University of Miami Law Review

Volume 33
Number 4 *1978 Developments in Florida Law*

Article 6

6-1-1979

Condominium Litigation

Barry A. Mandelkorn

Michael H. Kruel

Robert B. Galt

Condominium Litigation

BARRY A. MANDELKORN,* MICHAEL H. KRUEL** AND ROBERT B. GALT***

In this article, the authors examine and analyze recent judicial and legislative developments in the growing field of condominium litigation. In particular, the authors undertake a comprehensive examination of the documents associated with condominium ownership to ascertain the specific rights and liabilities incorporated therein.

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

** B.A., State University of New York at Buffalo, 1969; J.D., Brooklyn School of Law, 1973. Member of the Firm of Ruden, Barnett, McClosky & Schuster, Fort Lauderdale, Florida.

*** Former Articles and Comments Editor, *University of Miami Law Review.*

I. CLASS ACTIONS

A. *Introduction*

An article in the September 1978,[1] issue of the *University of Miami Law Review* explored the extent of a condominium association's ability to maintain litigation as a class representative of its unit owner members. The article concluded that the right and ability of an association to act in such a representative capacity had been firmly established in Florida and that further litigation would clarify the scope of this capacity.[2] A recent federal court decision addressed the ability of a condominium association to represent unit owners in class actions for rescission. This section of the present article uses that case as a basis for a discussion of whether a class action seeking to set aside a lease can be maintained without the consent of all owners. State court decisions involving class actions brought by individual unit owners are also briefly discussed.

B. *Class Action for Rescission*

In *Environ Condominium I Association, Inc. v. Radice Realty & Construction Corp.*,[3] the United States District Court for the Southern District of Florida denied the Association's motion for plaintiff class certification to represent approximately 648 unit owners. The suit alleged that the defendants had violated the Interstate Land Sales Act[4] and federal antitrust statutes[5] in the sale of condominium parcels. The plaintiffs sought a declaration that their recreation leases were null and void. Noting that the requested relief could adversely affect the property rights of absent class members, the court found that the threshold requirements of rule 23(a) of the Federal Rules of Civil Procedure had not been satisfied.

In order to maintain a class action under rule 23, the plaintiffs first had to satisfy the four prerequisites to a class action under rule 23(a).[6] It was conceded that the proposed class was too large to make

1. Mandelkorn & Krul, *Condominium Litigation, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 875 (1978).

2. *Id.* at 883.

3. No. 76-6068 (S.D. Fla. Apr. 28, 1978).

4. The Interstate Land Sales Act of 1968, 15 U.S.C. §§ 1701-1720 (1976).

5. Sherman Antitrust Act, 15 U.S.C. §§ 1-11 (1976); Clayton Act, 15 U.S.C. §§ 12-27 (1976).

6. FED. R. CIV. P. 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties

joinder practicable under rule 23(a)(1).[7] The court determined, however, that the plaintiffs had not carried their burdens of showing that their claims were typical of those of the class and that the named representatives would adequately represent the interests of the class under rule 23(a)(3) and (4).[8]

The court's order recognized the individual property rights and use rights that reside with each owner obligated under the lease. Some owners may contend that the lease is onerous or unconscionable. Others may not be prepared to give up the use of facilities should they prevail in setting aside the lease. After noting that the purported class representatives were seeking to have the recreation lease voided, the court stated:

> [T]he evidence in the record demonstrates that this goal is not shared by all of the class members, some of whom wish to preserve the right to use the recreational facilities, albeit under different terms. A declaration that the recreational leases of named plaintiffs are void would adversely affect other class members who could thereby lose the right to use the facilities at all or be forced to assume a greater burden in maintaining the facilities than they already bear. Where the interests and goals of potential class members conflict, class certification is inappropriate.[9]

---

are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Since the court found that the plaintiffs failed to satisfy rule 23(a), it did not reach the issues contested by the parties regarding the requirements of rule 23(b). Environ Condo. I Ass'n, Inc. v. Radice Realty & Constr. Corp., No. 76-6068, slip op. at 2-3 (S.D. Fla. Apr. 28, 1978).

7. *Id.* at 1.

8. *Id.* at 2.

9. *Id.* The court followed this statement with the following quotation from the landmark decision of the United States Supreme Court concerning adequate representation in class actions:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or challenge them are of a single class . . . ."

Id. (quoting Hansberry v. Lee, 311 U.S. 32, 44-45 (1940)). In *Hansberry,* the Court examined the validity of a class action which had been brought to test whether a restrictive covenant involving land had been adopted by a group of landowners.

> The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the several obligatons of the signers and those claiming under them. The promises ran severally to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it.

There are two significant aspects of the *Environ* ruling, aside from its holding, which distinguish the ruling from other condominium cases and merit further discussion. First, the court did not address the possibility of allowing members of the class to opt out[10] while the class action continued on behalf of those remaining. If the action was maintained under rule 23(b)(3), then notice to all members of the class would be mandatory.[11] This notice would advise each member of his option to be excluded from the class.[12] Because a list of the unit owners of the condominium is usually available,[13] providing notice to all unit owners should not be difficult.

Although there is an absence of case law in the federal courts,

---

311 U.S. 32, 44 (1940). In the instant case, the class action was brought to test a lease rather than a restrictive covenant, but in both cases, rights and obligations attached to each owner of land. Had the court decided that the action could be maintained as a rule 23(b)(1) or (2) class, the court could require that notice be given under rule 23(d), and in its discretion define the parameters of the class to exclude those whose interests are not adequately represented under rule 23(c)(4).

Hansberry has been criticized for using language which is unduly broad, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 72, at 347 (3d ed. 1970). In almost every case, some members of the class will not agree with the class representatives on whether, much less how, to enforce their rights. Some blacks may want segregated schools but they have been represented as a class by others who do not; some stockholders are defendants accused of improprieties, but in effect they sue themselves when a stockholders' derivative suit is brought; in fact, many shareholders' derivative suits are brought by minority shareholders challenging the actions of the majority; some landowners would prefer to have their air or water polluted rather than join in a class action for an injunction against a factory in which they work; and some taxpayers in a community would prefer not to have their rights asserted in a class action challenging the validity of a public expenditure because they favor the expenditure. Yet, all of these class action suits have been allowed. *See id.;* Weinstein, *Revision of Procedure: Some Problems in Class Actions,* 9 BUFFALO L. REV. 433, 460 (1960).

In *Hansberry* there were two factors, aside from the adequacy of the representation, which may have influenced the Court. First, the restrictive agreement was aimed at excluding blacks from the community. Second, the covenant provided that it would be effective only if 95% of the owners signed it. The parties stipulated to this crucial fact when only 54% had actually signed. These two factors have led one commentator to state:

> The refusal to recognize the adequacy of representation in *Hansberry v. Lee* seems based as much on the collusive and false stipulation in the prior case as on a fear that the plaintiffs did not represent the views of other members of the class. Moreover, subsequent developments in the law of restrictive covenants explain the *Hansberry* decision as one based on public policy against discrimination
>
> . . . .

Weinstein, *supra* note 8 at 460.

10. The term "opt out" denotes the exercise of a class member's option under FED. R. CIV. P. 23(c)(2)(A) which provides: "In any class action maintained under subdivision [23](b)(3), the court . . . shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date . . . ."

11. FED. R. CIV. P. 23(c)(2).

12. *Id.*

13. *See* Winter v. Playa del Sol, Inc., 353 So. 2d 598 (Fla. 4th DCA 1977) (right to inspect books). For a discussion of *Winter,* see text accompanying note 178 *infra.*

which apply rule 23, the Florida courts have appeared willing to allow class actions for rescission under rule 1.220(b) of the Florida Rules of Civil Procedure.[14] Indeed, the Supreme Court of Florida has determined that a separate rule with regard to class actions was required because of the peculiar features of the condominium form of ownership.[15] In the *In re Rule 1.220(b), Florida Rules of Civil Procedure,*[16] decision, the supreme court held that a condominium association may represent the class composed of its members with regard to matters of "common interest," and that nonconsenting unit owners may opt out of such class actions.

The second significant aspect of the *Environ* decision is its recognition that the court must be cautious in certifying class actions challenging the validity of a recreational lease because of the individual property rights at stake in the lease. The following discussion will attempt to trace the arguments which a developer, lessor or nonconsenting unit owner may make in seeking to prevent class certification of a suit for rescission of a recreational lease where the class representative is a condominium association.

When an association seeks to have the lease declared null and void it is committing, without any apparent consent or participation, all of its unit owner members to a course of action which, if successful, could significantly and materially alter and diminish the extent of every unit owner's condominium parcel, eliminate a portion of the appurtenances that have attached to and must pass with title to each unit and threaten the underlying organization and stability of the condominium. Such action threatens rights and privileges protected by the Condominium Act[17] from association intrusion in the absence of unit owner consent.

Each condominium is created by recording a declaration.[18] Under the controlling provisions of most declarations of condominium and the Condominium Act, the lease, as distinguished from the property demised under the lease, may be made a part of the common elements of the condominium.[19] Thus, each unit owner

14. *In re* Rule 1.220(b), Fla. Rules of Civil Procedure, 353 So. 2d 95, 97 (Fla. 1977)(per curiam).

15. Avila S. Condo. Ass'n v. Kappa Corp., 347 So. 2d 599, 608 (Fla. 1977)(allowing condominium association to maintain a class action sounding in self-dealing and unconscionability).

16. 353 So. 2d 95 (Fla. 1977) (per curiam).

17. FLA. STAT. §§ 718.101-.508 (1977).

18. *Id.* at § 718.104. The declaration provides for the undivided share of the common elements appurtenant to each unit among other things.

19. *Id.* § 718.106(2)(d). This section allows for "[o]ther appurtenances as may be provided in the declaration."

obtains a bundle of rights and obligations which become appurtenances to each unit. A declaration of condominium may also define the common elements of the condominium to include the long term recreational lease.[20] Furthermore, the association, as lessee, will often declare the leasehold interest to be a portion of the common elements for the purpose of carrying out the obligations of the association, as lessee, under the terms of the lease. Thus, the lease, as distinguished from the land and the improvements that make up the lease property, is part of the quantum of property and property rights that collectively represent the common elements of the condominium.

The provisions of the Condominium Act and the declaration determine the common elements appurtenant to each condominium unit.[21] The lease defines the limits of the right to use the common elements; therefore, it is a part of the appurtenances that have attached to each unit in the condominium owned separately, yet collectively, by the unit owners of the condominium. The classification of the lease as an appurtenance is the operative condition which prevents the association from taking voluntary and unilateral action which threatens the integrity of the appurtenant rights.

The appurtenances that attach to each unit and become a part of the condominium parcel assume a protected status under section 718.110(4) of the 1977 Florida Statutes.[22] The prohibitions of that section guard against voluntary or unilateral alteration or modification of the condominium parcel purchased and owned individually by each owner. Any attempt to amend the declaration to alter the property rights of an owner must be accompanied by the consent of

---

20. *Id.*

21. *Id.* § 718.106. Section 718.106 provides as follows:

> **718.106 Condominium parcels; appurtenances; possession and enjoyment.—**
> (1) *A Condominium parcel created by the declaration is a separate parcel of real property,* even though the condominium is created on a leasehold.
> (2) *There shall pass with a unit, as appurtenances thereto:*
> (a) *An undivided share in the common elements* and common surplus.
> (b) *The exclusive right to use such portion of the common elements* as may be provided by the declaration.

Id. (emphasis added).

22. Section 718.110(4) provides:

> Unless otherwise provided in the declaration as originally recorded, no amendment may change the configuration or size of any condominium unit in any material fashion, *materially alter or modify the appurtenances to the unit,* or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus *unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment*
> . . . .

Id. (emphasis added).

all the record owners. Similarly, those persons who have obtained a lien on a unit by contract or by operation of law are protected from a diminution of their security without their consent.[23]

The provisions of the declaration and bylaws must be consulted for the scope of an association's authority. There is no statutory grant of authority, however, which permits an association to assume a course of action which substantially affects the property rights that have attached to each unit as a part of the appurtenances to that unit.[24] Such action cannot reasonably be considered to be within the scope of its authority in the absence of unit owner consent. It is not an action that is taken in the discharge of its duties and responsibilities for the administration and management of the condominium.

A class action to void a recreational lease is unlike a claim for damages based upon negligent construction, breach of contract, breach of fiduciary duty or other causes of action that are common in condominium litigation. In all such instances, the association undertakes a course of conduct which, if successful, would financially benefit all owners. Such actions do not jeopardize property rights of owners. Conversely, a claim seeking rescission or cancella-

23. For a discussion of an association's decision to take action substantially affecting the rights of all owners, see notes 121-128 *infra* and accompanying text.

24. The Condominium Act invests the association with the right and obligation of operating, administering and managing the condominium. It does not reasonably permit authority beyond these functions. The following brief survey of the Condominium Act supports the proposition that the authority of the association is limited to administration. FLA. STAT. § 718.103(2) (1977) defines an association as "the corporate entity responsible for the *operation* of a condominium." (emphasis added).

The association operates the condominium through its board of administration, which is defined by § 718.103(3) as "the Board of Directors or other representative body responsible for *administration* of the association." (emphasis added). The administration of the association can only denote the authority of the board to discharge the duties entrusted to the association, which are those duties provided for by the declaration, by-laws and Condominium Act. Section 718.111 illustrates this restriction in subsection (4): "The powers and duties of the association include those set forth in this section and those set forth in the declaration and by-laws, if not inconsistent with this chapter." This statutory section offers a series of permissible association activities, which include, in summary: (1) access to units for purposes of maintenance and repair; (2) the ability to make and collect assessments; (3) the obligation to maintain accounting records; and (4) the obligation to obtain adequate insurance. In each instance, the powers are those essential for the management of the condominium. Assuming reasonable use, none of these activities interferes with the structure of the condominium or threatens the diminishment of the property rights of all owners.

The association is responsible for the maintenance of the common elements. *Id.* § 718.113(1). It is interesting that the association is prohibited by section 718.113 from causing any material alteration or substantial addition to the common elements during the course of its maintenance, except in the manner provided for in the declaration. As noted in the text, the declaration and by-laws of the condominium must be checked for any additional authority or power which is given to the association.

tion of a recreational lease is an action which may result in removing the lease and lease property from the condominium property available for use by all owners and which may also result in the loss of substantial value to all owners.

Prior to the rulings in *Environ* and *Westchester House Association, Inc. v. McPherson,*[25] it appeared, at least in the state courts, that class actions which sought rescission of a recreational lease could be maintained so long as the issues concerned matters of "common interest." With this recent judicial recognition of the individual property rights at stake under the lease, there is now some question as to whether an association or others may act as a class representative, absent consent of all unit owners to put their rights under the lease at stake.

In *Breslerman v. Dorten, Inc.,*[26] the District Court of Appeal, Third District, held that section 718.111 of the Florida Statutes (1977), does not prohibit a condominium unit owner from instituting a class action on behalf of all similarly situated unit owners.[27] Furthermore, the court held that once allegations of fraud and deceit were deleted from the action which sought damages and recission of a recreation lease, where a portion of the leased property was allegedly located beyond the mean high water mark, a valid cause of action for a class action had been stated.

---

25. No. 76-2564 (Cir. Ct. Fla. Oct. 11, 1977). See text accompanying notes 122-129 *infra.*

26. 362 So. 2d 37 (Fla. 3d DCA 1978) (per curiam).

27. In support of this holding the court cited Imperial Towers Condo., Inc. v. Brown, 338 So. 2d 1081 (Fla. 4th DCA 1976). In that case, a condominium association and four individual unit owners brought a class action which the trial court refused to certify. The District Court of Appeal, Fourth District, reversed the lower court on the basis that FLA. STAT. § 711.12 (1975) (current version at *id.* § 718.111 (1977)) established a class action as a matter of law with regard to an association. The court then stated:

> Because the class action is authorized by statute, any member of the class similarly situated may pursue the class action. For this reason, it was error for the court to rule out the class action concerning common elements brought by the four individual unit owners who are also members of the Association.

338 So. 2d at 1084-85. Subsequent to *Imperial Towers,* the Supreme Court of Florida determined that FLA. STAT. § 711.12(2) (1975) and *id.* § 718.111(2) (1977) were unconstitutional usurpations of the supreme court's power to adopt rules of practice and procedure. Avila S. Condo. Ass'n v. Kappa Corp., 347 So. 2d 599, 607-08 (Fla. 1977). Thus, the Third District's reliance on *Imperial Towers* in the instant case may be questionable. Individual unit owners, however, could certainly bring a class action under FLA. R. CIV. P. 1.220 if they meet the criteria for ordinary class actions, and FLA. STAT. § 718.111 (1977) would be inapplicable. Indeed, when the supreme court promulgated FLA. R. CIV. P. 1.220(b) regarding class actions by condominium associations it expressly stated in the rule: "Nothing herein limits any statutory or common law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available."

C. *Appeal of Certification*

A motion to dismiss appeals from an order which certified a class action was granted in *Atreco-Florida, Inc. v. Berliner.*[28] The District Court of Appeal, Fourth District, held that such an order was interlocutory in nature, and therefore, the appellate rules have no provision for an appeal from an order granting certification of a class action.

II. LEASE LITIGATION

Long term recreation leases remain the most often litigated subject in the area of condominium law. The recreation lease usually involves the rental of improved real property to the condominium association prior to the sale of any of the units and while the developer still controls the association. The association is obligated to make the rental payments, and it passes that obligation on to each unit owner at the time of their unit purchase. This section examines the recent cases which have arisen due to disputes over long term leases.[29]

---

28. 360 So. 2d 784 (Fla. 4th DCA 1978) (per curiam).

29. Two cases concerning condominiums have not been included in the text of this article but merit some mention as they may have greater impact in the future. In one case, Dome Condo. Ass'n, Inc. v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977), Judge King did not state what the parties were seeking to accomplish through that suit. It is difficult, therefore, to fit the opinion into one of the categories discussed in this article. Of interest, however, is that the United States District Court for the Southern District of Florida held that it should abstain from adjudicating controversies where: (1) several questions of state law are crucial to the resolution of the case; (2) the issues involved would require the court to interpret state statutes unconstrued by the Supreme Court of Florida; and (3) these issues involve condominiums, which have become quite influential in the social and economic growth of Florida.

The condominium association, on behalf of its unit owners, filed suit in state court. The defendant removed the case to federal court by way of diversity jurisdiction and the association moved for remand or abstention. *Id.* at 440. After analyzing the leading cases on abstention, the court concluded that the key to invoking the doctrine was "the presence of critically unsettled state law involving a power essential to the state sovereign prerogative." *Id.* at 443. The defendant conceded that the case involved unsettled state law the resolution of which was crucial to a final decision. The defendant argued, however, that there were no exceptional circumstances to warrant invoking the abstention doctrine. *Id.* at 440. The federal court disagreed. It noted that "[c]ondominiums are an important part of Florida's economic and social order," *id.* at 446, and that "the issue of condominium regulation is so vital to the growth of this state that judicial actions on this subject will affect individuals throughout the state." *Id.* at 447. Therefore, the court abstained from the case in order to avoid disruption of Florida's efforts to establish a coherent policy with respect to condominiums.

A. *Statutory Regulations*

1. DEPOSITS OF RENT PENDING LITIGATION

In 1974, the Condominium Act was amended to provide for deposits of rent into the registry of the court pending litigation.[30] The provisions for such deposits were incorporated within section 711.63(4) of the Florida Statutes (Supp. 1974), in the following form:

> [I]n any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner may interpose any defenses, legal or equitable, that he may have with respect to the lessor's obligations under the lease. If the unit owner interposes any defense other than payment of rent under the lease, the unit owner shall pay into the registry of the court the accrued rent as alleged in the complaint, or as determined by the court, and the rent which accrues during the pendency of the proceeding, when due. Failure of the unit owner to pay the rent into the registry of the court as provided herein constitutes an absolute waiver of the unit owner's defenses other than payment and the lessor shall be entitled to an immediate default.[31]

Six appellate decisions within one year of each other have construed section 711.63(4) or its replacement, section 718.401(4) of the 1977 Florida Statutes.[32] The District Court of Appeal, Fourth District, decided five cases which will be discussed in chronological order, and the opinion of the Supreme Court of Florida will be

30. 1974 Fla. Laws, ch. 74 § 104 (current version with some modification at FLA. STAT. §§ 718.401(4), § 719.401(4) (cooperatives) (1977)).

31. The current version, FLA. STAT. § 718.401(4) (1977), in its entirety, reads as follows:
> In any action by the lessor to enforce a lien for rent payable or in any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner may raise any issue or interpose any defenses, legal or equitable, that he may have with respect to the lessor's obligations under the lease. If the unit owner initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner fails to pay the rent into the registry of the court, it shall constitute an absolute waiver of the unit owner's defenses other than payment, and the lessor shall be entitled to default. When the unit owner has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement for all or part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities. The court, after preliminry hearing, may award all or part of the funds on deposit to the lessor for such purpose.

32. *Id.*

analyzed last.

In *Renaissance of Pompano Beach, Inc. v. Southeastern Development Corp.*,[33] unit owners applied for and received a court order that the lease rentals be paid into the court registry pending the outcome of their suit against the developer for an alleged breach of various lease agreements. Subsequently, the developer applied for a disbursement order, the propriety of which was the subject of this interlocutory appeal.[34] The court affirmed, per curiam, the trial court's order that registry funds be disbursed to the mortgagee notwithstanding the fact that the lease covenanted that the property was free from encumbrances. The majority apparently based their affirmance on the plain language of section 711.63(4), "which permits the court to direct 'disbursement of all or part of the funds . . . for payment of . . . mortgage payments . . . .' "[35]

An ex parte order which authorized paying funds into the court registry and the constitutionality of section 711.63(4) were at issue in *Gilman v. Chalfonte Condominium Apartment Association, Inc.*[36] The Fourth District found no error in the ex parte order because section 711.63(4) authorizes such deposits, and the clerk of the court requires a court order before he will accept money. The Fourth District refused to address the constitutional claims, finding that the trial court had not yet ruled on them.[37]

In *Palm-Aire Country Club Condominium Association No. 2, Inc. v. F.P.A. Corp.*,[38] the trial court had allowed the lessees to

33. 353 So. 2d 105 (Fla. 4th DCA 1977) (per curiam).

34. Under the 1977 Florida Rules of Appellate Procedure, an interlocutory appeal is cognizable where a "right to immediate possession of property" is at issue. FLA. R. APP. P. 9.130(a)(3)(c)(ii). Thus, rule 9.130 appears to include appeals from orders involving the right to distribution of accrued rent from the court's registry. *But see, e.g.*, Atreco-Florida, Inc. v. Berliner, 360 So. 2d 785 (Fla. 4th DCA 1978) (interlocutory appeal from an order certifying class action not permitted under new rules); City of Deerfield Beach v. Ocean Harbor Ass'n, 348 So. 2d 1192 (Fla. 4th DCA 1977) (no interlocutory appeal from an order denying summary judgment in a case which involved only money damages).

35. 353 So. 2d at 106 (Dauksch, J., dissenting) (quoting FLA. STAT. § 711.63(4) (1975) (current version at *id.* § 718.401(4) (1977)). Judge Dauksch could not accept the plain language of the statute to represent the legislative intent. Based upon the record, the judge would have remanded the case for a hearing to determine whether the mortgage funds and lease payments had been used for the construction and maintenance of the lease facilities. 353 So. 2d at 107. It is interesting to note that Judge Dauksch did not recede from his dissent in *Renaissance* when he joined the majority in Palm-Aire Country Club Condo. Ass'n No. 2, Inc. v. F.P.A. Corp., 357 So. 2d 249, 252 (Fla. 4th DCA 1977), *cert. denied*, 365 So. 2d 713 (Fla. 1978) (Dauksch, J., concurring specially).

36. 353 So. 2d 905 (Fla. 4th DCA 1977).

37. The court noted that on remand the trial court should rule on the constitutional aspects as soon as possible. *Id.* at 907.

38. 357 So. 2d 249 (Fla. 4th DCA 1978).

deposit their rental payments and then granted disbursement of rentals pursuant to section 718.401(4). The lessees challenged the latter order, arguing that the court could not allow disbursements for mortgage payments unless the lessors demonstrated that the mortgage payments were "incident to maintaining and equipping the leased facilities."[39] The Fourth District held that if it is shown at the preliminary hearing that the mortgage encumbers the leased property, the trial court may order disbursement of deposited funds necessary[40] for the mortgage payments. Mortgage payments, like the payment of taxes, need not be used for maintaining and equipping the lease premises nor must the lessor demonstrate an inability to obtain the funds from other sources.[41]

In *Hillcrest East No. 23, Inc. v. Hollywood Beach Hotel Development Co.*,[42] a condominium association and unit owners again challenged an order of a trial court authorizing disbursements. The lessees had been depositing their monthly rentals of $9,345 into the court's registry for several months when the lessors petitioned for disbursement and, alternatively, a declaration that section 718.401(4) is unconstitutional. The trial court held an evidentiary hearing, after which it granted disbursements of $5,130 each month from the monthly rentals deposited. The lower court never ruled on the constitutionality of the statute.[43]

The sole witness at the hearing was an officer of the development company. He testified that a $2,185 monthly mortgage encumbered the recreational facilities; however, neither the note nor the mortgage was ever offered as evidence. The lessees' counsel objected to the use of secondary evidence rather than the primary and best documentary evidence.[44] The trial court granted the disbursement of the monthly mortgage payments. The Fourth District held that the lessor is entitled to mortgage payment withdrawals if he proves

39. FLA. STAT. § 718.401(4) (1977).

40. "The existence of the mortgage is in and of itself prima facie evidence of the need for the money . . . . It is immaterial that the lessors might be able to make the payments from other sources." 357 So. 2d at 251.

41. *Id.* In a second interlocutory appeal which was consolidated with the one just described, the lessors, rather than the lessees, were seeking a reversal of the subsequent order of the trial court which limited the amount of funds available for disbursement. The Fourth District reversed the lower court, holding that the portion of rent attributable to the escalation clause could be disbursed because the statutory prohibition of such clauses was prospective only and therefore did not apply to the instant leases. *Id.* at 251-52. This portion of the *Palm-Aire* decision is discussed in detail *infra*.

42. 359 So. 2d 546 (Fla. 4th DCA 1978).

43. *Id.* at 548.

44. *Id.*

that the mortgage encumbers the leased recreational facilities;[45] however, proof that an existing mortgage encumbers the based premises and not some other property must be derived from the documents. Thus, the court remanded the issue for more evidentiary hearings.

The undisputed evidence also showed that the remainder of the money ordered disbursed was to be used for expenses of the development company's subsidiary, which managed and maintained the leased recreation facility. The developer listed such expenses as taxes on its office building in which the management company maintained its offices, "salaries, employee benefits, telephone, utilities, insurance, and office supplies."[46] As to this part of the trial court's order, the Fourth District held that it was error to order disbursement of funds for expenses incurred in the operation of the management company's office since "deposited funds can be used only for expenses in some way *directly related* to the recreational facility."[47]

In the most recent decision of the Fourth District involving section 711.63(4), a trial court had once again granted an order allowing disbursement of funds for mortgage payments. The appellants-lessees, in *Chalfonte Condominium Apartment Association, Inc. v. Chalfonte Development Corp.*,[48] argued that the trial court erred in failing to apportion the amount to be distributed for mortgage payments since the mortgage initially covered lands other than those covered by the recreation lease. After the district court of appeal noted that the land covered by the recreation lease was the only land presently covered by the mortgage, it held that the trial court had not erred.

The constitutionality of section 711.63(4) of the Florida Statutes[49] was questioned by the developers-lessors in both *Gilman* and *Hillcrest,* but the circuit courts refrained from ruling on the issue.[50] Finally, after a circuit court upheld the constitutionality of section 711.63(4) and the case went before the Supreme Court of Florida, it appeared as if the issue would be resolved. Yet, in *Century Village, Inc. v. Wellington, E,F,K,L,H,J,M, & G Condominium Association,*[51] the supreme court refused to reach the constitutional

45. 357 So. 2d at 249.
46. 359 So. 2d at 548.
47. *Id.* (emphasis added).
48. 363 So. 2d 37 (Fla. 4th DCA 1978).
49. FLA. STAT. § 711.63(4) (1975) (current version at FLA. STAT. 718.401(4) (1977)).
50. *Hillcrest,* 359 So. 2d at 548; *Gilman,* 353 So. 2d at 906.
51. 361 So. 2d 128 (Fla. 1978).

claims by deciding the case on other grounds. Thus, it is still an open question as to whether section 711.63(4), applied retroactively, impairs the obligation of contract in violation of article I, section 10 of the Constitution of the United States and the Constitution of Florida.[52] *Century Village,* however, did address several significant aspects of the rent deposit procedure.

A number of condominium associations filed a suit against Century Village Inc., the developer-lessor. Since the validity of rent escalation clauses was at issue, the associations deposited the escalated portion of their rental payments into the court registry.[53] The rent deposit procedures were challenged by the developer-lessor, and this appeal followed the trial court's order upholding the rent deposit.[54]

The supreme court first noted that section 711.63(4) would have to have retroactive application in order to be applicable because the statute was not passed until after the leases sued upon had been entered into.[55] The court held that when the legislature passed the act which included section 711.63(4), it clearly and explicitly intended for the provisions of that section to apply retroactively.[56]

Turning to Century Village's declaration of condominium, the majority found express language[57] which incorporated into the dec-

---

52. *See id.* at 132 n.3. The appellants also sought to have FLA. STAT. § 711.63(4) (1975) invalidated as a violation of their constitutional right to due process. The court refused to reach this issue because it was not raised by the parties below. 361 So. 2d at 130.

53. *Id.* The associations continued to pay the unescalated portion of their rents as usual. The parties stipulated to depositing the escalated portion of rents into an interest bearing bank account to be distributed to the prevailing party at the conclusion of the suit. *Id.*

54. *Century Village* was appealed directly to the supreme court because the trial court passed on the statute's constitutionality. FLA. CONST. art. V, § 3(b)(1).

55. 361 So. 2d at 131.

56. *See* 1974 Fla. Laws, ch. 74-104, § 19. By determining that the statute applies retroactively, the supreme court has made it tougher for the statute to pass constitutional muster. *Compare* Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) (holding that FLA. STAT. § 711.231 (1975) (current version at *id.* §§ 711.302(3), .401(4) (1977)) would violate the contract clauses in the U.S. CONST. art. I, § 10 and FLA. CONST. art. I, § 10 if it were applied retroactively) *with* Schlytter v. Baker, 580 F.2d 848 (5th Cir. 1978) (holding that prospective application of FLA. STAT. § 711.231 (1975) (current version at *id.* §§ 718.302(3), .401(4) (1977)) did not violate substantive due process or equal protection claims under the U.S. CONST. amend. XIV, § 1).

57. The submission statement contained in Century Village's Declaration of Condominium provides:

> [The developer] hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 Et. Seq. [*sic*] (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby* . . . .

(emphasis added).

The "Condominium Act" referred to above is defined in section I(G) as follows: "Condominium Act means and refers to the condominium act of the State of Florida (Florida Statute 711, et seq.) *as the same may be amended from time to time.*" 361 So. 2d at 133 (emphasis added).

laration the provisions of the Condominium Act as it "may be amended from time to time."[58] The supreme court held that the developer had agreed, therefore, to be bound by section 711.63(4). Consequently, the court did not feel compelled to decide whether section 711.63(4) is an unconstitutional impairment of contract.[59]

The developer-lessor also contended that section 711.63(4) was inapplicable because the plaintiffs in the suit were condominium associations rather than unit owners.[60] The deposit provisions of the statute explicitly state that they are applicable to "unit owners" and do not mention associations.[61] The associations argued that the new class action rule[62] equates an association and unit owners. The supreme court agreed with the developer-lessor that section 711.63(4) was inapplicable to the case at bar. It held that "[o]nly where a *unit owner* initiates an action or interposes a defense are the deposit provisions applicable."[63] In rejecting the associations' argument, the court stated: "The terms 'association' and 'unit owner' are not interchangeable in this statutory context."[64]

Nevertheless, the Supreme Court of Florida held that the rental deposits in question were authorized. This holding was based upon

---

58. *Id.*

59. In his lone dissent, Justice Boyd stated that although "the declaration contained an agreement to be bound by future amendments to the Act," *id.* at 134, he could not dismiss so obvious an impairment of the landlord's constitutional right to timely receipt of rental payments. Justice Boyd was bothered by the use of "boilerplate" contract language being used in a manner which no landlord intended when it entered the declaration. *Id.*

This portion of the *Century Village* opinion, dealing with the "amended from time to time" clause, is discussed in greater detail in the text accompanying notes 88-92 *infra.*

60. 361 So. 2d at 133.

61. FLA. STAT. § 711.63(4) (1975) (current version with some modifications at *id.* §§ 718.302(3), .401(4) (1977)). Section 711.63(4) provides, in part:

> If the *unit owner* initiates any such action or interposes any such defense other than payment of rent under the lease, the *unit owner* shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due.

(emphasis added).

The current version of this section adds the words "or the association" to the emphasized language. *Id.* § 718.401(4).

62. FLA. R. CIV. P. 1.220(b); *see* Avila S. Condo. Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977).

63. 361 So. 2d at 133.

64. *Id.* It is curious that the court seemed intent on not deciding any issues which it could avoid, *see id.* at 132 n.3, 134 n.5, yet, it did not decide whether section 711.63(4) applied to associations until after it first determined the retroactivity of the statute and found that the declaration was automatically amended.

rule 1.600 of the Florida Rules of Civil Procedure[65] and upon a trial judge's inherent discretion to "fashion suitable remedies based upon the facts of particular cases to carry out the purposes of the rule and statute."[66] The possibility that the supreme court merely thought that the exclusion of "associations" was an oversight by the legislature is supported by the term's inclusion in the new version of section 711.63(4).[67]

2. ESCALATION CLAUSES

a. The "Automatic Amendment" Theory

(i). *Introduction*

Escalation clauses in recreational facilities leases or condominium management contracts operate to increase the rent in accordance with a formula based upon recognized consumer price or commodity indices. Recently, there have been attempts to have such clauses declared invalid and unenforceable under section 711.231 of the Florida Statutes.[68] Section 711.231 is the statutory prohibition against the inclusion and enforcement of escalation clauses in recreation leases. This statutory prohibition became effective on June 4, 1975.[69]

---

65. FLA. R. CIV. P. 1.600 provides:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and by leave of court. Money paid into court under this rule shall be deposited and withdrawn by order of court.

66. 361 So. 2d at 134.

67. Current version at FLA. STAT. § 718.401(4) (1977).

68. FLA. STAT. § 711.231 (1975) (current version at *id.* §§ 718.302(3), .401(4) (1977)). Section 711.231 provided:

> It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in leases [for recreational facilities or other commonly used facilities serving condominiums] or management contracts for condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or management contract which provides that the rental under the lease or fee under the contract shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

In 1976, the Condominium Act was renumbered, resulting in management and recreational contracts being separated. Thus, § 711.231 became §§ 718.302(3), .401(8). Since the cases discussed involve interpretations of the 1975 statute, the old numbering system will be retained in the text.

69. The prospective validity of § 711.231 has withstood a challenge brought under the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States. Schlytter v. Baker, 580 F. 2d 848 (5th Cir. 1978). The fifth circuit upheld the section's validity on the ground that "it furthers the legitimate objectives of curbing

In *Fleeman v. Case,*[70] the Supreme Court of Florida held that section 711.231 could not be applied to leases which predate the statute's effective date. The supreme court found the statute to be without express legislative intent that the statutory prohibition be applied retroactively.[71] The court, however, went on to conclude that if retroactive application were permitted, such application would impair the obligation of contract in violation of article I, section 10 of both the Constitution of the United States and the Constitution of Florida.[72]

Notwithstanding that the lease predates the effective date of section 711.231, unit owners have contended that specific language in their particular declaration of condominium[73] causes the declaration and lease to be amended to incorporate all amendments to the Condominium Act, including section 711.231.[74] The theory advanced in such a cause of action is best characterized as the "automatic amendment" theory, inasmuch as the unit owners contend that the declaration and lease are automatically amended to include all amendments to the Condominium Act. Unit owners at-

---

inflation and controlling abuses in the condominium trade." *Id.* at 850. As the court itself acknowledged, there does not appear to be any basis in fact for this rationale. *Id.*

70. 342 So. 2d 815 (Fla. 1976).

71. *Id.* at 818.

72. *Id.* It now appears that the supreme court has recognized that it was mere dictum which addressed the constitutional aspects in *Fleeman.* Section 711.231 had been declared unconstitutional by a circuit court, and the resulting dismissal of the suit on that ground was before the Supreme Court of Florida in Buckley Towers Condo., Inc. v. Buchwald, 354 So. 2d 868 (Fla. 1978). Citing *Fleeman,* the court affirmed the trial court's dismissal of the suit because the statute could not be applied to a lease created prior to the effective date of the statute. The supreme court, however, quashed the circuit court's order declaring the statute unconstitutional because it was unnecessary to rule on the constitutionality of an inapplicable statute.

73. All unit purchasers are made subject to a declaration of condominium, the provisions of which set out many of the rights and obligations of the unit owners, association and developers. The source of unit owners' "automatic amendment" theory must be found in that particular condominium's documents. In each case, however, where the theory was argued, the operative provision was to the effect that the Condominium Act, as *amended from time to time,* was incorporated into the declaration of condominium. *See* Century Village, Inc. v. Wellington, E,F,K,L,H,J,M & G, Condo. Ass'n, 361 So. 2d 128 (Fla. 1978); Palm-Aire Country Club Condo. Ass'n No. 2, Inc. v. F.P.A. Corp., 357 So. 2d 249 (Fla. 4th DCA 1978); Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), *cert. denied,* 355 So. 2d 517 (Fla. 1978).

74. *Century Village* involved the applicability of the automatic amendment theory to FLA. STAT. § 711.63(4) (1975) rather than § 711.231. Unless a valid distinction can be drawn between the two statutes, however, *see* pp. 929-31 *infra,* it would appear that the Supreme Court of Florida would apply the theory to § 711.231. In *Century Village,* the court applied the automatic amendment theory to find the developer "bound by all future amendments to the Condominium Act, including, *but not limited to* Section 711.63(4) . . . ." 361 So. 2d at 131 (emphasis added). The supreme court also quoted with approval from a case which had applied the theory to § 711.231. *Id.* (quoting Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), *cert. denied,* 355 So. 2d 517 (Fla. 1978)).

tempt to avoid the prohibition against retroactive application of section 711.231 by contending that the declaration and lease expressly incorporate the statutory prohibition.

The automatic amendment theory was first announced in *Kaufman v. Shere.*[75] Subsequently, the theory has been addressed in *Palm-Aire Country Club Condominium Association No. 2, Inc. v. F.P.A. Corp.,*[76] and *Century Village, Inc. v. Wellington, E,F,K,L,H,J,M, & G Condominium Association.*[77] Because many declarations of condominium may contain language similar to that found in the above cases,[78] the applicability of the automatic amendment theory is likely to be at issue in future cases.[79] This portion of the article will discuss the manner in which the courts have approached the problem and analyze the factors which should be considered prior to a determination that the lease incorporates section 711.231.

(ii). *Case Law*

In *Palm-Aire,* the District Court of Appeal, Fourth District, refused to apply the automatic amendment theory where the lease provided for the exclusive method of amendment. The trial court permitted the deposit of the lease rents into the registry of the court during the pendency of the litigation. The court also allowed the disbursement from the fund of sums necessary to make payments on the mortgage encumbering the lease property.[80]

The Fourth District rejected application of the automatic amendment theory, concluding that "the rent escalation clauses in the recreational leases have not been voided by virtue of an automatic amendment of condominium documents triggered by the adoption of section 711.231."[81] This conclusion was based, in major part, on the finding that "the lease provides for an *exclusive method of amendment which does not include an automatic amendment whenever there is a change in the Condominium Act.*"[82]

The "exclusive method of amendment" to which the Fourth

75. 347 So. 2d 627 (Fla. 3d DCA 1977), *cert. denied,* 355 So. 2d 517 (Fla. 1978).

76. 357 So. 2d 249 (Fla. 4th DCA 1978).

77. 361 So. 2d 128 (Fla. 1978).

78. Justice Boyd has referred to the operative words of the automatic amendment theory as "undoubtedly condominium contract boilerplate." *Id.* at 134 (Boyd, J., dissenting).

79. *See, e.g.,* Royal Coast Condo. Ass'n, Inc. v. J&W Inv., Inc., No. 76-5367 (Cir. Ct. Fla. July 31, 1979).

80. 357 So. 2d at 251. For a discussion of this aspect of the case, see p. 922 *supra.*

81. 357 So. 2d at 252.

82. *Id.* at 251-52 (emphasis added).

District referred, was a set of restrictions and limitations on amendments to the Palm-Aire lease. Under article XXIX of the Palm-Aire lease,[83] amendments to the lease must occur in recognition of the following specific restrictions: The amendment must not (1) change an owner's rent under the lease; (2) impair the manner by which owners share common expenses under the lease; or (3) impair the right of owners to use and enjoy the recreational area. According to the lease terms, an amendment to the Palm-Aire lease would not cause any of the foregoing changes without joinder and consent of all persons affected thereby.

To sanction the automatic amendment theory would run afoul of the specific requirements and restrictions that govern the amendment process. The Fourth District respected the specific lease amendment restrictions in holding that the lease could not be considered automatically amended in conformity with all amendments to the Condominium Act.

In rejecting the automatic amendment theory in *Palm-Aire,* the Fourth District attempted to distinguish its decision from that of the Third District in *Kaufman v. Shere.*[84] The cases, however, cannot be easily distinguished or reconciled. In *Kaufman,* the court found section 711.231 to be incorporated within the lease, thereby prohibiting enforcement of the escalation clause after the effective date of the statute. The holding was based upon the condominium's declaration which provided in pertinent part: "[T]he provisions of the Condominium Act as presently existing, or as it may be amended from time to time, including the definitions therein contained, are adopted and included herein by express reference."[85] Like *Kaufman,* the Palm-Aire declaration contained a provision

---

83. Article XXIX of the Palm-Aire lease provided:

> This long term lease may be amended by agreement in writing executed by the Lessor and the Lessee Association, which amendment shall be duly recorded in the Public Records of the County where the leased premises are located, and the recording of said amendment shall also constitute and be deemed an amendment to the Declaration of Condominium to which this long term lease is attached as Exhibit 4, as to the provisions in said Declaration relative to said long term lease. *No amendment shall change a unit owner's rent under this long term lease, nor impair the manner of sharing common expenses* under this long term lease, *nor impair the right of the unit owners to use and enjoy the recreational area* and facilities, *without the unit owners so affected and all record owners of mortgages thereon, joining in the execution of said amendment.*

Memorandum in Support of Motion for Reconsideration at 18, Royal Coast Condo. Ass'n, Inc. v. J&W Inv., Inc., No. 76-5367 (Cir. Ct. Fla. July 31, 1979) (emphasis added by Memorandum).

84. 347 So. 2d 627 (Fla. 3d DCA 1977), *cert. denied,* 355 So. 2d 517 (Fla. 1978).

85. *Id.* at 628.

incorporating the Condominium Act as amended from time to time. Paragraph VI of the Palm-Aire declaration provided: "VI. Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 *et seq.*), *as the same may be amended from time to time.*"[86]

Not only did *Kaufman* and *Palm-Aire* exhibit provisions of the declaration that can, and did, serve as a basis for the urging of the automatic amendment theory, but both sets of documents contained essentially the same procedures and restrictions with regard to amendments.[87] Thus, despite the Fourth District's attempt to distinguish the cases, it appears that the two courts reviewed similar theories in the face of similar document provisions and came to different conclusions.

Century Village involved the applicability of the automatic amendment theory to section 711.63(4) of the Florida Statutes[88] rather than section 711.231. The holdings in *Century Village* which are pertinent here[89] are the Supreme Court of Florida's findings that (1) the legislature intended to apply the statute retroactively and (2) the Century Village documents encompass the statute where the declaration of condominium provided for the incorporation of all amendments to the Condominium Act.[90]

---

86. Memorandum in Support of Motion for Reconsideration at 21, Royal Coast Condo. Ass'n, Inc. v. J&W Inv., Inc., No. 76-5367 (Cir. Ct. Fla. July 31, 1979) (emphasis added by Memorandum).

87. Paragraph eight of the *Kaufman* declaration of condominium provides as follows:

> 8. AMENDMENT OF DECLARATION
>
> This Declaration may be amended from time to time by resolution *adopted at any regular or special meeting of the unit owners* of the Condominium called in accordance with the By-Laws, at which a quorum is present, such amendment to be by the *affirmative vote of ¾ of the unit owners present* at such meeting. *Such amendment shall be duly recorded* in compliance with Section 10 of the Condominium Act. *No amendment shall change any condominium parcel nor the proportionate share of expenses or common surplus attributable to any parcel, nor the voting rights appurtenant to any parcel, unless the record owner or owners thereof and all record owners of liens upon such parcel or parcels shall join in the execution of such amendments; provided,* further, *that no amendment of the Declaration which in any way affects, changes or alters the obligation of the Condominium with respect to the lease of recreational Area,* shall ever be effective or binding on the lessor thereof, its successors and assigns without the consent of said lessor in writing first had, and obtained, this provision in the Declaration being an essential consideration to the lessor to make said lease.

Id. at 21-22 (emphasis added by Memorandum). A Comparison of the *Kaufman* restrictions and procedures on amendments with those of *Palm-Aire* indicates a compelling similarity.

88. FLA. STAT. § 711.63(4) (1975) (current version at *id.* § 718.401(4) (1977)).

89. For a discussion of the case as a whole, see text accompanying notes 51-67 *supra*.

90. Quoting passages from the condominium documents the court laid out the operative language as follows:

Century Village may be distinguished from *Palm-Aire* and *Kaufman* because, in *Century Village,* the court only permitted the incorporation of the remedial deposit statute[91] but did not permit the substantial alteration and reduction of the lease obligation through incorporation of section 711.231, a section which the legislature did not intend to have retroactive effect.[92]

(iii). *Analysis of the Theory*

Since the basis of the automatic amendment theory lies in section 711.231, the maintenance of the claim must find direct support in the terms and provisions of the declaration of condominium and long term lease or it will violate the mandate of the supreme court in *Fleeman.* It must appear that the declaration and lease provisions are consistent with the theory in general. The provisions of the declaration and lease, therefore, must be examined, independently of the principles announced in *Kaufman, Palm-Aire* and *Century Village.*

Assuming that the documents use language to the effect that

The submission statement contained in Century Village's Declaration of Condominium provides:

> [The developer] hereby states and declares that said realty, together with improvements thereon, is submitted to Condominium ownership, pursuant to the Condominium Act of the State of Florida, F.S. 711 Et. Seq. (hereinafter referred to as the "Condominium Act"), *and the provisions of said Act are hereby incorporated by reference and included herein thereby. . . .*
>
> The "Condominium Act" referred to above is defined in Section I(G) as follows: "Condominium Act means and refers to the condominium act of the State of Florida (Florida Statute 711, et. seq.) *as the same may be amended from time to time.*"

361 So. 2d at 133 (emphasis added).

91. The fact that the supreme court ultimately allowed the deposit procedures based upon FLA. R. CIV. P. 1.600 indicates that it viewed the provisions of § 711.63(4) as procedural in effect. *See* 361 So. 2d at 134.

92. *See* Buckley Towers Condo., Inc. v. Buchwald, 354 So. 2d 868 (Fla. 1978); Fleeman v. Case, 342 So. 2d 815 (Fla. 1976). This distinction might also apply to FLA. STAT. § 711.66(5)(e) (1975) (current version at *id.* § 718.302 (1977)). In Avila S. Condo. Ass'n, Inc. v. Kappa Corp., 347 So. 2d 599 (1977), the supreme court refused to hold a preexisting recreation lease to the "fair and reasonable" standard of § 711.66(5)(e) because of a lack of legislative intent to have the statute apply retroactively. *See also,* Point E. One Condo. Corp. v. Point E. Developers, Inc., 348 So. 2d 32 (Fla. 3d DCA 1977). FLA. STAT. § 711.63(7)(b), (c) (1975) (current version at *id.* § 718.401(6)(a) (1977)), which provides an association with the right of first refusal to purchase a lessor's interest in the lease, has also been determined not to have retroactive application. Buckley Towers Condo., Inc. v. Buchwald, 356 So. 2d 1306 (Fla. 3d DCA 1978). Although § 711.63(7)(b), (c) is not a procedural statute, incorporation of it would not seem to alter major substantive rights to the extent that incorporation of §§ 711.231 or 711.66(5)(e) would.

the Condominium Act, *as amended from time to time,* is incorporated within the document, there may still be reason to interpret the documents not to incorporate section 711.231. Contract provisions are not interpreted by isolating them from the remainder of the document. The intentions of the parties as embodied in a document must be gathered from its entirety and must consider the purposes to be accomplished, as well as the obligations created.[93] An interpretation that results in an absurd or inconsistent result is prohibited.[94] Where a document contains both general and specific provisions relating to the same subject, the specific and the particular will control.[95] In light of these principles, the courts must look to see if other provisions of the documents indicate that the escalation clause is not to be changed by amendment or otherwise.

For example, the lease may contain a provision which clearly states that it imposes upon the lessee a firm and irrevocable obligation to pay the full rent for the full term of the lease. Similarly, the escalation clause in the lease may provide that the rentals, once increased, shall never be decreased. Leases may provide that their terms may never be amended without the consent of the lessors. In such cases, it may be that, even assuming that the lessee's interpretation of the operative words for automatic amendment is accurate, the court should not permit the incorporation of provisions of the Condominium Act that would serve to eliminate specific rights and obligations that are firmly established in the lease. There may be an inconsistency in the amendment process. Many leases and declarations provide a specific method of amendment in clear and unambiguous language. *Palm-Aire* relied heavily upon this inconsistency to interpret the documents as not authorizing automatic amendments whenever the Condominium Act is amended.[96]

Besides interpreting the documents regarding major inconsistencies, the courts must also determine if the lease, as opposed to the declaration, has been automatically amended. If the lease itself has a provision which expressly incorporates all amendments to the Condominium Act then, of course, there can be no argument that the escalation clause contained in the lease will be subject to such a provision. In *Kaufman, Palm-Aire* and *Century Village,* however, the operative language was contained in the declaration of condomi-

93. Triple E. Dev. Co. v. Floridagold Citrus Corp., 51 So. 2d 435 (Fla. 1951).

94. *Id.;* Quinerly v. Dundee Corp., 31 So. 2d 533 (Fla. 1947); Jacobs v. Parodi, 50 Fla. 541, 39 So. 833 (Fla. 1905).

95. Aetna Life Ins. Co. v. White, 242 So. 2d 771 (Fla. 4th DCA 1970), *appeal after remand,* 277 So. 2d 290 (Fla. 4th DCA 1973).

96. 357 So. 2d at 251-52.

nium. In such a case, it must be determined whether the lease incorporates the declaration or whether the lease is independent and unaffected by any interpretation given to the automatic amendment language found in the declaration. Although none of the cases discussed whether the lease incorporated the declaration, it would appear that the lease must be deemed to incorporate the declaration if section 711.231 is to apply to the escalation clause.

One factor which would be indicative of the independence of the lease is whether the execution of the lease occurred prior to the execution and recordation of the declaration. In such a case, the obligations of the lease would be fixed by the time the declaration became effective. Therefore, the fact that the declaration incorporated the lease would not mean that the lease incorporated the declaration. Another factor which would be important is whether the developers and lessors are distinct persons or separate entities entitled to their own legal identities and interests. Both of these factors may have had some effect in *Kaufman,* although they were not discussed by the court. In that case, the lease stated, in its opening paragraph, that it was executed simultaneously with the declaration of condominium. In addition, it appeared that the developer controlled the lessor.

In contrast to *Kaufman* is the case of *Urbanek v. Kandell.*[97] In *Urbanek,* the court had occasion to discuss the independent integrity that must be afforded to both declarations and leases. In the context of responding to the urging of the automatic amendment theory by virtue of specific language in the applicable declaration, Judge Norse determined:

> The Court believes, therefore, that the Long-Term Lease agreement is an independent contractual undertaking between the Condominium Association, its members, and the lessor. . . .
>
> The fact that a valid binding contract, in this case a lease, is attached as an exhibit to the Declaration of Condominium as required by statute does not destroy the Lease's separate standing as an independent contractual undertaking. This litigation concerns the rights and responsibilities of the parties under the lease agreement between the landlord and the tenant and is not concerned with the provisions of the Declaration of Condominium as such. In fact, the Court believes that any modification of the Declaration of Condominium whether by operation of law or otherwise, which would have the effect of impairing the obligation under the separate lease agreement contract, particularly

97. No. 75-542-CA (Cir. Ct., Fla. Aug. 26, 1977).

when performance thereunder has occurred, would not be effective to prejudice the rights of the lessor thereunder and could not be construed to affect, modify or alter the rights of the parties thereunder.[98]

(iv). *Conclusion*

The first consideration with regard to the applicability of the automatic amendment theory must be the express language of the documents relied upon by the owners in support of their claim to have an escalation clause invalidated pursuant to section 711.231. The interpretation of this language must be made in light of companion provisions in the declaration of condominium and lease. Even if certain provisions of the declaration appear to support the automatic amendment theory, it may be argued that the theory should not be applied if other terms clearly provide for an exclusive method of amendment or state that the escalation clause is not subject to any alteration or impairment.

The next consideration should be whether the provisions of declaration are incorporated within the lease. If not, the lease may not be affected by the automatic amendment of the declaration, since the escalation clause will be found in the lease.

The District Courts of Appeal for the Third and Fourth Districts appear to be in conflict on when the automatic amendment theory may be utilized to assert a claim for relief under section 711.231. The Supreme Court of Florida, however, has indicated, in *Century Village,* that the theory will be applied when the documents expressly incorporate all amendments to the Condominium Act and the application seeks to incorporate a procedural or remedial statute.

b. The "Gold Clause" Theory

The District Court of Appeal, Fourth District, held in *Shaughnessy v. REC Centers, Inc.*[99] that a valid cause of action, seeking a declaratory judgment invalidating an escalation clause in a long term recreational lease, had been stated where it was alleged that the escalation clause violated a 1933 joint resolution of the Congress of the United States of America,[100] commonly known as the

98. *Id.* slip op. at 12.

99. 361 So. 2d 807 (Fla. 4th DCA 1978).

100. 31 U.S.C. § 463 (1976). The joint resolution provides as follows:

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particu-

"Gold Clause" resolution. In so holding, the Fourth District reversed the trial court's dismissal of the suit and remanded the case to allow the appellants the opportunity to present appropriate proof that the gold clause was applicable to the challenged clause.[101]

The escalation provision provided:

> (b) In the event that the United States dollar should ever be *officially devalued* by the United States government or replaced by a regular species of a lesser value, then and in that event the rental to be paid by the lessee to the lessor or any purchase price to the lessor by the lessee shall be *increased in proportion to said devaluation* so that the rental to be paid to the lessor or the purchase price of the property covered by this lease to be paid to the lessor shall be the same in terms of actual value as the United States dollar was on January 1, 1967.[102]

The appellees argued that the escalation provision had no relationship to the gold clause[103] in that the provision was merely an indexing device used to preserve the lessor's future purchasing power at the January 1, 1967 level in the event of a future official devaluation of the dollar. Appellees contended that the actual value of the dollar in 1967 was the standard by which the rent was to be adjusted, and this value was measured by the purchasing power of

---

lar kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

101. 361 So. 2d at 809.

102. *Id.* at 808 (emphasis added).

103. The court noted that:

> "a valid reason for the Joint Resolution was to establish a uniform currency and parity between kinds of currency and to make that currency dollar for dollar, legal tender for the payment of all debts. Congress struck down gold clauses with the Joint Resolution because they interferred with its power to establish a uniform currency."

Id. at 809 (quoting Equitable Life Assurance Soc'y of the United States v. Grosvenor, 426 F. Supp. 67, 73 (W.D. Tenn. 1976) (summarizing Norman v. Baltimore & O.R.R. Co., 294 U.S. 240 (1935))).

the 1967 dollar.[104] The Fourth District, however, recognized that the escalation clause did not adjust rents against a standard measured by the actual or purchasing value of the 1967 dollar, but rather, solely against the percentage by which the dollar is officially devalued. Thus, the court was left with the question of whether the challenged provision was one which "require[d] payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured [by gold or by a particular kind of coin or currency.]"[105]

It would be wholly speculative to predict how the courts will eventually handle the unique argument that an escalation clause may be invalid due to the gold clause. It is interesting, however, that as recently as 1975, the Supreme Court of Tennessee struck down "a provision for repayment of a loan 'in constant United States dollars adjusted for inflation (deflation)'"[106] as violative of the 1933 joint resolution. Furthermore, the Fourth District noted that one definition of devaluation would lend support to the gold clause theory.[107] Thus, although the application of the gold clause to escalation clauses in condominium recreation leases may appear outrageous at first glance, the practioner should be aware of it if litigation involves condominium documents with provisions similar to those at issue in *Shaughnessy*.

3. ASSOCIATION OPTION TO PURCHASE LESSOR'S INTEREST

Section 711.63(7)(b) and (c) of the Florida Statutes[108] provides a condominium association the option to purchase the lessor's leasehold interest if the lessor wishes to sell his interest, receives a bona fide offer, and seventy-five percent of the unit owners sharing the

---

104. *Id.*

105. 31 U.S.C. § 463(a) (1976).

106. 361 So. 2d at 809 (quoting Aztec Properties, Inc. v. Union Planters Nat'l Bank, 530 S.W.2d 756, 761 (Tenn. 1975)).

107. The Fourth District stated:

> Devaluation of currency is an economic tool utilized by governments in the complicated mechanisms of international monetary policies. One noted author defines devaluation as occurring when gold officially goes up in price relative to a specific currency, as from $21.00 an ounce to $35.00 an ounce. Samuelson, *Economics*, pg. 627 (8th Edition, 1970). If this definition is a currently proper one and if it is that which was contemplated by the parties to the escalation clause involved herein, then the increase in future rental payments would be based upon an amount of money measured by gold, or by a particular kind of coin or currency, to wit: a currency based upon the amount of gold that that currency will purchase.

Id.

108. FLA. STAT. § 711.63(7)(b) -.63(7)(c) (1975) (current version at *id.* § 718.401(6)(a) (1977)).

leased property approve. In *Buckley Towers Condominium, Inc. v. Buchwald,*[109] the District Court of Appeal, Third District, affirmed the trial court's dismissal of a condominium association's action for a declaratory decree enforcing its alleged option under section 711.63(7)(b) and (c). The court noted that the lease had been entered into prior to the effective date of the statute and did not contain any provision giving the association an option or a right of first refusal. Following the familiar rules of statutory construction and constitutional law, the court held that section 711.63(7)(b) and (c) could not be applied retroactively.[110]

B. *Lien Rights*

The University of Miami Law Review's 1977 survey of condominium litigation[111] discussed the case of *Gersten v. Bessemer,*[112] decided by the District Court of Appeal, Fourth District, and noted that the supreme court had taken jurisdiction of the case on certiorari.[113] The Supreme Court of Florida recently issued its opinion, reversing the district court[114] and eliminating the conflict between the Fourth District and prior decisions of the supreme court.

In *Gersten,* a lot buyer and a subdivision developer entered into a purchase and sale agreement. The agreement provided that the buyer pay certain maintenance and recreational facility charges; additionally, it put the buyer on notice that there would be no warranties of restrictions of record. The agreement, however, did not mention that the buyer's duty to pay the charges would be secured by a lien against his property. The developer subsequently recorded a declaration of restrictions which provided for the establishment of a lien in the event of nonpayment of the charges. Even though the deed received by the defendants at closing made reference to the declaration of restrictions, the defendants argued that they had had no actual notice of the lien.[115] The suit arose when the developer sought to foreclose the lien for nonpayment of the recreational facilities charge. The trial court's final judgment of foreclosure was reversed by the Fourth District on the ground that the property was

109. 356 So. 2d 1306 (Fla. 3d DCA 1978).

110. *See* Avila S. Condo. Ass'n, v. Kappa Corp., 347 So. 2d 599 (Fla. 1976); Fleeman v. Case, 342 So. 2d 815 (Fla. 1976).

111. Mandelkorn & Krul, *supra* note 1, at 912-13.

112. 352 So. 2d 68 (Fla. 4th DCA 1977), *rev'd,* 6 FLA. L.W. 78 (Fla. Feb. 8, 1979) (No. 52,264).

113. Mandelkorn & Krul, *supra* note 1, at 913 n.161.

114. 6 FLA. L.W. 78 (Fla. Feb. 8, 1979) (No. 52,264).

115. *Id.* at 79.

protected by the homestead exemption of article X, section 4, of the Florida Constitution of 1968. The court found that both the lien rights and the homestead exemption attached at the time of closing; therefore, the homestead exemption was given priority.[116]

The supreme court was not as concerned as the district court of appeal about the exact time when the lien became effective. The buyer contended that there was no agreement showing an intent to have the property serve as security for payment of the obligation. Even if there was such an intent, he asserted, it did not exist until title was transferred. The Fourth District agreed with this assertion. The developers contended that the lien was in existence at the time of conveyance or, in the alternative, related back to the time of recording the declaration of restrictions.[117] The Supreme Court of Florida held that the affirmative covenant to pay recreation facilities charges was attached to, and ran with, the land. As such, the covenant was in equity a lien.[118] The covenant, in effect, created its own enforcement mechanism which was already in existence when the buyer took title to the land.[119] "Whether this result be achieved by holding the lien to be preexisting, or by recognizing the relation back of the subsequently arising lien, would seem to be of little practical importance."[120]

In *Westchester House Association, Inc. v. McPherson*,[121] a condominium association asserted that its purchase of a long term recreational lease, and the consequent assessment made against each unit owner, gave rise to lien rights. The circuit court determined that the association did not have a valid, foreclosable lien against a unit owner who did not consent to the purchase of the recreational lease and its facilities.

As required by the Condominium Act, the association was established by the documents which created the Westchester House Condominium. Recreation areas were subject to a long term land lease between the developer and the association, as the corporate

116. *Id.* Generally, a lien must be established prior to the property acquiring homestead status in order to be able to enforce that lien against the homestead property. *Id.* at 80 n.1.

117. *Id.* at 79. The developers also argued that the lien's existence might relate back to the recording of the completion of the recreational facilities. *Id.*

118. *See* Hullum v. Bre-Lew Corp., 93 So. 2d 727 (Fla. 1957); Dewing v. Davis, 117 So. 2d 747 (Fla. 2d DCA 1960).

119. 6 FLA. L.W. at 79; *see* Mendrop v. Harrel, 233 Miss. 679, 691, 103 So. 2d 418, 424 (1958) (covenant to pay for paving of streets also created a lien upon the land to enforce the charge).

120. 6 FLA. L.W. at 79. Although there were no dissents in *Gersten*, three justices concurred in the result only.

121. No. 76-2564 (Cir. Ct. Fla. Oct. 11, 1977).

lessee.[122] Each individual unit owner was required, upon closing, to join in the long term lease as an individual lessee and thereby accept the obligations and benefits of the lease. The lease contained an option to purchase exercisable only in 1980 or 1981 by the association. The option was for the whole of the devised premises at a price of $160,000.[123]

Prior to April 1974, negotiations were commenced between the lessor and association members, and a purchase of the leasehold interest was agreed upon with the closing set for June 1, 1975. Mrs. McPherson was the sole dissenter. She refused to consent to the buy-out.[124] In April, the association's board of directors passed a resolution which approved the purchase and assessed each unit owner, including Mrs. McPherson, his portion of the purchase price. After Mrs. McPherson's refusal to pay the assessment, an action to foreclose a lien against her unit was filed by the association. In defense of the foreclosure action, it was argued that the assessment was not in accord with the restriction in the condominium documents which gave the board of directors authority to make assessments only for common expenses. The declaration of condominium provided the association with the power to make *"alterations or improvements to the common property"*[125] and to assess the costs as common expenses. The court agreed with the defendant that the association's authority to make alterations and improvements was limited to improvements to the physical property of the condominium, rather than to improvements of the legal or financial position of the owners by the acquisition of an interest in real property.

The defendant further contended that even if the assessment had been made in accordance with the condominium documents, the association was not entitled to the benefit of a lien under section 711.14 and 711.15 of the Florida Statutes.[126] Thus, the lien, being unrecognized in the law, was unenforceable. The court agreed with the defendant's contention that the lien created by section 711.15 is solely a lien for the expenses authorized in section 711.14. The court determined that the acquisition of the long term recreational

122. *Id.* slip op. at 1-2.

123. *Id.* at 2.

124. *Id.* at 5. The association asserted that the defendant had also agreed to the acquisition of the leasehold interest for $190,000. The defendant, however, denied that she was in favor of purchasing at $190,000. Rather, she only favored purchasing the lease at the 1980 option price of $160,000. *Id.* at 2. The court found that the evidence that defendant had agreed to the purchase fell far short of establishing grounds for estoppel. *Id.* at 5.

125. *Id.* at 4.

126. FLA. STAT. §§ 711.14 -.15 (1975) (current versions at *id.* §§ 718.115 -.116 (1977)).

lease was not a "common expense" within the meaning of section 711.14[127] and did not carry with it the legal right of a lien.

Finally, the court found that the board of directors had no authority to rewrite the lease agreement. The association had only a right to exercise an option under the lease. The option, however, was exercisable only under certain conditions which had not yet occurred. Thus, the material deviations from the contract constituted a novation. All owners, however, were parties to the contract because they had signed a joinder and assumption agreement which individually bound each owner to the lease as lessees. Having identified each individual owner's contract right, the court held that the association did not have the right to enter into the novation without authorization by the agreement itself or by all the individual owners whose contract rights would be impaired.[128] The court preserved Mrs. McPherson's right to continue to make lease payments in lieu of involuntarily participating in the purchase of the lease facilities. This recognition of each owner's individual property rights in the recreational lease is the most important aspect of the *McPherson* decision. Because section 711.14 would easily have permitted the association to have amended its declaration or by-laws to declare the purchase price to be a common expense, the court's finding that section 711.14 did not, in and of itself, authorize this sort of assessment as a common expense is not of particular significance where an association has sufficient support for the buy-out to authorize the necessary amendments.

Section 711.10, however, makes it clear that a unit owner's appurtenances cannot be affected without his consent, thereby prohibiting any act by the association which affects the leasehold interest. Thus, the association should have raised the funds necessary to purchase the lessor's interest without assessing Mrs. McPherson and, to avoid legal merger, should have continued to collect rent from Mrs. McPherson to repay those owners who advanced the

127. FLA. STAT. § 711.14(1) (1975) (current version at *id.* § 718.115(1) (1977)) provides as follows: "(1) Common expenses include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this law, the declaration or the by-laws."

128. It should be noted, however, that in *Westchester*, at closing, each owner executed a joinder and assumption agreement which individually bound each owner to the lease as a lessee. Given these circumstances, the court had little difficulty in identifying the individual contract rights possessed by each owner. Although this feature may provide a basis for distinguishing from a case in which no such agreement exists, it is significant to note that recreation leases typically provide for a unit owner's assumption of obligations as if he were a lessee under the lease.

funds to make up the purchase price shortage. Because the association chose instead to terminate the lease, Mrs. McPherson had asserted she is obligated to pay neither the assessment nor the rent under the now terminated lease.

The District Court of Appeal, Fourth District, in *City National Bank v. Home Federal Savings & Loan Association,*[129] reversed a trial court's holding that a mortgagee's foreclosure permanently extinguished all obligations under the recreation lease which pertained to the individual unit foreclosed. When the condominium was established, a long term recreational lease and a declaration of condominium were recorded in that order. A mortgage on the particular unit in controversy was subsequently recorded by the institutional lender. The unit owner defaulted on assessments due the condominium association and on mortgage payments owed to the mortgagee. The association foreclosed its lien and obtained title to the unit. The institutional lender then brought an action to foreclose its mortgage, joining the association as the title holder and the assignee of the lessor of the recreational facilities lease.[130] The lender's foreclosure action was successful.

On appeal, it was not contested that the institutional lender had vested title to the unit pursuant to the foreclosure proceedings. Rather, the assignee of the lessor contended that the institutional lender and its successors in title remained liable for rents due on the recreational lease and that the foreclosure action could not have erased the obligation to pay the rent allocated to the foreclosed unit.

The trial court agreed with the institutional lender's argument that the language in the lease, which subordinated the lessor's lien to the lien acquired by the institutional lender, wiped out the recreational lease as to the unit once the first mortgage lien was foreclosed on that unit.[131] The lessor's assignee and the association urged that a crucial distinction existed between the *lien* for unpaid recreational assessments or rents and the *lease* itself. The lien could be subordinated and eventually wiped out, but the recreational lease, along with the rights and obligations thereunder remained attached to the unit as part of its appurtenances.

The Fourth District found that the declaration of condominium made the recreational *lease,* not the land demised under the lease, part of the common elements.[132] The court also noted language of

129. 356 So. 2d 814 (Fla. 4th DCA 1978).

130. *Id.* at 815.

131. *Id.* at 815-16.

132. *Id.* at 816. The court noted that the declaration followed the then applicable statu-

the declaration which it felt "makes it crystal clear that sucessors in title, by foreclosure or otherwise, remain liable for common expenses covering the common elements—prospectively, at least."[133] Thus, the court held that the institutional lender remained liable for its obligations under the recreational lease.

C. *Arbitration*

In response to an interlocutory appeal, the District Court of Appeal, Second District, has affirmed a trial court's denial of a motion to compel arbitration between a condominium association and a management company.[134] *R.B.F. Management Co. v. Sunshine Towers Apartment Residences Association, Inc.*,[135] held that where the validity of an entire management contract is challenged, its validity is a matter to be resolved by the judiciary and not by arbitration.

The plaintiff below was a condominium association which challenged three separate management contracts.[136] Each contract contained an arbitration clause. The defendant management company properly invoked the trial court's jurisdiction to compel arbitration,[137] and under Florida law[138] "an agreement or provision in a contract requiring arbitration shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy."[139] However, the trial court refused to compel arbitration since the plaintiff sought only rescission of the entire agreement and not revocation or damages.[140] The Second District analyzed what it believed to be the relevant case law and concluded that judicial resolution was necessary because if rescission were granted the par-

---

tory power. *Id;* FLA. STAT. § 711.06(2) (1973) (current version at *id.* § 718.108(2) (1977)); *see* Sauls v. Crosby, 258 So. 2d 326 (Fla. 1st DCA 1972).

133. 356 So. 2d at 817. The court noted that the declaration tracked the appropriate language of the then applicable Condominium Act. *Id.;* FLA. STAT. § 711.15(6) (1973) (current version at *id.* § 718.116(6) (1977)).

134. R.B.F. Management Co. v. Sunshine Towers Apt. Residences Ass'n, Inc., 352 So. 2d 561 (Fla. 2d DCA 1977).

135. *Id.*

136. 352 So. 2d at 561. The management contracts were entered into between the developer-controlled association and the management company, normally a creation of the developer. Such "sweetheart contracts" often lead to litigation after the associaton comes under the control of the unit owners. *Id.* at 561-62. Charges of self-dealing by developer-controlled associations have not been uncommon. *See* Mandelkorn & Krul, *supra* note 1, at 916-18.

137. 352 So. 2d at 562; *see* FLA. STAT. § 682.03 (1975).

138. FLA. STAT. § 682.02 (1975).

139. 352 So. 2d at 562.

140. *Id.*

ties would have no contract at all and the arbitration clause would be nonexistent.[141]

III. Enforcement of Declaration of Condominium

A. *Use of Units—Enforcement of Rules and Regulations*

In *Mavrakis v. Playa del Sol Association, Inc.*,[142] a group of unit owners brought an action in federal court[143] for declaratory and injunctive relief against the condominium association. The plaintiffs had each purchased a unit prior to 1975. At the time of their purchase, the declaration of condominium, articles of incorporation and by-laws of the association, and a document entitled, "Preliminary Rules We Live By" did not prohibit family and guests of the owner to use the condominium unit in his absence.[144] In 1975, the board of directors of the association promulgated new rules which restricted or prevented the use of a unit by family, invitees and guests in the owner's absence.[145]

The association argued that it had the power under the various condominium documents to make reasonable rules and regulations which promoted "the health, happiness and peace of mind of the majority of the unit owners."[146] It contended that the new rules represented a valid exercise of its power since they were promulgated primarily as a security measure.[147]

The unit owners contended that the new rules abrogated specific use and property rights acquired at the time of their purchase pursuant to the declaration of condominium.[148] Furthermore, they

141. The court refused to adopt an alternative approach which it recognized as having been propounded by "persuasive and respectable authority." *Id.* at 564. For a discussion of the separability of the arbitration clause, see Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915 (1st Cir. 1960), *cert. denied*, 364 U.S. 911 (1960).

142. No. 77-6049-CIV-WMH (S.D. Fla. May 11, 1978).

143. Diversity of citizenship was the basis of jurisdiction, and the case was before the court on cross-motions for summary judgment. *Id.* slip op. at 1.

144. *Id.* at 2.

145. The court quoted the "New Rules and Regulations" of the Condominium in relevant part as follows: "Owners and lessees may designate members of their immediate family as guest occupants of their apartments in their absence . . . for periods not to exceed 30 days in any 12 month period . . . . Under no circumstances may members of the immediate family have overnight guests in the owner's or lessee's absence." *Id.*

146. *Id.* at 3. One such document, the articles of incorporation of the association, was quoted, in part, by the court. It granted the association the power to "make and establish reasonable rules and regulations governing the use of APARTMENTS, COMMON PROPERTY and LIMITED COMMON PROPERTY . . . ." *Id.*

147. *Id.* at 4.

148. *Id.* at 3. Article XIII of the declaration expressly permitted residential use of the unit by the owner or his immediate family, guests or invitees. *Id.*

argued that the use restrictions in the new rules amounted to an illegal amendment of the declaration by the board of directors of the association.

The court agreed with plaintiffs that the procedures for amending the declaration had to be followed in order to alter legally the use and property rights of the unit owners.[149] The court strictly interpreted the rulemaking power of the association.[150] Plaintiffs' consent to abide by any "reasonable rules and regulatons" was found not to be consent to give up original use rights. In order for a use restriction to be valid, the restriction must be clearly inferable from the declaration of condominium.[151]

> A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto—it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration of condominium as may be provided for in such declaration, or as may be provided by statute in the absence of such a provision, this enjoyment and use cannot be impaired or diminished.[152]

In the instant case, the court found that the association had failed to show that the restriction on an owner's right to allow his family, guests and invitees to use his unit in his absence, were clearly inferable from the declaration. Although the question of whether the rules were reasonable was not at issue, the court deemed them to be an unreasonable means of promoting the health, security and happiness of the majority of unit owners.[153]

An amendment to a condominium association's by-laws, providing that all pets, including replacement pets, not registered as of a date approximately one year prior to the amendment would not be permitted on the premises, was held void and unenforceable as an attempt to impose a retroactive regulation.[154] *Winston Towers 200 Association, Inc. v. Saverio*[155] was initiated by the association

149. *See* Sterling Village Condo. Inc. v. Breitenbach, 251 So. 2d 685 (Fla. 4th DCA 1971) (strictly construing declarations of condominium).

150. No. 77-6049-CIV-WMH (S.D. Fla. May 11, 1978).

151. *Id.* at 4.

152. *Id.* (quoting Pepe v. Whispering Sands Condo. Ass'n, Inc., 351 So. 2d 755, 757-58 (Fla. 2d DCA 1977)).

153. *Id.* at 5. The court went on to comment, however, that the restriction could be the subject of an amendment to the declaration.

154. Winston Towers 200 Ass'n, Inc. v. Saverio, 360 So. 2d 470 (Fla. 3d DCA 1978).

155. *Id.*

to enjoin Mr. Saverio from keeping a pet in violation of the amended by-laws.

Mr. Saverio owned a female dog which had been properly registered with the association prior to 1973. In 1974, the by-laws were amended prohibiting an owner from keeping a pet not registered as of February 28, 1973. In May, 1975, Saverio's dog gave birth to a puppy which the owners decided to keep.[156]

Under the facts of the case, it would seem to be irrelevant that the by-laws required all pets, including replacement pets, to be registered by a date one year prior to the amendment because the pup was not born until after the by-law was amended. Nevertheless, the District Court of Appeal, Third District, affirmed the lower court's finding that the association was attempting to impose a retroactive regulation. Although the court did not discuss the policy behind prohibiting retroactive regulations where their retroactivity could not have damaged the complaining party, the decision is consistent with cases holding that amendments may not abridge vested contractual rights by retroactive application.[157]

In *Backus v. Smith,*[158] a contract was entered into whereby the Smiths agreed to sell a condominium unit to the Backuses, who placed an earnest money deposit with a realtor. Notice of the contract was given to the condominium association which had a right of first refusal pursuant to the declaration of condominium. At an association meeting, all of the members, including the Smiths, voted to exercise the rights of first refusal. The Smiths then refused to perform the contract, informing the Backuses of the association action. The Backuses accepted the return of the earnest money deposit and filed suit against the Smiths.[159] The trial court entered a summary judgment for the Smiths.

The District Court of Appeal, First District, reversed the summary judgment on the grounds that the record revealed numerous

156. *Id.*

157. *See generally* Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G, Condo. Ass'n, 361 So. 2d 128 (Fla. 1978) note 51 *infra* and accompanying text; Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) (rental escalation clause in leases for recreational facilities had no retroactive effect on grounds of impairment of contract in violation of federal and state constitutional provisions). Although, under the facts of the case, it would seem to be irrelevant that the by-laws required all pets, including replacement pets, to be registered by a date one year prior to the amendment, the public policy against retroactive application is determinative. The court, therefore, did not discuss the possibility that Mr. Saverio's dog may have conceived subsequent to the passage of the amendment.

158. 364 So. 2d 786 (Fla. 1st DCA 1978).

159. *Id.* The Backuses also sued the association in the second count of the complaint for tortious interference with a contract. This aspect of the suit is briefly discussed in the text accompanying notes 188-189 *infra.*

procedural deficiencies at the association meeting which resulted in the decision to exercise the right of first refusal. The court found that the Backuses had standing to challenge the propriety of the association's failure to comply with the declaration of condominium because the Smiths relied upon it as the reason they could not sell. Furthermore, the court noted that the record indicated that the Backuses may have offered to accept whatever title the Smiths could convey.[160] For these reasons, summary judgment was inappropriate.[161]

In the 1977 survey,[162] *Franklin v. White Egret Condominium*[163] was briefly discussed. At the time, the District Court of Appeal, Fourth District, had issued only a slip opinion. More than nine months later,[164] a divided court[165] denied a petition for rehearing in an opinion which, for the first time in the case, provided some discussion and analysis of the constitutional issues.[166]

In *Franklin,* a condominium association brought suit seeking a declaratory judgment that an owner's conveyance of one-half of his interest to his brother, who had a child under the age of twelve, was void. The Fourth District reversed the trial court's grant of declaratory relief to the association and held that an age restriction prohibiting children under the age of twelve from residing in the condominium was an unconstitutional infringement upon the parent owner's right to marry and to procreate.[167]

On petition for rehearing, the court first noted the need to find sufficient state action to invoke the protection of the fourteenth

160. 364 So. 2d at 788.

161. The Backuses' acceptance of a return of the earnest money order did not terminate, as is the general rule, all contractual obligations. This result was due to express language in the contract which provided that in the event of a default by the seller, the buyer had the option of getting his deposit back *and* the right of specific performance. *Id.* at 1539.

162. Mandelkorn & Krul, *supra* note 1, at 921-22.

163. 358 So. 2d 1084 (Fla. 4th DCA 1977).

164. The original opinion was issued August 9, 1977, and the petition for rehearing was denied in an opinion issued May 31, 1978.

165. Judge Letts, who had replaced Judge Mager for the purpose of ruling on the petition for rehearing, dissented from the denial of a rehearing.

166. "We are cognizant of the great interest which our former opinion in this action has created. We are also aware that restrictive covenants, such as those at issue today, are commonplace among condominium associations in Florida." 358 So. 2d at 1090.

167. *Id.* at 1089. In support of its finding that the right to bear children is protected by the right of privacy, the court cited: Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating a New York statute prohibiting nonpharmacists from distributing contraceptives to minors); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (invalidating a school board rule requiring imposed maternity leave before childbirth); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

amendment. It pointed out that restrictive covenants in condominiums involve no state action so long as there is voluntary compliance.[168] Relying on *Shelley v. Kraemer*,[169] however, the court found that judicial enforcement of a private restrictive covenant constituted state action.[170]

Once state action was found, the court examined the constitutional rights of the parents who were forbidden to have their children under twelve live with them in the condominium.[171] The crucial issue in *Franklin* was whether the court would characterize the constitutional rights infringed upon as "fundamental." If the rights at

168. 358 So. 2d at 1088.

169. 334 U.S. 1 (1948).

170. 358 So. 2d at 1089. Ever since Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court has struggled with its application and searched for limits to its broadest holding. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 934 (9th ed. 1975). The Court's recent decisions in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), indicate that it is constricting the scope of state action. In *Jackson*, the Court held there was no state action when a state regulated private monopolized utility terminated electric power to a customer allegedly without due process. The "public function" doctrine was analyzed under the facts of that case to determine if state action was present. Thus, the *Shelley* rule was not at issue. In a dissent, however, Justice Douglas pointed out that "the State would presumably lend its weight and authority to facilitate the enforcement of [the utility's] published procedures," which would then have appeared to violate *Shelley*. In *Flagg Bros.*, the Court held that no state action was involved where a warehouseman sells goods entrusted to him for storage, as permitted by the Uniform Commercial Code (U.C.C.). The plaintiffs argued that the U.C.C. procedures were constitutionally inadequate under the fourteenth amendment if the warehouseman utilizing the U.C.C. to sell the goods was engaged in state action. The crucial difference, it seems, between both *Flagg Bros.* and *Jackson* on one hand and *Shelley* and *Franklin* on the other is that in the former cases the goal of terminating electricity or selling goods can be accomplished by self-help, while in the latter cases, the goal of enforcing a restrictive covenant requires judicial assistance.

It may be that the present Court would not follow *Shelley* if it were presented with the facts of *Franklin*, not only because of its tendency to restrict state action but because *Shelley* may have been largely decided in response to the unique situation which involves racial discrimination. Today, the civil rights legislation and the revitalization of the thirteenth amendment, *see* Jones v. Mayer Co., 392 U.S. 409 (1968), have almost eliminated the need to use *Shelley* in racial discrimination cases.

Nevertheless, *Shelley* is still good law. In fact, the Court went out of its way to distinguish *Flagg Bros.* from the situation where the authority of a court was invoked. 436 U.S. at 160 n.10 (citing *Shelley* with approval). The Supreme Court stated that

> the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act.

Id. at 166. In light of the extreme similarity between *Shelley* and *Franklin*, it therefore seems that the Fourth District was correct in finding the existence of state action.

171. If the Fourth District had examined the rights of the children, the restrictive covenant could probably have withstood the attack. Age is not a suspect class, so a rational basis is all that would have been needed to justify the restriction. It might be possible, however, to argue that the child had some fundamental "family" rights at stake.

stake were not found to be fundamental rights then the court would have needed to find only a rational basis for having an age restrictive covenant in the declaration.[172] The majority felt that the restriction was not only unsupported by a compelling state interest but was also "obviously unreasonable."[173]

The dissent could not dispose of the issue as easily. Pointing to an elderly retirement community or condominium as an example, the dissent made the following argument:

> Nature itself biologically provides that only younger adults can procreate. It is axiomatic that catabolism in the old results in physical and mental frailties which render them not only incapable of reproduction, but also incompetent to withstand the rough, tumble and noise of rampaging youngsters—inevitable accompaniments to the normal rearing of young children. For this very reason, kids are commonly barred from hospitals. Sick people need peace and quiet and so do old people who lose their erstwhile resilience to turmoil and commotion. Indeed, tranquility is a must for the mental health of older people and I would allow them to have it.[174]

A homeowners' association may well be able to establish that a rational basis does exist for age restrictive covenants. It seems doubtful, however, that the interests which provide the rational basis qualify as "compelling state interests."[175] Therefore, by determining that the fundamental rights of marriage, procreation, family and privacy were at stake, the court was able to find the age restrictive covenant unconstitutional. An analysis of these constitutional rights is beyond the scope of this article. It is likely, however, that similar cases will be litigated in the future and provide some guidance as to how the courts will view such restrictive covenants.

---

172. This two-tier approach to equal protection—strict scrutiny for challenges involving fundamental rights and rational basis for challenges not involving fundamental rights—evolved in the Warren Court of the 1960's. *See* Gunther, *The Supreme Court, 1971 - Foreward: In Search of Evolving Doctrine in a Changing Court: A Model for Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

173. 358 So. 2d at 1088. The court found that a cutoff age of 12 was unreasonably arbitrary. Additionally, the court noted that provisions for children-guests and the established residence of certain families with children under 12 would render enforcement of the provision invalid under the equal protection clause.

174. *Id.* at 1091.

175. The courts have found a "compelling state interest" only in extreme conditions. *E.g.,* Korematsu v. United States, 323 U.S. 214 (1944) (war time necessity grounds for finding compelling state interest in excluding persons of Japanese ancestry from designated west coast areas).

B. *Right to Make Copies of Records*

The privilege of inspecting condominium documents, pursuant to section 718.111(7) of the Florida Statutes,[176] carries with it the right of unit owners to make copies of the records.[177] In *Winter v. Playa del Sol, Inc.*,[178] the District Court of Appeal, Fourth District, found that allowing unit owners to inspect visually the records but denying them the ability to make handwritten notations was contrary to the clear intent of the statute. Accordingly, it reversed the trial court's grant of summary judgment in favor of the association which had refused to allow nonresident owners to copy the names and addresses of other nonresident owners.[179]

C. *Estoppel*

In *Fifty-Six Sixty Collins Avenue Condominium, Inc. v. Dawson*,[180] a condominium association was estopped from asserting that a unit owner had failed to comply with the declaration of condominium or that the owner had not obtained sufficient approval from the association when she installed shutters on the balcony of her unit. The court held that the following facts contributed to an estoppel: (1) the board of directors of the association approved installation of such shutters in a meeting with a sales representative; (2) the unit owner relied upon the minutes of the above meeting; (3) the association knew or should have known of the unit owner's reliance upon the minutes; and (4) the association knew of the unit owner's intention to install the shutters and that work had begun months before it took any action.[181]

A unit owner was not as fortunate in *Fountains of Palm Beach Condominium, Inc. No. 5 v. Farkas*[182] where the District Court of Appeal, Fourth District, reversed a trial court's determination that the association was estopped from complaining that a patio slab laid by the owner violated the declaration of condominium. The declaration of condominium required that the owner obtain prior written consent from both the management company and the association before he could alter the common elements. The owner had approached both the management company and the board of directors

176. FLA. STAT. § 718.111(7) (1977).
177. Winter v. Playa del Sol, Inc., 353 So. 2d 598 (Fla. 4th DCA 1977).
178. *Id.* at 599.
179. *Id.*
180. 354 So. 2d 432 (Fla. 3d DCA 1978).
181. *Id.* at 433-34.
182. 355 So. 2d 163 (Fla. 4th DCA 1978).

of the association seeking permission to lay a patio. After being told that the directors lacked the legal status[183] to grant or deny permission, the owner constructed the patio anyway. The association subsequently brought this suit to require the owner to remove the patio at his expense.

The Fourth District refused to find either waiver or estoppel as a defense to the owner's violation of the declaration. It noted that "[t]he statement by the board of directors that it had no legal authority to give its permission was not a form of assent, nor even an intimation of tacit approval."[184]

IV. Association Liability

A. *Torts*

Hemispheres Condominium Association, Inc. v. Corbin,[185] discussed the duty of care owed by a condominium association to a person renting from an owner while that person swims in a pool maintained by the association. The District Court of Appeal, Third District, held that the association has a duty to exercise ordinary care with respect to both the owner and the renter. This duty, however, is of a lesser magnitude than that required of the operators of places which provide public entertainment for profit.[186] Having established that the association owed a renter a duty to use only ordinary care, the court concluded that the evidence which had been presented to the jury was legally insufficient to establish negligence.[187]

A summary judgment in favor of an association accused of tortious interference with a contract between a unit owner and a potential buyer was affirmed in *Backus v. Smith.*[188] The would-be buyer attempted to attack procedural deficiencies and deviations from the requirements of the declaration of condominium in a meeting where the association had voted unanimously to exercise its right of first refusal to purchase the unit. The court found that the potential

183. *Id.* at 163. It appears that this condominium association may have been at the awkward stage where the developer gives up control of the association to unit owners.

184. *Id.* at 164.

185. 357 So. 2d 1074 (Fla. 3d DCA 1978).

186. *Id.* at 1076 (citing Rainbow Enterprises, Inc. v. Thompson, 81 So. 2d 208 (Fla. 1955)).

187. The condominium had a "pool attendant" rather than a "lifeguard" on duty when Mr. Corbin drowned. The plaintiff, however, failed to introduce evidence from which a jury might legally conclude that the attendant's lack of "lifeguard" status or his other duties were the proximate cause of Corbin's death. 357 So. 2d at 1077.

188. 364 So. 2d 786 (Fla. 1st DCA 1978).

buyer lacked standing to attack the failure of the association to follow its procedural guidelines. Further, the court stated that a claim of tortious interference must be substantiated by a showing of malice, of which the record was devoid.[189]

B. *Contracts*

A recent decision by the District Court of Appeal, Fourth District, has held that section 711.13(4) of the Florida Statutes (1973) and its replacement sections[190] authorize cancellation of contracts for personal property by a condominium association.[191] In *Wash & Dry, Inc. v. Bay Colony Club Condominium, Inc.*,[192] the developer had entered into twenty contracts with a washing machine company for the supply, service and repair of machines throughout the condominium buildings. After the unit owners assumed control of the association, the association cancelled all the contracts relying upon section 711.13(4) and its replacement section.[193]

The washing machine company argues that the statutory sections were inapplicable. It contended that the statute was designed solely to protect the unit owners against self-dealing by the developer through the use of "sweetheart" management contracts. Additionally, it contended that washing machines were not covered as they were not real property within the common areas.[194]

The Fourth District rejected the company's argument and held that the statute applied to both real and personal property and that the statute's purpose was not limited to the elimination of "sweetheart contracts." The court also refused to find a ratification of the contracts by the association even though the association continued to make payments on the contracts for months after it gained control.[195]

---

189. *Id.* For other aspects of this case, see notes 158-160 and accompanying text *supra.*

190. FLA. STAT. § 711.13(4) (1973) was replaced by *id.* § 711.66(5) (1975) which made some linguistic changes that facilitated bringing personal property which served the unit owners within the ambit of the statute. The current version of this statutory section is codified at *id.* § 718.302(1) (1977).

191. 368 So. 2d 50 (Fla. 4th DCA 1979).

192. *Id.*

193. FLA. STAT. § 711.13(4) (1973) provided, in part: "Any initial or original contracts first entered into by the association or its fiduciaries or appointees for maintenance, management, or operation of condominium property shall be subject to cancellation at any time subsequent to the time any individual unit owners assume control of their association."

194. 368 So. 2d at 51.

195. *Id.* at 51.

V. DEVELOPER LIABILITY

A. *Implied Warranty of Fitness and Merchantability*

The viability of stating a cause of action under the common law for breach of an implied warranty of merchantability in the sale of new condominiums was reaffirmed in *Greenburg v. Johnston.*[196] Even when a statutory cause of action under section 718.203 of the 1977 Florida Statutes cannot be maintained because construction of the condominium began prior to the effective date of the statute, a cause of action in implied warranty still exists.[197]

B. *Municipal Services*

A developer may also be liable for unused municipal services. In *Town of Redington Shores v. Redington Towers, Inc.*,[198] the developer of a condominium paid to hook up with a municipal sewer system but refused to pay service charges for the use of the system by unoccupied units as required by the town ordinance. The developer argued that the assessments on units which were not benefitted by the sewer system amounted to an unconstitutional deprivation of its property rights.[199]

The District Court of Appeal, Second District, held that there was no constitutional violation because the developer received the benefit of the system's availability for use which was reasonably related to the service charges.[200] The benefit of availability of use was not dependent upon the occupancy status of a unit; therefore, the developer was liable for the assessments.

VI. LENDER LIABILITY

In 1978, the District Court of Appeal, Fourth District, was again called upon to decide the scope of a construction lender's liability to condominium unit purchasers.[201] In *Armetta v. Clevetrust Realty Investors,*[202] unit owners sought to charge the project's construction

196. 367 So. 2d 229 (Fla. 2d DCA 1979).

197. *Id.* For extended discussion of implied warranties in the sale of condominiums, see Mandelkorn & Krul, *supra* note 1, at 924-26.

198. 354 So. 2d 942 (Fla. 2d DCA 1978). Only the validity of the sewage fees was discussed by the court since the parties had agreed that resolution of it would be dispositive of their rights with regards to their garbage fees. *Id.* at 943 n.1.

199. *Id.* at 943.

200. *Id.* at 943-44.

201. In 1977, the Fourth District was faced with similar issues in First Wisconsin Nat'l Bank v. Roose, 348 So. 2d 610 (Fla. 4th DCA 1977). For a discussion of that case, see Mandelkorn & Krul, *supra* note 1, at 928-30.

202. 359 So. 2d 540 (Fla. 4th DCA 1978).

lender with negligence, joint venture responsiblity and breach of fiduciary duty. Finding nothing to indicate that the lender was anything more than an ordinary mortgage lender, the Fourth District affirmed the dismissal with prejudice of the above courts.

To determine whether the lender had the duty to supervise the developer's actions, the court examined the allegations in the complaint and the terms of the loan agreement for evidence that the lender either *controlled* the building operations or became an *active participant* in the construction enterprise.[203] In the instant case the court found no such unusual circumstances. Citing *First Wisconsin National Bank v. Roose*[204] as authority, the Fourth District also held that the lender was not involved in a joint venture because the lender had not anticipated any losses or profits beyond the usual interest charges.[205] The court also found that the lender owed no fiduciary duty to the purchasers and, consequently, that duty could not have been breached.[206]

203. *See* Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (lender had become an active participant); Dunson v. Stockton, Whatley, Davin & Co., 346 So. 2d 603 (Fla. 1st DCA 1977) (lender had assumed control).

204. 348 So. 2d 610 (Fla. 4th DCA 1977).

205. 359 So. 2d at 543.

206. *Id.* at 542. The unit owners claimed that FLA. STAT. § 711.25 (1971) and the mortgage agreement between the owners and the developers created a fiduciary relatonship. The court found that, while provisions did impose some duties upon the parties, a duty on the part of the lender to collect and manage deposit monies was not among them.