The association typically delegates its management authority to a board of managers elected by the unit owners as members of the association.³²⁴ The major function of the board is the enforcement of the bylaws and any administrative rules that are adopted. The board, in turn, elects officers and may establish standing committees to help run the development and hire professional advisors such as an accountant, attorney, or professional agent to manage the property.³²⁵

i. *Bylaw Provisions.* Section 5311.08 of the Ohio Act outlines the condominium's governance structure and the contents of the bylaws.³²⁶ The section requires the establishment of a unit owners association to be governed by the bylaws and stipulates that any amendments to the bylaws must be set forth in an amendment to the declaration.³²⁷ Unless the declaration indicates otherwise, the bylaws must provide for the election of a board of managers³²⁸ and its officers.³²⁹ The bylaws must also delineate the powers of the board³³⁰ and set out procedures for calling and conducting the owners association meetings,³³¹ authorizing and performing repairs of the common areas,³³² assessing and collecting common expenses,³³³ distributing common profits,³³⁴ and adopt-

323. Hyatt, *supra* note 202, at 982-84.

324. *See, e.g.*, OHIO REV. CODE ANN. § 5311.08(B)(1) (Page Supp. 1978).

325. Hennessy, *Condominium Management*, 48 ST. JOHN'S L. REV. 1064, 1068 (1974); *see* 1 P. ROHAN & M. RESKIN, *supra* note 22, §§ 17A.02-03.

326. OHIO REV. CODE ANN. § 5311.08 (Page Supp. 1978).

327. *Id.* § 5311.08(A).

328. *Id.* § 5311.08(B)(1).

329. *Id.* § 5311.08(B)(3).

330. *Id.* § 5311.08(B)(1).

331. *Id.* § 5311.08(B)(2). This includes the establishment of a quorum requirement. *See* text accompanying notes 338-39 *infra*.

332. OHIO REV. CODE ANN. § 5311.08(B)(4) (Page Supp. 1978).

333. *Id.* § 5311.08(B)(5).

334. *Id.* § 5311.08(B)(6). Common profits is defined as:

The amount by which the total income received from assessments charged for special benefits to specific units, rents received from rentals of equipment or space in common areas, and any other fee, charge or income other than common assessment exceeds expenses allocable to the income, rental, fee, or charge.

Id. § 5311.01(G).

ing administrative rules.³³⁵ Despite the numerous items required to be in the bylaws, the Ohio statute still accords the unit owners considerable flexibility in determining the actual details of administration. Given the varying sizes, nature, and needs of condominiums, this flexibility is necessary.

Another element which must be included in the bylaws is a quorum requirement, expressed in terms of percentage of interest in the common areas, for meetings of the owners association.³³⁶ The quorum requirement is included in the bylaw provisions³³⁷ to protect against a minority of unit owners making decisions adverse to majority interests. Ohio, like many states,³³⁸ allows the association to determine what percentage will constitute a quorum. In contrast, the enabling acts of several states specify a percentage, usually a majority.³³⁹ The drawback of a statutory quorum requirement is that in a larger condominium obtaining a quorum for routine meetings may be difficult, if not impossible.³⁴⁰ Thus, the flexible Ohio provision is a more suitable approach.

The statute's general disclosure provisions³⁴¹ should be extended to include the bylaws in order to improve the position of prospective purchasers. Although the recent amendments require the developer to disclose information regarding the management of the development,³⁴² they do not require the developer,³⁴³ the governing board, or unit owners to provide prospective purchasers with copies of the declaration, bylaws, or administrative rules.³⁴⁴ Since the Act's general disclosure requirements do not include all the information covered in the bylaws, an explicit requirement would help both initial and subsequent unit purchasers. Full disclosure of the bylaws is important also because a unit owner is potentially liable for damages caused by noncompliance with the

335. *Id.* § 5311.08(B)(7).

336. *Id.* § 5311.08(B)(2).

337. See generally 1 P. ROHAN & M. RESKIN, *supra* note 22, § 5.04.

338. See states cited in *id.* § 5.04, at 5-22 n.5.

339. See states cited in *id.* § 5.04, at 5-22 to 23 n.6.

340. See *id.* § 5.04, at 5-24.

341. OHIO REV. CODE ANN. § 5311.26 (Page Supp. 1978). See notes 326-35 *supra* and accompanying text.

342. OHIO REV. CODE ANN. § 5311.26(H) (Page Supp. 1978).

343. The recent amendments do, however, require that the offering statement apprise prospective purchasers of their right to review the condominium instruments. *Id.* § 5311.26(J).

344. Compare CAL. CIV. CODE § 1360 (West Supp. 1978) (requiring the governing body or the owners of a unit to provide prospective purchasers with these documents on request and allowing an action for actual damages and punitive damages of up to \$500 plus attorneys' fees upon failure to do so).

bylaws.³⁴⁵

ii. *Powers and Duties of Directors and Officers.* Any discussion of condominium governance necessarily involves a consideration of the powers and duties of the board of managers (directors) and its officers, who manage the condominium for the unit owners. Questions can arise regarding what functions the board or its officers may be empowered to perform and what the standard of liability for nonperformance of duties should be.

Section 5311.08 of the Ohio Act is the source of the board of managers' power. It requires that the bylaws provide for the annual election of one-third of the board members from among the membership and specifies that the board is empowered to act for the association unless the declaration or bylaws provide otherwise.³⁴⁶ The section further requires that the bylaws state the board's powers and duties, the compensation for board members, the method for their removal, and the rules for hiring a professional manager or managing agent.³⁴⁷ The bylaws also must provide for the election by the board of a president, one or more vice presidents, a secretary, a treasurer, and any other officers of the association.³⁴⁸

While the propriety of various actions taken by condominium boards has been adjudicated in other jurisdictions,³⁴⁹ the power of a board to engage in certain transactions, such as borrowing money, remains unclear.³⁵⁰ A possible legislative solution to this uncertainty would be to enumerate specifically board powers. Such a restrictive approach, however, could render the board incapable of responding to unforeseen problems. Since managerial

345. See OHIO REV. CODE ANN. § 5311.23 (Page Supp. 1978).

346. *Id.* § 5311.08(B)(1).

347. *Id.*

348. *Id.* § 5311.08(B)(3).

349. See, e.g., *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975) (upholding right of directors to adopt a rule prohibiting the use of alcoholic beverages in the condominium clubhouse); *Vinik v. Taylor*, 270 So. 2d 413 (Fla. Dist. Ct. App. 1972) (upholding right of board of managers to approve an alteration of a unit owner's balcony); *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. Dist. Ct. App.), *cert. denied*, 254 So. 2d 789 (Fla. 1971) (requiring unit owner to restore an altered portion of the unit's exterior to its original condition); *Amoruso v. Board of Managers of Westchester Hills Condominium*, 38 App. Div. 845, 330 N.Y.S.2d 107 (1972) (approving expenditure of \$500 by board of managers when bylaws provided that additions costing less than \$5,000 need not be approved by unit owners). See also Note, *supra* note 269, at 525 nn.17-19.

350. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 17A.13; see Hyatt & Rhoads, *supra* note 170, at 920 n.17.

flexibility is necessary to the vitality of a condominium, restrictive legislation seems undesirable.

There is currently some debate over whether unit owners associations should be incorporated.³⁵¹ Some state statutes have resolved this by specifically requiring the incorporation of the owners association,³⁵² bringing the established body of corporate law to condominium management. Although the Ohio condominium statute remains silent on the subject of incorporation, presumably the owners association may incorporate as either an ordinary or a nonprofit corporation. The recent amendments fail to include an express provision that the association may incorporate. A mandatory requirement of incorporation is, however, not necessary in order to define the duties of the association's directors. Commentators have been disposed toward imposing fiduciary duties upon the directors, officers, and managers of unincorporated associations.³⁵³ However, since Ohio case law is silent on the subject, a legislative basis for imposing a fiduciary obligation upon the managers of the association would be appropriate.

Although it may be permissible to impose legislatively a fiduciary duty upon the association's directors and officers, any further delineation of duties in the enabling act would not be desirable. As in defining the board's power,³⁵⁴ it is difficult to conceive of a statutory scheme that would specify all the duties of directors and officers but that would not severely limit the functioning of the board. Abusive exercise of power by directors and officers could be curbed through the adoption of a provision similar to Hawaii's, which prohibits a director who has a conflict of interest from voting.³⁵⁵ It has also been suggested that the devel-

351. See, e.g., Hyatt & Rhoads, *supra* note 170, at 919-20; Note, *Condominiums: Incorporation of the Common Elements—A Proposal*, 23 VAND. L. REV. 321 (1970).

In Ohio the unincorporated condominium association is analogous to an unincorporated association since § 5311.08 provides that the management responsibility rests with the owners association. Compare OHIO REV. CODE ANN. § 5311.08(B)(1) (Page Supp. 1978) with *id.* §§ 1745.01-04 (Page 1964 & Supp. 1977) (unincorporated association). This responsibility may in turn be delegated to the board and its officers. See generally *Miazga v. International Union*, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); *McFadden v. Leeka*, 48 Ohio St. 513, 28 N.E. 874 (1891); *Thraves v. White City Beach Ass'n*, 7 Ohio L. Abs. 661 (6th Dist. Ct. App. 1929).

352. E.g., FLA. STAT. ANN. § 718.111(1) (West Supp. 1978); GA. CODE ANN. § 85-1632e(a) (1978).

353. H. OLECK, NON-PROFIT CORPORATIONS, ORGANIZATIONS AND ASSOCIATIONS § 40, at 85 (3d ed. 1974), cited in Hyatt & Rhoads, *supra* note 170, at 921 n.25.

354. See text accompanying notes 349-50 *supra*.

355. HAW. REV. STAT. § 514A-82(14) (Supp. 1977). The statute prohibits any person employed in a management capacity from serving on the board. *Id.* § 514A-82(15).

oper be prohibited from serving on the board or being employed in a managerial capacity.³⁵⁶ This would deny unit owners the benefit of the developer's managerial expertise. As a protection against potential developer abuse, this restriction is too broad; a narrower prohibition against voting on issues in which a conflict of interest exists would furnish a better solution.

iii. *Voting Rights.* The most important voting right of each unit owner is the right to vote for the association's board of managers.³⁵⁷ There are also voting rights for matters not within the ambit of day-to-day management. Thus, a unit owner may vote on any proposed amendments to the declaration,³⁵⁸ any proposed reallocation of the percentages of interest in the common areas,³⁵⁹ repair of damaged common areas and facilities,³⁶⁰ rehabilitation of the property,³⁶¹ and removal of the property from the operation of the condominium act.³⁶²

The Ohio Act imposes voting percentages that become progressively stricter as the type of action requiring a vote becomes more extraordinary. For example, a decision to rehabilitate condominium property³⁶³ or to amend the declaration or bylaws³⁶⁴ requires at least seventy-five percent approval; a change in the percentage of interest in the common areas requires unanimous approval.³⁶⁵ The recent statutory amendments do not alter this approach, but they do clarify that amendments to the declaration which alter percentage interests in common areas must receive unanimous approval.³⁶⁶

356. Rohan, *supra* note 45, at 1038.

357. See OHIO REV. CODE ANN. § 5311.08(B)(1) (Page Supp. 1978).

Section 5311.08 does not require that the manner in which voting rights are apportioned among the unit owners be specified in the bylaws. The contention, however, that Ohio's enabling act does not specify how voting rights are to be determined, 1 P. ROHAN & M. RESKIN, *supra* note 22, § 5.04, at 5-25, is not entirely accurate. Unless otherwise provided in the declaration, § 5311.22 establishes the voting power of each unit owner as his percentage of interest in the common areas and facilities appurtenant to his unit.

358. OHIO REV. CODE ANN. § 5311.05(B)(9) (Page Supp. 1978).

359. *Id.* § 5311.04(D).

360. *Id.* § 5311.14(B) (Page 1970).

361. *Id.* § 5311.15.

362. *Id.* § 5311.17.

363. *Id.* § 5311.15.

364. *Id.* § 5311.05(B)(9) (Page Supp. 1978).

365. *Id.* § 5311.04(D); *accord*, Grimes v. Moreland, 41 Ohio Misc. 69, 322 N.E.2d 699 (C.P. Franklin County 1974).

366. OHIO REV. CODE ANN. §§ 5311.04(D), .05(B)(9) (Page Supp. 1978).

Most jurisdictions have adopted this general approach.³⁶⁷ The statutes frequently let the bylaws of the individual condominium determine the details about voting rights in director elections.³⁶⁸ This flexible approach, as in the Ohio statute, will foster the smooth operation of the condominium and thus protect the unit owners' investments.³⁶⁹

b. *Unit Use and Alienation Restrictions.* The condominium form of ownership generally entails a situation in which many people must live in proximity to one another. Thus, there is a need for certain restrictions on unit use and alienation that will ensure a peaceful existence among neighbors and yet still remain consistent with fee simple ownership.

i. *Use Restrictions.* The majority of state enabling statutes provide that the declaration, deeds, and bylaws, as well as any administrative rules and regulations promulgated by the board, may contain restrictions on the use of particular units or the common areas.³⁷⁰ Use restrictions typically include the prohibition of annoying or nuisance-creating activities; the regulation or prohibition of pets, alcoholic beverages, or children; and limitations on alterations or modifications of the interior or exterior of units.³⁷¹ The major problems presented by use restrictions pertain to their validity and enforcement.

Section 5311.19 of the Ohio Act requires the unit owners, their tenants, and all those in possession and control of any part of the condominium property to comply with the restrictions and covenants in the deed, declaration, and bylaws and with any administrative rules that are adopted.³⁷² An action for damages or

367. See, e.g., FLA. STAT. ANN. § 718.110(4) (West Supp. 1978); ILL. ANN. STAT. ch. 30, § 304(c) (Smith-Hurd 1969); WASH. REV. CODE ANN. § 64.32.090(13) (1966).

368. See, e.g., CONN. GEN. STAT. ANN. § 47-80 (West 1978); FLA. STAT. ANN. § 718.112(2)(a) (West Supp. 1978); HAW. REV. STAT. § 514A-82(1) (Supp. 1977); VA. CODE § 55-79.73(b) (Supp. 1978).

369. For a discussion of the importance of flexibility in day-to-day administration, see text accompanying notes 336-41 *supra*.

370. See jurisdictions cited in I P. ROHAN & M. RESKIN, *supra* note 22, § 10.02 n.17; see, e.g., OHIO REV. CODE ANN. § 5311.08(B)(7) (Page Supp. 1978).

371. See I P. ROHAN & M. RESKIN, *supra* note 22, § 10.02, at 10-3. See generally Hyatt & Rhoads, *supra* note 170, at 930-37.

372. OHIO REV. CODE ANN. § 5311.19 (Page 1970). The amendments provide that the declaration of an expandable condominium must state whether there are any limitations on the location of any improvements that may be made on any part of the property added to the original development. *Id.* § 5311.05(C)(7) (Page Supp. 1978). For nonstructural improvements to the additional property, the declaration must describe the improvements that must or may be made and state whether there are any restrictions on these improvements. *Id.* § 5311.05(C)(11).

injunctive relief may be brought by the owners association or by unit owners, individually or collectively, for failure to comply.³⁷³ Section 5311.20 provides that the association may be sued in an action relating to any of its obligations or duties, presumably including the obligation or duty to enforce use restrictions. The recent amendments broadened the scope of available judicial relief for noncompliance with any provision of the condominium instrumentation. Now any interested person may bring an action for a declaratory judgment to determine his legal relations under any of the condominium instruments or may obtain an injunction against one who refuses to comply or threatens not to comply with any lawful provision of the instruments.³⁷⁴ The amendments also allow a class action suit by one or more unit owners.³⁷⁵ Further, the instruments may be enforced against the condominium property or anyone who owns or has owned an interest in the property.³⁷⁶

Although there is no Ohio case law on the issue of the validity and enforceability of use restrictions, courts in other jurisdictions have generally held that the restrictions must not be aimed at a specific person in the absence of reasonable justification and must not be destructive of any vested right.³⁷⁷ Commentators analyzing these cases have concluded that, in order to be valid and enforceable, restrictions on use must be adopted pursuant to the procedures of the enabling act, must be reasonable, and if created by rulemaking, must comport with due process.³⁷⁸ These standards should apply in Ohio either by judicial creation or legislative enactment. Legislation should explicitly provide that the bylaws and rules contain specific, detailed standards. Further, all unit owners, as members of the association, should be given the opportunity to review and comment on any proposed administrative rules before they become effective.³⁷⁹

Although the amendments do broaden the scope of available judicial relief for failure to comply with use restrictions, the statute fails to provide more adequate enforcement alternatives. While courts have generally been willing to uphold board action

373. OHIO REV. CODE ANN. § 5311.19 (Page 1970).

374. *Id.* § 5311.23 (Page Supp. 1978).

375. *Id.*

376. *Id.*

377. See cases cited in Note, *supra* note 269, at 530 n.45; Note, *Promulgation and Enforcement of House Rules*, 48 ST. JOHN'S L. REV. 1132, 1135 nn.27-30 (1974).

378. See Hyatt, *supra* note 202, at 983-84, 1001-05; Hyatt & Rhoads, *supra* note 170, at 918-19, 930-37; Note, *supra* note 269, at 529-30.

379. Hyatt, *supra* note 202, at 1005.

on the use of property,³⁸⁰ court enforcement is often burdensome and slow.³⁸¹ Litigation may lead to animosity, factions among unit owners, sale of units, and foreclosures.³⁸² A legislative solution to the inadequacy of a judicial enforcement might take the form of an informal enforcement mechanism, such as an internal administrative hearing procedure or an arbitration board.³⁸³ Either of these means would probably provide a more efficient resolution of disputes and would promote effective condominium administration. Judicial enforcement would properly be left only as a last resort.

Another criticism of the amendments is that they fail to require that the written offering statement³⁸⁴ set forth the use restrictions. The courts can cure this omission by interpreting the required disclosure of "material circumstances or features affecting the development"³⁸⁵ to include disclosure of use restrictions. The amendments contemplate an indirect form of disclosure by requiring that the written offering statement apprise prospective purchasers of their right to review the condominium instruments.³⁸⁶ The deficiency of this form of disclosure is that it does not necessarily require disclosure of use restrictions contained in administrative rules.

ii. *Alienation Restrictions.* The primary check on complete freedom of alienation of condominium ownership interests is the right of first refusal. The right of first refusal means that a unit owner who desires to sell or lease his unit must give the association the right to purchase or lease the unit on the same terms offered by the prospective purchaser or lessee. It raises two problems: (1) its possible unenforceability as a restraint on alienation and (2) its possible invalidity under the Rule Against Perpe-

380. See note 349 *supra*.

381. Commenting on judicial action as a means of enforcement, one writer has concluded that "with high court and legal costs, and with the tortoise-like nature of the judicial process, these sanctions are of limited value." 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.02, at 10-7; see Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U. L. REV. 137, 146 (1964).

382. Note, *supra* note 377, at 1132.

383. Note, *supra* note 269, at 529-30.

384. OHIO REV. CODE ANN. § 5311.26 (Page Supp. 1978). See note 62 *supra* and accompanying text.

385. OHIO REV. CODE ANN. § 5311.26 (Page Supp. 1978). See note 63 *supra* and accompanying text.

386. See OHIO REV. CODE ANN. § 5311.26(J) (Page Supp. 1978).

tuties.³⁸⁷

Many condominium enabling acts, including Ohio's, specifically state that each unit and the appurtenant interest in the common areas constitute real property for all purposes.³⁸⁸ Hence a right of first refusal might be unenforceable as a restraint on alienation by analogy to the law on restraints on alienation of a fee.³⁸⁹ The amendments do not resolve the question of the applicability of the doctrine of free alienability to condominium transactions.

Since the Act provides that any restraints on alienability must be disclosed in the written statement,³⁹⁰ it might be presumed that Ohio law now implicitly recognizes the validity of alienation restrictions in condominium transactions as long as such restraints are revealed to prospective unit purchasers. However, a closer examination of the Ohio approach to restraints on alienation reveals that this presumption is improper. In Ohio not all restraints on alienation are void *per se*; only those restraints on alienation which are unreasonable or against public policy are prohibited.³⁹¹ Thus the disclosure requirement cannot be presumed to validate all properly revealed restraints. The amendments merely add the requirement of disclosure to the test of enforceability of alienation restraints. It is reasonable to conclude that if the legislature had decided to exempt condominium property from the operation of the rule, it would have done so explicitly.³⁹²

Although the applicability of the Rule Against Perpetuities to rights of first refusal in the condominium context is somewhat uncertain,³⁹³ a right of first refusal arguably creates an interest in

387. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03[1], at 10-15.

388. OHIO REV. CODE ANN. § 5311.03(A) (Page Supp. 1978). See jurisdictions cited in 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03[1], at 10-11 n.2.

389. *See id.* § 10.03[1], at 10-16 to 17.

390. OHIO REV. CODE ANN. § 5311.26(N) (Page Supp. 1978).

391. *See, e.g.,* Raisch v. Schuster, 47 Ohio App. 2d 98, 100-01, 352 N.E.2d 657, 659 (1st Dist. 1975) (declaring an implied covenant among tenants in common not to partition to be void as an unreasonable restraint on alienation, but expressing a willingness to enforce such a covenant containing an express time limitation reasonably related to the purposes of the restriction).

392. *See* 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03[1], at 10-16 to 19. The authors recommend that the reasoning of the court in *Gale v. York Center Community Coop.*, 211 Ill. 2d 86, 171 N.E.2d 30 (1961) (upholding the validity of a right of first refusal in a cooperative arrangement) be carried over into the condominium area. The *Gale* court balanced the benefits of the restraint, such as harmonious living and reduction of the risk of financial interdependence, against the harms caused by the restraint, such as the inability of the owner to freely convey his interest, inconvenience, and possible economic loss.

393. Rhode Island and Utah have exempted condominium property from the rule against restraints on alienation. R.I. GEN. LAWS § 34-36-28 (1969); UTAH CODE ANN.

realty that is subject to the Rule. The effect of applying the Rule Against Perpetuities would limit the right of first refusal to the period of the Rule rather than the life of the condominium. The legislature could resolve this ambiguity, as has been done in some states, by adopting a provision making the Rule inapplicable to any document executed pursuant to the Act.³⁹⁴ Because of the controversy surrounding the application of the Rule, and its limited utility in the condominium context,³⁹⁵ such a provision would be desirable.

c. *Removal from the Statute.* As a matter of internal governance, the decision to remove a condominium from the operation of the Act is of vital importance. The general prohibition against partition of the common areas³⁹⁶ is necessary to the existence of a condominium; however, under some circumstances, partition and sale of the property or termination of the condominium may become desirable. Deterioration of the surrounding neigh-

§ 57-8-28 (1974). According to the Restatement of Property, a provision that the owner of property shall not sell it without first giving a designated person the opportunity to meet the offer does not constitute an invalid restraint on alienation as long as it does not violate the Rule Against Perpetuities. RESTATEMENT OF PROPERTY § 413(1) (1944). Florida has adopted the Restatement approach. See *Chianese v. Culley*, 397 F. Supp. 1344 (S.D. Fla. 1975) (holding that a right of first refusal is not invalid as long as there is no absolute restriction against sale without the permission of the second party). Massachusetts has adopted a permissive approach, authorizing bylaws to provide for a right of first refusal, as long as the right is not used to discriminate on the basis of race, creed, color, or national origin, MASS. ANN. LAWS. ch. 183A, § 12(c) (*Michie/Law. Co-op* 1977). See 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03[2], at 10-20 to 27 and authorities cited therein; Ross, *Condominiums and Pre-Emptive Options: The Right of First Refusal*, 18 HASTINGS L.J. 585, 590-92 (1967). If a condominium unit owner's interest is regarded as a fee simple absolute, the granting of an option to purchase in the owners association would have to be limited to the period of the rule. Rohan and Reskin point out, however, that since it is actually the owners association, as collective owner of the fee interest in the common area, that is receiving the preemptive option, the option may be excepted from the Rule Against Perpetuities as being merely an option annexed to one owner's interest in favor of all the unit owners. The authors also analogize to a leasehold interest exception to the Rule Against Perpetuities. They conclude that the right of first refusal granted to all the owners is different from such a right in gross and should be upheld as socially desirable.

394. *E.g.*, R.I. GEN. LAWS § 34-36-28 (1969); UTAH CODE ANN. § 57-8-28 (1974). See jurisdictions cited in 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03[2], at 10-22 n.26.

395. See 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10.03(2), at 10-20 to 22.1. The authors point out that measuring the option to purchase in the association by the period of the Rule is ineffective since the duration should be the life of the condominium. An alternative to the Rhode Island and Utah approach would be to set an arbitrary time limit in reference to the life of the condominium that would not exceed the period of the Rule. As a matter of policy, the authors argue, the Rule should not be applied to commercial transactions with reasonable objectives.

396. OHIO REV. CODE ANN. § 5311.04(A) (Page Supp. 1978).

borhood, obsolescence, condemnation, or total or partial destruction of the condominium property are typical circumstances.³⁹⁷ Protection should be provided, however, to those owners who wish to continue the condominium³⁹⁸ and to creditors who have liens on the condominium property.

Section 5311.17, addressing removal and partition of the condominium property,³⁹⁹ was unchanged by the recent amendments. Unless otherwise provided by the declaration, property may be removed from the operation of the Act by the unanimous vote of all unit owners.⁴⁰⁰ Liens and encumbrances on all or any part of the property, except taxes and assessments not yet due, must first be paid, released, or discharged.⁴⁰¹ A certificate, signed by the chief officer of the board of managers of the association and certifying that all liens and encumbrances on the common areas have been satisfied, must be filed with the county auditor and recorded.⁴⁰² Each unit owner must certify the same as to his individual unit.⁴⁰³ Upon removal, the entire property is owned in common by the unit owners. Each unit owner's undivided interest in the property is the percentage of interest in the common areas owned prior to termination.⁴⁰⁴

The present provisions for voluntary removal could be amended to provide flexibility for the majority as well as protection for the minority. First, Ohio should require a less than unanimous vote for termination and removal, absent a provision in the declaration specifying otherwise, because unanimity among the

397. See KERR, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 43 (1963).

398. *Id.* But see I P. ROHAN & M. RESKIN, *supra* note 22, § 8.02[2], at 8-10 to 11. ("There may be sound reasons why a small but obstinate minority should not be able to defeat the desires of a majority.")

399. OHIO REV. CODE ANN. § 5311.17 (Page 1970).

400. The opening language of § 5311.17(A) is ambiguous. It is unclear whether the phrase "[u]nless otherwise provided by the declaration" refers to the unanimous vote or the ability to elect to remove the property from the chapter. Some support for the proposition that a declaration in Ohio may provide for removal of property by less than a unanimous vote may be had by reference to Florida law. The termination provision of the original Florida condominium enabling act was interpreted to authorize less than unanimous approval for removal. McCaughan, *The Florida Condominium Act Applied*, 17 U. FLA. L. REV. 1, 45 (1964). The language of the termination provision of the amended Florida statute, FLA. STAT. ANN. § 718.117 (West Supp. 1978), presents the same ambiguity as the language of the Ohio Act; however, no authority has interpreted the change in language as substantive.

401. OHIO REV. CODE ANN. § 5311.17(A) (Page 1970).

402. *Id.* § 5311.17(A), .17(B).

403. *Id.* § 5311.17(A).

404. *Id.* § 5311.17(C).

unit owners is nearly impossible. For example, Hawaii provides protection to all owners by requiring approval by at least eighty percent both of the total number of owners and of the common interests.⁴⁰⁵ Georgia requires only a four-fifths vote.⁴⁰⁶ Second, Ohio should allow lienors' consent to the removal rather than require discharge of the liens.⁴⁰⁷ Upon consent, liens could be transferred, with original priority, to the undivided share in the property attributable to the unit originally encumbered by that lien.⁴⁰⁸ Third, Ohio should authorize the removal of part of the condominium property, as is permitted in some states,⁴⁰⁹ rather than require the removal of all or none.⁴¹⁰

The present Act makes only incomplete provision for involuntary removal. Section 5311.14 deals with repair of damaged condominium property and the possibility of sale after a decision not to make needed repairs.⁴¹¹ Unless the declaration provides otherwise, if all or any part of the common areas is damaged or destroyed, the unit owners, by seventy-five percent of the voting interests,⁴¹² may elect not to repair or restore such common areas. If such an election is made, any unit owner may bring an action for sale of the whole property, as upon partition. The net proceeds from the sale of the property and from any insurance or indemnity will be considered one fund and will be distributed to all the owners in proportion to each owner's percentage of interest in the common areas. Before an owner is entitled to receive proceeds, all liens and encumbrances on his unit must be paid, released, or discharged.⁴¹³

Two changes would make the current provision more complete. First, a more expedient procedure would permit the same or some greater percentage to authorize a sale directly without in-

405. HAW. REV. CODE § 514A-21(a)(1) (Supp. 1977).

406. GA. CODE ANN. § 85-1630e(a) (1978). Section 85-1630e(b) provides that the declaration may specify a smaller minimum if no unit is used for exclusively residential purposes.

407. *E.g.*, FLA. STAT. ANN. § 718.117(1) (West Supp. 1978).

408. *Id.* § 718.117(2).

409. *E.g.*, GA. CODE ANN. § 85-1631e (1978); HAW. REV. STAT. § 514A-21(b) (Supp. 1977); VA. CODE § 55-79.64 (Supp. 1978).

410. OHIO REV. CODE ANN. § 5311.17 (Page 1970). Some states provide that the removal of property from the operation of the Act is not a bar to resubmission. *E.g.*, FLA. STAT. ANN. § 718.117(3) (West Supp. 1978); HAW. REV. STAT. § 514A-22 (Supp. 1977). These provisions are apparently superfluous.

411. OHIO REV. CODE ANN. § 5311.14(B) (Page 1970).

412. The declaration may, however, require a greater percentage of the voting power to elect not to repair or restore the damaged common areas. *Id.*

413. *Id.*

volving a judicial proceeding. The statute might further authorize equitable relief where property is damaged or destroyed, and there has been no repair or any agreement to repair within a reasonable time.⁴¹⁴ This would protect owners holding only a minority interest from excessive delay in the repair or sale of property. Second, the statute should be amended to include procedures for eminent domain and condemnation. There are several issues which should be resolved explicitly, such as the allocation of awards and damages, the reapportionment of percentage interests, the rebuilding, relocation, and restoration of improvements, the termination of the condominium, and the authority of the association to negotiate for unit owners. These issues could be dealt with either by statute,⁴¹⁵ in the declaration,⁴¹⁶ or both.⁴¹⁷

B. *Liability of Unit Owners*

In addition to liability to the association for unpaid assessments or for breach of the condominium instruments, individual unit owners may also be subject to liability on claims of third parties. Of particular interest are the claims of those who have been injured by a tort committed on the common areas and the claims of mechanics and materialmen for work performed on the common areas. The allocation of liability for these claims presents problems which are unique to condominium ownership.

1. *Tort Liability*

In Ohio, the unit owners association is similar to an unincorporated association.⁴¹⁸ The rule at common law was that an unincorporated association could not be sued by third parties or by members of the association.⁴¹⁹ The courts reasoned that the association had no separate legal existence with respect to third persons, and because the negligence of the association was imputed to all members, no member could recover from the association since to do so would give rise to the theoretical anomaly of a member suing himself. The common law rule that an unincorporated asso-

414. *See, e.g.*, FLA. STAT. ANN. § 718.118 (West Supp. 1978).

415. *See, e.g.*, VA. CODE § 55-79.44 (Supp. 1978).

416. *See, e.g.*, KY. REV. STAT. ANN. § 381.830(1)(b) (Baldwin Supp. 1977).

417. *See, e.g.*, MD. REAL PROP. CODE ANN. § 11-112 (Supp. 1977) (dealing with the issues absent any provision in the declaration). *See also* Comment, *supra* note 20, at 284-85.

418. *See* note 351 *supra*.

419. *See* *Koogler v. Koogler*, 127 Ohio St. 57, 186 N.E. 725 (1933); *Paddock Hodge Co. v. Grain Dealers' Nat'l Ass'n*, 18 Ohio App. 66 (6th Dist. 1921).

ciation has no legal status no longer exists in Ohio.⁴²⁰ The Ohio Condominium Act specifically provides that, in an action relating to the common areas or to any right or duty of the unit owners association, the association may be sued as a separate legal entity.⁴²¹ Nevertheless, members may still be liable if a plaintiff elects to proceed against them individually.⁴²² Further, the members can be held jointly and severally liable for the tortious conduct of the association's servants and for injuries sustained in the common areas.⁴²³ The negligence of other owners using the common areas may be imputed to other members based upon their common ownership of the areas.⁴²⁴ Today the imputation of tort liability to all members of the association will probably not preclude suit against a condominium association by a member.⁴²⁵ These remedies are cumulative; thus the individual owner may still be sued by a fellow member of the association.⁴²⁶ Hence, a unit owner is potentially liable for a judgment in a suit against the association by either a third person or another owner.

A balance must be struck between the interests of the injured party and those of the unit owners, so that the former is not deprived of a remedy and the latter is not subjected to unlimited liability. An individual owner may be sued for the entire amount of the plaintiff's damages and thus forced to proceed against his fellow owners for contribution.⁴²⁷ Even if a plaintiff sues the asso-

420. See 9 AKRON L. REV. 602 (1976).

421. OHIO REV. CODE ANN. § 5311.20 (Page 1970).

422. Cf. *Miazga v. International Union*, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); *Marsh v. General Grievance*, 1 Ohio St. 2d 165, 205 N.E.2d 571 (1965); *Lyons v. American Legion Post No. 650 Realty Co.*, 172 Ohio St. 331, 175 N.E.2d 733 (1961) (historical development of separateness of actions).

423. Note, *supra* note 351, at 327.

424. Lawrence, *Tort Liability of a Condominium Unit Owner*, 2 REAL EST. L.J. 789, 797 (1974). Nonculpable defendants can, however, argue for the joinder of the unit owner at fault, under OHIO R. Crv. P. 19 or 19.1.

425. See *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971) (members of a condominium unit owners association could bring an action against the association). See also *Tanner v. Legal Order of Moose*, 44 Ohio St. 2d 49, 337 N.E.2d 625 (1975) (an unincorporated association may be sued by one of its members for negligence); *Miazga v. International Union*, 2 Ohio St. 2d 49, 250 N.E.2d 884 (1965) (a union could be sued by one of its members).

426. See note 422 *supra*.

427. See OHIO REV. CODE ANN. §§ 2307.31-.32 (Page Supp. 1977) (allowing for the contribution among joint or several tortfeasors and thus abrogating the common law rule denying enforcement of contribution among tortfeasors). See, e.g., *Maryland Cas. Co. v. Gough*, 146 Ohio St. 305, 65 N.E.2d 858 (1946); *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N.E. 593 (1886).

It has been suggested that state condominium statutes require mandatory contribution

ciation as an entity and the resultant judgment is treated as a common expense, those owners who had previously paid their aliquot share may be reassessed for the shares of those who did not.⁴²⁸ The 1963 Condominium Act did little to limit individual liability, and the recent amendments do not provide increased protection.⁴²⁹

The Ohio Act protects unit owners against unlimited tort liability by requiring the board of managers to purchase liability insurance for injury or damage relating to the common areas.⁴³⁰ Two weaknesses in this approach can be identified. First, there is no minimum amount requirement with respect to tort coverage. Second, the provision allows the declaration or bylaws to relieve the board of managers of the statute's requirements. Although the optional nature of the insurance provision may be helpful in avoiding duplication of insurance coverage by the board and individual unit owners, it is questionable whether this discretion furthers the objective of unit owner protection.

A preferable approach to the problem of unlimited owner liability would entail strengthening Ohio's insurance provision and adding protection against unlimited liability.⁴³¹ First, section 5311.16 should include a minimum coverage requirement for tort liability and pro rata liability for judgments in excess of insurance coverage. Each owner's pro rata share would be based on the same percentage as his interest in the common areas. This ap-

from other unit owners if less than all are sued, unless the person sued was alone personally responsible for the tort. 1 P. ROHAN & M. RESKIN, *supra* note 22, § 10A.05[2][a], at 10A-15.

428. *Id.* § 10A.03[3][d].

429. Section 5311.13 requires that any lien arising on two or more units be borne proportionately. OHIO REV. CODE ANN. § 5311.13 (Page Supp. 1978). It is unclear whether this provision applies to judgment liens resulting from the imposition of tort liability since most of the section addresses mechanic's and materialsman's liens. Note, *supra* note 269, at 533. If this section is intended to apply to torts, a more precise approach would be appropriate.

430. Section 5311.16 provides:

Unless otherwise provided by the declaration or bylaws, the board of managers shall insure all unit owners, their tenants, and all persons lawfully in possession or control of any part of the condominium property for such amount as it determines against liability for personal injury or property damage arising from or relating to the common areas and facilities and shall also obtain for the benefit of all unit owners fire and extended coverage insurance on all buildings and structures of the condominium property in an amount not less than eighty per cent of the fair value thereof. The cost of such insurance shall be a common expense.

OHIO REV. CODE ANN. § 5311.16 (Page 1970).

431. One state exempts unit owners from personal liability for damages caused by the association or accrued in connection with the common areas. MISS. CODE ANN. § 89-9-29(B) (1972). Incorporation of the owners association also will limit personal liability. Note, *supra* note 269, at 534; Note, *supra* note 351, at 327, 338.

proach has been adopted in Florida, and the maximum amount of an owner's pro rata share is further limited to the value of his unit.⁴³² Second, section 5311.20 should be amended to permit only suits against the owners association. Any resulting judgment in excess of insurance coverage should be divided among unit owners as a common expense.⁴³³ Each owner should be discharged from liability upon payment of his share, which would prevent the reassessment of any unpaid portion of a judgment to those who have already paid.⁴³⁴

2. *Mechanic's and Materialman's Liens*

The second major topic of discussion in the area of unit owner liability involves mechanic's and materialman's liens for work performed on the condominium property. Since condominium projects are usually large scale and many workmen contribute labor and materials, the problems associated with such liens are troublesome. The concept of common ownership, the prohibition against partition of the common elements, and the nonseverability of common areas and units further complicate the question of the application of mechanic's and materialman's liens.

Section 5311.12 of the 1963 Act, unamended by the recent legislation, prohibits conveyance of any unit until all liens and encumbrances, except taxes and assessments of political subdivisions, have been paid or satisfied.⁴³⁵ The provision apparently requires that all mortgage obligations and liens must be paid or satisfied or released by the time of the first conveyance of a unit since presumably the section covers the developer as owner of the property.⁴³⁶ The amendments do fill a major technical gap in the

432. FLA. STAT. ANN. § 718.119(2) (West Supp. 1978). In addition, if the association is subjected to liability in excess of insurance coverage, it must give notice within a reasonable time to the owners, who then have the right to intervene and defend. *Id.* § 718.119(3).

433. See WASH. REV. CODE ANN. § 64.32.240 (1966). *White v. Cox*, 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971), left open the question of what property of the unit owners can be reached if the association is sued. See also OHIO REV. CODE ANN. § 1745.02 (Page 1978), which provides that a money judgment against an unincorporated association will not be enforceable against the property of an individual member.

434. See KY. REV. STAT. ANN. § 381.897(1) (Baldwin Supp. 1977). When the plaintiff is another unit owner, it has been suggested that state statutes limit recovery to the amount of insurance coverage. 1 P. ROHAN & M. RESKIN, *supra* note 22, 10A.05[2][b], at 10A-16.

435. OHIO REV. CODE ANN. § 5311.12 (Page 1970).

436. See *id.* § 5311.02 requiring the owner of the property to submit it to chapter 5311. The FHA Model Act provides that at the time of the first conveyance of each unit every lien affecting such unit must be satisfied. FHA MODEL ACT, *supra* note 276, § 14. This approach might present problems for the contractor because construction costs may be

1963 Act by providing protection against liens for work performed before submission of the property to the Act but not recorded until after submission or unit conveyance. When a lien for work or materials arises against property which later becomes condominium property, after the declaration is filed the lien is enforceable only against units (1) owned by the declarant, (2) conveyed by the declarant to someone other than a bona fide purchaser, or (3) conveyed by the declarant to a bona fide purchaser whose deed is recorded after the affidavit of the mechanic's lien.⁴³⁷ It is further provided that a foreclosure of enforceable liens will not of itself terminate the condominium.⁴³⁸

Section 5311.13 provides that a mechanic or materialman may be entitled to a lien on an owner's interest for work performed on or material furnished to a unit, even though the owner did not consent, if the work was authorized by the board of managers or necessary to protect public safety or prevent damage to another part of the condominium.⁴³⁹ Liens arising from work authorized by the board of managers and performed on the common areas will apply against the interests of all owners.⁴⁴⁰ If a lien affects the interest of more than one unit, the obligation is borne by each owner in the ratio that his percentage of interest in the common areas bears to the total percentage of interest in the common areas of all affected units.⁴⁴¹ A unit may be discharged from the lien by payment of the proportionate amount to the lienor.⁴⁴² Thus, a

difficult to apportion among individual units. Comment, *supra* note 198, at 993-99. It may be difficult to identify exactly who worked on each individual unit.

437. OHIO REV. CODE ANN. § 5311.13(E), .13(F) (Page Supp. 1978). The following example illustrates the operation of these amendments:

Therefore, if a lien arose against 100 acres and thereafter a declarant submitted a declaration of condominium as to one acre with ten units thereon and sold five of the units to purchasers in good faith for value, three of whom recorded their deeds before the affidavit of mechanic's lien was filed for record, once the affidavit of mechanic's lien was filed, under the bill's provisions the lien would attach to the 99 acres that were not submitted as condominium property, the five unsold units of the declarant and their appurtenant interests in the common areas and facilities, and the two units and their appurtenant interests that were recorded after the affidavit of mechanic's lien was recorded.

COMMITTEE REPORT, *supra* note 112, at 13.

438. OHIO REV. CODE ANN. § 5311.13(E) (Page Supp. 1978).

439. *Id.* § 5311.13(B).

440. *Id.* § 5311.13(C).

441. *Id.* § 5311.13(D). This approach, however, may prove to be unfair if the work was principally for the benefit of a particular owner or owners. Gregory, *The California Condominium Bill*, 14 HASTINGS L.J. 189, 206 n.37 (1963). The statute also could have authorized the parties to contract otherwise by enumerating appropriate percentages in the declaration. *Id.* at 441 n.37.

442. OHIO REV. CODE ANN. § 5311.13(D) (Page Supp. 1978).

unit owner cannot be reassessed for the unpaid shares of other owners. However, it has been suggested that a unit owner, as a member of the association, may still be personally liable for the entire amount of the debt, even though his fair share of expenses has been paid.⁴⁴³ The statute should prevent reassessment of owners who have paid their share of the amounts due, as one state presently provides.⁴⁴⁴ Further, the statute could be simplified procedurally by substituting a single lien filed against the association for work performed on the common areas in lieu of liens against the individual units.⁴⁴⁵

IV. RECOGNITION OF PROGRESSIVE FORMS OF CONDOMINIUMS

A. *Expandable Condominiums*

The amendments specifically sanction the development of expandable condominiums.⁴⁴⁶ Land and improvements may be added to the condominium property by the filing of an amendment to the declaration executed by the developer and all the owners and lessees of the additional land. The amendment must contain the information, drawings, and plans required initially of all condominiums, along with a reallocation of the percentages of interest in the common areas appertaining to each unit. The execution and recording is considered an effective amendment to the declaration and does not require unanimous approval of the unit owners.⁴⁴⁷

The expandable condominium has many advantages for a developer. It gives him flexibility to determine the total number of units to construct, their design, the time period over which construction can be completed, and the common facilities to be in-

443. Berger, *supra* note 296, at 1023; Theriot, *supra* note 231, at 1223-24.

444. MD. REAL PROP. CODE ANN. § 11-115(6) (Supp. 1977). The unit owners association could also exercise its common-expense lien right against the delinquent owners, see OHIO REV. CODE ANN. § 5311.18(A) (Page Supp. 1978), in order to reimburse the owners who overpaid. Theriot, *supra* note 231, at 1224.

445. See, e.g., LA. REV. STAT. ANN. § 9:1131(B) (West Supp. 1978).

446. OHIO REV. CODE ANN. §§ 5311.01(R), .03(C) (Page Supp. 1978). For a more comprehensive treatment of phase development under the original Ohio Condominium Act and the recent amendments, see Note, *Expanding Condominiums in Ohio*, 29 CASE W. RES. L. REV. 228 (1978). See also Joliet, *The Expandable Condominium: A Technical Analysis*, 9 A.B.A. L. NOTES 19, 22 (1972); Rosenstein, *Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Act*, 47 TEMP. L.Q. 655, 663 (1974); Theriot, *supra* note 231, at 1218-19; Comment, *supra* note 20, at 288. The amendments also allow for the division and contraction of units in a nonresidential development. OHIO REV. CODE ANN. § 5311.03(G) (Page Supp. 1978).

447. *Id.* § 5311.051.

cluded.⁴⁴⁸ The developer can test the market in the first phase and then alter the price, design, or size of the units in the next phase.⁴⁴⁹ He even may decide to discontinue construction if the initial phase of the project is unsuccessful. The developer may also utilize his experience with initial phases to determine his future marketing and operating plans.⁴⁵⁰ Expandable developments are especially advantageous for larger projects. Since the developer can build a small number of units initially, his capital investment is smaller. Thus his risk is minimized, and he can spread construction costs over a number of years.⁴⁵¹ The developer's cash flow is improved since the profits from the first stage may be used to finance subsequent phases.⁴⁵²

While the expandable condominium may be advantageous to developers, it can present problems to unit owners. Although the owners may have to contribute less for common area expenses as more owners are added, if more common facilities are not built, the original common areas may become overcrowded.⁴⁵³ If the developer builds fewer units than originally projected, initial unit purchasers may be responsible for a greater share of expenses than anticipated.⁴⁵⁴ If additional common areas are included in subsequent phases, original owners may face increased common expenses. The addition of units alters an owner's percentage interest in proceeds from sale or condemnation of property since they are determined by the percentage interest in the common areas.⁴⁵⁵ Unit owners may also be unhappy if additions do not conform to the original buildings in style, quality, or price.⁴⁵⁶

The recent amendments attempt to balance the interests of developers and owners. The amendments permit a developer to add

448. Theriot, *supra* note 231, at 1219.

449. Merrill, Cooper, & Papell, *An Overview of California Condominium Law*, 6 SW. U. L. REV. 487, 495 (1974).

450. Note, *Phasing Condominiums*, 48 ST. JOHN'S L. REV. 872, 884 (1974).

451. *Id.*

452. *Id.* at 872; Comment, *supra* note 20, at 288. An expandable development also has advantages for the construction lender. If money is tight and the chances of the project's success are uncertain, the lender's risk can be reduced by phasing the project over several stages. If the developer is financially unstable and goes bankrupt after construction of the first stage, the lender will be under no obligation to furnish financing for the uncommenced stages. *Id.*

453. Note, *supra* note 450, at 884; Comment, *supra* note 47, at 462.

454. Comment, *supra* note 47, at 462.

455. OHIO REV. CODE ANN. § 5311.14 (Page 1970).

456. Comment, *Condominiums in Virginia—The Condominium Act of 1974*, 9 RICH. L. REV. 135, 145 (1974).

additional property⁴⁵⁷ to the condominium development only if the declaration contains certain prescribed disclosures, assurances, and descriptions.⁴⁵⁸ The information required in the declaration may inhibit the developer's flexibility because he must have a fairly definite idea of the future development of the project before the declaration is filed and the original units sold. However, this limit on developer flexibility is desirable in light of the protection it offers prospective purchasers and unit owners.

The adoption of additional disclosure requirements could enhance purchaser protection. The declaration should state the minimum⁴⁵⁹ and maximum⁴⁶⁰ number of units that may be built. It

457. "Additional property" is defined as "land or improvements described in the original declaration that may be added in the future to an expandable condominium property." OHIO REV. CODE ANN. § 5311.01(Q) (Page Supp. 1978). "Expandable condominium property" is defined as "a condominium property the original declaration of which reserves the right to add additional property." *Id.* § 5311.01(R).

458. The declaration for an expandable condominium must contain:

(1) the declarant's explicit reservation of the option to expand the condominium property;

(2) a statement of any limitations on that option, including whether the owners' consent will be required and the method for ascertaining their consent;

(3) the time, within seven years of recording the declaration, when the option to expand will expire and any other circumstances which will terminate the option before that time; however, the developer may reserve the right to renew the option for another seven-year period if the renewal right is exercised within six months of the expiration date and is approved by a majority of the owners;

(4) a legal description of the additional property to which the option applies;

(5) a statement of whether all or part of the additional property must be added or whether there are any limitations on the parts of the property that may be added;

(6) a statement of whether parts of the additional property may be added at different times, along with any limitations on the order in which they may be added and a legal description of their boundaries;

(7) a statement of any limitations on the location of any improvements upon any part of the additional property;

(8) the maximum number of units in each phase or the maximum number of units per acre;

(9) the extent to which additional units may be used for nonresidential purposes;

(10) a statement about the compatibility of additional structures with existing structures in quality, materials, and style;

(11) a description of any improvements, other than structures, to be made upon portions of the additional property, along with any restrictions upon such improvements;

(12) a statement of whether the new units will be substantially identical to the old units or limited to any particular types;

(13) a description of any right reserved by the declarant to designate common areas or to create limited common areas in the additional property; and

(14) any drawings the declarant considers appropriate to supplement the declaration. *Id.* § 5311.05(C). This list does not include all the technical information required in the declaration when an option to expand is reserved.

459. *See* LA. REV. STAT. ANN. § 9:1124.2(A)(2) (West Supp. 1978).

460. OHIO REV. CODE ANN. § 5311.05(C)(8) (Page Supp. 1978). *See* note 458 *supra*.

should describe also any additional common elements or recreational facilities that may be constructed and should specify which ones will be constructed if less than the projected maximum number of units are built.⁴⁶¹ The declaration should reveal the effect on governance of the association if an expansion phase is not added.⁴⁶² This additional information would give the buyer a more complete indication of how many others may be using the common areas and how the percentage interests and expenses may be reallocated. Any amendment should require also that a developer notify the owners of existing units of any decision not to add a phase as well as of any decision to commence one.⁴⁶³ It should also address the possibility of overburdening existing common areas, perhaps by specifying that a certain amount of common area be added with each phase⁴⁶⁴ or by requiring the developer to post a bond upon which to draw to complete the common areas.⁴⁶⁵

In addition to the current disclosure provisions in the declaration, the amendments require the developer to disclose in the written offering statement the total number of units that may be added in future expansion.⁴⁶⁶ This requirement, however, does not extend far enough. It does not apply to commercial or industrial condominiums,⁴⁶⁷ where developers may actually be more apt to utilize the expandable concept.⁴⁶⁸ Nor does it require a complete description of the phasing.⁴⁶⁹ A more effective offering statement would include the extent to which additional units must conform to the quality and style of the original units, the basis for reallocating the percentage interests, the projected minimum number of units, and any requirements for additional common areas and recreational facilities.

By definition, the new amendments permit units to be added to a development but do not require additional land to be added.⁴⁷⁰ Building additional units on land that was originally part of the common areas may, however, constitute a taking of common areas

461. See LA. REV. STAT. ANN. § 9:1124.2(A)(5) (West Supp. 1978).

462. See FLA. STAT. ANN. § 718.403(2)(d), .403(2)(e) (West Supp. 1978).

463. See *id.* § 718.403(3).

464. See Theriot, *supra* note 231, at 1221.

465. See Rosenstein, *supra* note 446, at 663-64.

466. OHIO REV. CODE ANN. § 5311.26(B) (Page Supp. 1978).

467. *Id.* § 5311.24(A).

468. Comment, *supra* note 38, at 900.

469. Compare FLA. STAT. ANN. § 718.506(14) (West Supp. 1978).

470. See note 457 *supra*.

rather than a reallocation of interests.⁴⁷¹ In *Grimes v. Moreland*,⁴⁷² a common pleas court held that the erection of fences and installation of air conditioning compressors by unit owners in the common area constituted a taking of common property requiring the unanimous approval of an amended declaration. The court found that, even though the percentage of interest would not be changed, it would apply to a smaller area of ground.⁴⁷³ Under *Grimes*, a developer can add new units only to land which was not previously designated as common area.

Ohio should adopt a provision that would assure greater flexibility for developers yet put prospective purchasers on notice of potential changes in the status of the common areas. The concept of convertible land is a useful approach;⁴⁷⁴ it requires that property characterized as convertible land be described in the declaration before the developer is permitted to withdraw it from the common areas.⁴⁷⁵

Some states have statutorily authorized contractable condominiums so that portions of the condominium property can be withdrawn from the project.⁴⁷⁶ Under current Ohio law only the project as a whole can be removed from the operation of the statute, and only at the expense of terminating the condominium.⁴⁷⁷ The advantage of the contractable condominium concept is that it gives the developer added flexibility in those instances when the project is not as successful as planned. It also helps the mortgagee who gets the property through foreclosure since he would have the option to continue the project or withdraw the land.⁴⁷⁸

B. *Leasehold Condominiums*

Although states vary in their specific definitions of leasehold condominiums, generally the unit owner purchases an undivided interest in a leasehold on a fee which has been submitted to the

471. The amendments do not require unanimous owner approval before the developer reallocates the percentage interests in the common areas; execution and recording are sufficient to amend the declaration. OHIO REV. CODE ANN. § 5311.051 (Page Supp. 1978). See note 508 *infra*.

472. 41 Ohio Misc. 69, 322 N.E.2d 699 (C.P. Franklin County 1974).

473. *Id.* at 74, 322 N.E.2d at 703.

474. See VA. CODE § 55-79.41(i), .61 (Supp. 1978).

475. *Id.* § 55-79.54(b).

476. GA. CODE ANN. § 85-1631e (1978); LA. REV. STAT. ANN. § 9:1136 (West Supp. 1978); VA. CODE §§ 55-79.41(g), .64 (Supp. 1978).

477. OHIO REV. CODE ANN. § 5311.17 (Page 1970).

478. Comment, *supra* note 456, at 141.

Condominium Act.⁴⁷⁹ A frequently cited advantage of the leasehold form of ownership is that it is less expensive than fee ownership; the purchaser does not have to buy the underlying land. This advantage may be illusory since the total rent obligation is often equal to the amount that could have been realized by outright sale.⁴⁸⁰

As of 1976, the enabling legislation of two-thirds of the states, including Ohio, provided for the creation of leasehold condominiums.⁴⁸¹ They have been marketed, however, in only a few states, and the concept has proven useful only in Florida, Hawaii, and California⁴⁸² for reasons which at present are largely inapplicable to Ohio. In these jurisdictions, particularly desirable locations such as beachfront property are a scarce commodity. Affluent persons seeking second homes for vacation purposes are often more concerned with location than fee simple ownership. In Hawaii, where leasehold condominiums are most prevalent, much of the land is unavailable for sale.⁴⁸³ Because land in Ohio is not as scarce, it is unlikely that Ohio will see an upsurge of leasehold condominiums in the near future.

Nonetheless, the Ohio law does authorize the leasehold form of condominium ownership. The novelty of this concept and its infrequent use preclude the same empirical documentation of developer abuse that is available for the condominium interest in fee. What little experience there is with leasehold condominiums indicates that they present several additional problems. One major problem is that a unit owner who has completely complied with the lease provisions may be forced to forfeit his interest in the

479. 1A P. ROHAN & M. RESKIN, *supra* note 22, § 19.03, at 19-6. In the leasehold condominium, the developer receives a ground lease from the fee owner of the land. Upon completion of the development various arrangements may be set up. First, the developer's ground lease from the owner of the land may be cancelled and separate leases to the units issued. Second, the developer's ground lease remains, and he assigns his interest to the unit owners. Third, the developer's ground lease remains, and he subleases the units—the so-called "sandwich lease." Under this method, the developer may receive long term profits because he can charge unit owners ground rent which exceeds his obligation under the master lease. Bucknall, *supra* note 1, at 37-38; Merrill, Cooper, & Papell, *supra* note 449, at 505. Fourth, the developer and landowner may be the same person, who, after construction is completed, transfers long-term leaseholds to unitholders. Bucknall, *supra* note 1, at 33. Finally, the developer and fee owner may set up an arrangement to share the rent and responsibilities. 1A P. ROHAN & M. RESKIN, *supra* note 22, § 19.03, at 19-7.

480. Bucknall, *supra* note 1, at 37-38.

481. See jurisdictions cited in *id.* at 35 n.22.

482. *Id.* at 35.

483. *Id.* Hawaii is unique in that "[m]uch of the land in the state is owned by large trusts and native families who cannot or will not transfer any freehold interest." *Id.*

leased premises if the developer or other unit owners become delinquent in their rental payments or otherwise breach a lease covenant.⁴⁸⁴ Depending on the arrangements among the fee owner, developer, and owner-lessee of the condominium, the fee owner may be entitled to exercise a right of reentry and terminate the entire lease.⁴⁸⁵ Even where the lessor exercises this right only against a unit owner in default, several questions still arise—whether the unit remains under the condominium regime and whether the unit becomes a freehold through merger of the leasehold and reversionary estates upon reentry.⁴⁸⁶ Another problem is that the landlord may dominate the unit owners through covenants in the lease agreement. The unit owner-lessee must abide by the covenants to avoid termination of the lease. The tenant, because of the long term nature of the lease, cannot avoid the restrictive lease by moving elsewhere.⁴⁸⁷

Unique financial risks are associated with the leasehold condominium. Initially, the prospective leasehold purchaser may have difficulty obtaining financing because of the low priority of leasehold interests in financial portfolios and the dubious resale value of a leasehold.⁴⁸⁸ If rent is subject to recalculation at varying intervals,⁴⁸⁹ this can create difficulty for a lender in judging the future capability of the applicant to afford the lease expense. Assuming the unit owner obtains financing, the investment has several additional risks. If a unit owner sells his unit and assigns his leasehold interest to the purchaser, he may remain liable on the rent obligation.⁴⁹⁰ As the expiration date of the lease approaches, it may be impossible to sell the remaining interest because prospective purchasers may not be able to obtain financing; mortgagees generally will not be satisfied with a leasehold as security unless it extends significantly beyond the amortization period of the loan.⁴⁹¹ Moreover, the landlord may be entitled to ownership of the improvements on the property if the lease is not

484. *Id.* at 45; Comment, *supra* note 145, at 996.

485. *See* note 479 *supra*.

486. Bucknall, *supra* note 1, at 45.

487. *Id.* at 44.

488. *Id.* at 41.

489. IA P. ROHAN & M. RESKIN, *supra* note 22, § 19.05, at 19–12.

490. In Ohio, a lessee is not relieved of the obligations of his express covenants by reason of an assignment. *See* City Nat'l Bank & Trust Co. v. Swain, 29 Ohio L. Abs. 16 (10th Dist. Ct. App. 1939). The assignee, however, is the principal obligor, and the lessee becomes a surety. *See* Gholson v. Savin, 137 Ohio St. 551, 31 N.E.2d 858 (1941).

491. Bucknall, *supra* note 1, at 42.

actually renewed.⁴⁹² Thus, although fee owners would ordinarily maintain their property to protect their investment, leasehold owners who do not anticipate a return on their investment may allow their property to lapse into disrepair.⁴⁹³ Finally, because of the novel nature of the leasehold condominium, there is little experience or law to draw upon to advise the purchaser as to the full nature of the risks associated with this type of investment.

The 1963 Ohio Condominium Act did not specifically deal with leasehold condominiums. It merely required that real estate submitted to the chapter be either a fee simple estate or a ninety-nine year leasehold renewable forever.⁴⁹⁴ The recent amendments expand the definition of leasehold condominium and address some of the problems inherent in this form of ownership. The definition of leasehold condominium adopted in the amendments contemplates various leasehold arrangements.⁴⁹⁵ A person may own his unit in fee, have a ninety-nine year lease of the land on which the unit is built, and have a lease in the common areas and facilities for ninety-nine years or for a lesser period as long as the leases expire at the same time. Alternatively, a person may enter into a ninety-nine year lease of both the land and unit, or he may purchase the land or unit and have a ninety-nine year lease on the other. It is unclear, however, whether a person may be a lessee of the land or unit for a period less than ninety-nine years, as the section seems to require a ninety-nine year lease of only one of them. This issue is of vital importance since membership in the unit owners association is limited to unit owners, and a unit owner must own either a fee or ninety-nine year lease in a unit.⁴⁹⁶

492. See, e.g., *Teaff v. Hewitt*, 1 Ohio St. 511 (1853); *Cincinnati Oakland Motor Co. v. Meyer*, 37 Ohio App. 90, 174 N.E. 154 (1st Dist. 1930); *In re Logan's Estate*, 71 Ohio L. Abs. 391, 131 N.E.2d 454 (P. Ct. 1955).

493. Bucknall, *supra* note 1, at 43-44.

494. OHIO REV. CODE ANN. § 5311.02 (Page 1970).

495. Section 5311.01(W) defines a leasehold condominium development as a condominium development in which each unit owner owns a ninety-nine year leasehold estate, renewable forever, in his unit, or in the land upon which that unit is situated, or both, together with an individual leasehold interest in the common areas and facilities, with all such leasehold interests due to expire at the same time.

OHIO REV. CODE ANN. § 5311.01(W) (Page Supp. 1978).

The main distinguishing feature between an interest in a leasehold condominium and an ordinary apartment lease is the length of the lease and its perpetual renewability. A unit owner who owns his unit in fee and holds an undivided interest in common areas with other unit owners but leases the recreational facilities from the developer would not be part of a leasehold condominium development.

496. *Id.* §§ 5311.02, .08(C)

The amendments' requirement that the leasehold of either the unit or the land be for ninety-nine years, renewable forever, follows the recommendations of others who have studied leasehold condominiums.⁴⁹⁷ A lengthy lease will permit the lease owner to build up equity and provide a sufficient amortization period for a loan, at least for the initial purchase.⁴⁹⁸ Under Ohio common law a ninety-nine year lease renewable forever is considered to be similar to a fee, and under statute it carries many of the incidents of a fee.⁴⁹⁹ Presumably, resale of the interest will be a lesser problem if buyers know the lease is of potentially infinite duration. However, several uncertainties remain. There is some question about who is to renew the lease—the developer, the unit owners association, a percentage of the unit owners, or each individual unit owner. It is also unclear whether each renewal must be for ninety-nine years or whether other time intervals could be used. The condominiums will be sold at different times, and thus individual leases will expire at different times. The amendments do not spell out the legal consequences of lease expiration, non-renewal of particular leases, renewal for periods other than ninety-nine years, and allocation of costs of maintenance and repair on common areas should some units no longer be part of the condominium.

The amendments require that the declaration disclose the nature and terms of any rights under the lease. The declaration must state where the ground lease and any other leases that may terminate or reduce the condominium property are located and the date of expiration of these leases. Further, the declaration must state whether any land or improvements will be owned in fee simple by the unit owners and whether the unit owners can remove improvements upon expiration of the lease. Finally, the declaration must state whether unit owners have a right to redeem the reversion and must assure that the lessor shall not terminate the interest of any unit holder not in default.⁵⁰⁰ If even part of the condominium property is to be held in a leasehold estate, the amendments re-

497. Bucknall, *supra* note 1, at 46; THE LEASEHOLD CONDOMINIUM—PROBLEMS AND PROSPECTS, THE REPORT OF THE ONTARIO TASK FORCE ON LEASEHOLD CONDOMINIUMS, reprinted in 1A P. ROHAN & M. RESKIN, *supra* note 22, app. 19-1, at 19-22 [hereinafter cited as ONTARIO TASK FORCE].

498. Bucknall, *supra* note 1, at 46.

499. See *Welfare Fed'n v. Glander*, 146 Ohio St. 146, 64 N.E.2d 813 (1945); *Rawson v. Brown*, 104 Ohio St. 537, 136 N.E. 209 (1922). *But see Taylor v. DeBus*, 31 Ohio St. 468 (1877) (limiting *Worthington v. Hewes & McCann*, 19 Ohio St. 66 (1869)). See also OHIO REV. CODE ANN. § 2105.04 (Page 1976).

500. OHIO REV. CODE ANN. § 5311.05(D) (Page Supp. 1978).

quire the drawings to show the locations and dimensions of each leasehold and to label them as leased, each with different letters or numbers.⁵⁰¹

Further information must be disclosed in the condominium instruments and in the written statement. The developer must disclose in the instruments that in a leasehold condominium he may retain the same interest in the common areas and facilities as he retains in the entire condominium development. In the written statement the developer must provide a precise statement of the nature of the condominium ownership interest that is being offered. Presumably, this would require nothing beyond a statement that it is a leasehold condominium. Given the disclosure policy evidenced by the amendments and the vital need of the prospective purchaser for the information that must be contained in the declaration, it seems to be a major flaw of the amendments that the written statement need not disclose the same information. Certainly a prospective purchaser ought to be told that he cannot keep the building he has paid for after the lease expires, that a lease of some portions of the condominium property will expire in twenty years, or that he cannot purchase the reversion. Full disclosure of such provisions ought to be the legal minimum.⁵⁰²

The amendments fail to clarify or resolve many of the potential issues. First, the amendments fail to deal with the merger problem. Georgia law⁵⁰³ provides that there will be no merger if the lessor acquires title to the unit. The Uniform Condominium Act also specifically provides that there will be no merger if the owner of the reversion obtains the leasehold interest and provides for the reallocation of the interest in the common area upon termination of a lease.⁵⁰⁴ The Ohio statute should include these details to avoid confusion. Second, the amendments place few constraints on the lessor's power to design the leasehold to suit his own needs.⁵⁰⁵ Third, a fair method of determining rights to improvements on leased property and compensation for removal or

501. *Id.* § 5311.07.

502. *Id.* §§ 5311.25(B), .26(B). Disclosure in the written statement should mean that the nature of the leasehold condominium interest and all material information shall be presented in a readable and understandable manner. *See id.* § 5311.26(B) For a discussion of disclosure, see notes 43-102 *supra* and accompanying text.

503. GA. CODE ANN. § 85-1623e(b) (1978).

504. UNIFORM CONDOMINIUM ACT, §§ 2-107(c),-107(d), *reprinted in* 1A P. ROHAN & M. RESKIN, *supra* note 22, § 1907, at 19-15.

505. *See* Bucknall, *supra* note 1, at 44-45; ONTARIO TASK FORCE, *supra* note 497, at 19-40.

nonremoval ought to be determined.⁵⁰⁶ Tenants' rights ought to be governed by the bylaws of the condominium rather than by the lease so that tenants in the same condominium property will not be subject to varying restrictions. Finally, landowners should be required to give the tenant first option to purchase the reversion.⁵⁰⁷ Provision ought to be made for rent recalculation, for both time period and amount, so that the tenant is not subjected to unconscionable or frequent rent increases.⁵⁰⁸ Landowners should be permitted to terminate the lease only in extreme circumstances and should be required to give extensive notice.⁵⁰⁹

V. CONCLUSION

The increasing development of condominiums as an important form of property has not been without problems. In response, the Ohio legislature has moved to alleviate these difficulties through amendments in three major areas. First, condominium consumer protection measures have been developed which should curb developer abuse. Second, individual and collective rights and liabilities of those involved in condominium properties have been further delineated, relieving much uncertainty while judiciously reinforcing appropriate interests of both unit owner and developer. Finally, by recognizing expandable and leasehold condominiums, the new legislation should promote the innovative use of these property concepts.

As with any new legislation, there is room for criticism and improvement. The adequacy of the recent consumer protection amendments is a valid issue. Some may feel that a stronger position should have been taken and that administrative enforcement procedures should have been developed. Nevertheless, Ohio has followed a commendably cautious course by attempting to provide adequate consumer protection through the mechanism of disclosure. The time may arrive when disclosure will prove to be an inadequate prophylactic; for present purposes the creation of administrative protection in Ohio seems unwarranted. It is noteworthy that even the most recent convert to the regulatory approach, Florida, provided protection to consumers through disclosure until the need for an administrative solution became compelling. In

506. ONTARIO TASK FORCE, *supra* note 497, at 19-40.

507. See FLA. STAT. ANN. § 718.401(6)(b) (West Supp. 1978).

508. ONTARIO TASK FORCE, *supra* note 497, at 19-66.

509. Bucknall, *supra* note 1, at 45.

an era of increasing skepticism of governmental intervention the Ohio approach is consistent with both present needs and public opinion.

As this article argues, there are several notable ambiguities and omissions in the recent legislation. More disclosure may prove to be necessary, especially in the area of expandable condominiums. A clause prohibiting unconscionable practices and requiring good faith dealing may become necessary to provide some judicial flexibility in the absence of administrative relief. Further, there are several issues which the legislature should have addressed and which may need to be resolved in the future. Noteworthy omissions include the failure to provide for a better balance between an injured party's right of recovery and the present unlimited liability of unit owners, the status of rights of first refusal under the doctrine of free alienability, and the standard of liability for members of the board of managers.

Past predictions of the increased popularity and use of condominiums⁵¹⁰ have proved accurate. In response to this once novel concept, the legislature authorized condominium ownership in Ohio some fifteen years ago. Within a framework of rapid evolution, the General Assembly has made a sweeping but cautious revision of the condominium law that strikes a needed balance between developers and purchasers.

510. Comment, *Condominium: An Introduction to the Horizontal Property System*, 11 DEPAUL L. REV. 319, 328 (1962).