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ALTERNATE DISPUTE RESOLUTION OF CONDOMINIUM AND COOPERATIVE CONFLICTS

SCOTT E. MOLLEN*

Many experienced practitioners and jurists believe that after relationships involving love and/or sex, the next most passionate relationship in our society is that of landlord-tenant and its related configurations, i.e. condominium unit owner/condominium ("condo") board of directors and cooperative ("co-op") shareholder/co-op board (collectively referred to hereinafter as "occupancy relationships").¹ Conflicts arising from "occupancy relationships" ("occupancy conflicts") often evoke emotions of extreme hostility, bitterness and frustration. Many parties to such disputes erupt into diatribes of emotionally charged words which exponentially expand and intensify the conflict. The printable vocabulary of occupancy conflicts often includes words like "livid," "vicious," "revenge," "fraud," "arrogant," "pompous," "power crazy," "breach of fiduciary duty," "self-dealing," "favoritism," "insensitive," "litigious," "stupid," and "troublemaker." Not only are occupancy conflicts extremely intense, but they are propagating with alarming rapidity.

It has been reported that during the months of February, March, and April of 1997, in just three of the boroughs of New York City (Brooklyn, Queens, and Manhattan), co-op corporations or condo associations ("associations"), were involved in 4,328 Housing Court litigations.² Such a statistic is only the tip

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¹ The principal problems and issues discussed herein are also generally applicable to homeowner associations.

² See Jay Romano, *Co-op Cases are Getting Own Court*, N.Y. TIMES, Oct. 26, 1997, sec. 11, at 3 (discussing plans to create a part in the housing court solely for condominium and co-op disputes).

of a massive iceberg because it excludes Housing Court litigation in the populous borough of the Bronx and the condominium laden borough of Staten Island. This statistic also excludes supreme court actions in all five boroughs, actions in the United States District Courts for the Southern and Eastern Districts of New York, disputes pending before alternate dispute resolution organizations such as the American Arbitration Association, JAMS Endispute, National Arbitration & Mediation (NAM), and disputes that are gestating in the dialogue and negotiation phases.

The Housing Court litigation statistic provides only a hint as to the enormous resources, public and private, that are consumed by such litigation. Given the intense and hostile nature of these conflicts, occupancy litigation commonly involves prolific, expensive, and wasteful motion practice.³ Parties to such disputes often make motions to punish for civil and/or criminal contempt and/or for sanctions.⁴ Opposing parties also tend to

³ In New York, landlords commonly make motions; such as a motion seeking immediate possession of leased premises, a motion seeking to compel payment of rent and other charges, a motion to obtain a levy on the tenant's household goods, a motion for relief from a stay to pursue eviction, and a motion for a protective order. See N.Y. REAL PROP. ACTS. LAW art. 7 (McKinney 1979 & Supp. 1999). New York tenants commonly make motions to obtain orders requiring landlords to release tenants' belongings, for a preliminary injunction to enjoin the landlord from evicting the tenant, for dismissal of non-payment and holdover proceedings based upon lack of proper service or a defective notice or pleading and for immediate repair of defective conditions. See Scott E. Mollen, *Legal Fees of \$336,000 Awarded Following a \$44,000 Judgment—Co-Op was Compelled to Wage Expensive Fight Against Skilled Attorney*, N.Y. L.J., Nov. 20, 1996, at 5 (discussing a court award of \$336,000 in attorneys fees in an occupancy conflict); see also *Ansonia Assoc. v. N.Y.S. Div. of Hous. & Comm. Renewal*, 599 N.Y.S.2d 275 (App. Div. 1993); *Ansonia Assoc. v. Ansonia Tenants' Coalition, Inc.*, 566 N.Y.S.2d 637 (App. Div. 1991); *Ansonia Assoc. v. N.Y.S. Div. of Hous. & Comm. Renewal*, 550 N.Y.S.2d 328 (App. Div. 1990); *Ansonia Assoc. v. N.Y.S. Div. of Hous. & Comm. Renewal*, 504 N.Y.S.2d 421 (App. Div. 1986); *Ansonia Assoc. v. Ansonia Residents' Assoc.*, 434 N.Y.S.2d 370 (App. Div. 1980); *Ansonia Tenants' Coalition, Inc. v. Ansonia Assoc.*, 573 N.Y.S.2d 211 (Sup. Ct. 1991). The *Ansonia* decisions provide a classic illustration of an extremely expensive, protracted and contentious occupancy conflict.

⁴ New York has strict housing code standards and statutes which are enforced through the use of civil or criminal sanctions. See *Minjak Co. v. Randolph*, 528 N.Y.S.2d 554, 557 (App. Div. 1988). In *Minjak Co.*, the court held that "it is within the public interest to deter conduct which undermines those standards when that conduct rises to the level of high moral culpability or indifference to a landlord's civil obligations." *Id.* at 558. Consequently, a court may order punitive damages in breach of warranty of habitability cases. See *id.* Other examples of criminal and civil sanctions may result from failure to cure a housing violation. See, e.g., N.Y. MULT. DWELL. LAW § 304 (McKinney 1974 & Supp. 1999); Department of Hous. Preserva-

engage in fierce battles over pre-trial discovery.⁵ Moreover, aggrieved occupants will often attempt to invoke the assistance of government agencies⁶ and local elected officials. Some aggrieved occupants will even seek local news media coverage of their disputes.

Bar associations, industry and occupant organizations, state regulators, and legislators throughout our country are studying, debating, and proposing possible strategies for effectively dealing with the rising tide of occupancy conflicts. Since the proliferation of occupancy conflicts has been national in scope, it cannot be fairly ascribed to the stereotypical pugnacious New York personality.

For the many reasons discussed herein, knowledgeable professionals, regulators, legislators, owners, sponsors, and occupants are increasingly concluding that certain forms of Alternate Dispute Resolution ("ADR") can be extremely effective in resolving occupancy conflicts in a timely and cost effective manner. Moreover, many experts have concluded that employment of ADR procedures enhances the likelihood that the disputants will view the ADR process end result as equitable and just.⁷

I. GROWTH OF CONDOMINIUM AND COOPERATIVE OWNERSHIP

A number of factors have fueled the growth of the condo and co-op form of ownership, as well as other forms of common inter-

tion & Dev. v. Deka Realty Corp., 620 N.Y.S.2d 837, 845-46 (App. Div. 1995) (upholding an assessment of criminal and civil contempt fines and penalties against a landlord who failed to correct housing code violations and remanding the case for a redetermination of the amount).

⁵ See, e.g., American Realty Co. v. 64 B Venture, 574 N.Y.S.2d 344, 346 (App. Div. 1991) (refusing to grant a counterclaim defendant pre-trial discovery and calling it a "fishing expedition").

⁶ For example, in New York City, aggrieved occupants have attempted to enlist the assistance of, inter alia, the City Department of Housing Preservation and Development, the City Department of Buildings, the City Fire Department, the City's Landmarks Commission, the Real Estate Financing Bureau of the State Attorney General's office, and the State Division of Housing and Community Renewal.

⁷ While use of an ADR process will often yield a timely and cost effective result and participant satisfaction that is greater than that attainable through litigation, ADR may not be appropriate for every party or every situation. For example, there are occasions when parties will benefit by establishing a judicial precedent or by delaying a resolution. Some parties may believe that because of their larger litigation war chest, they are more likely to achieve their desired result through expensive and protracted delay, i.e. uneven economic circumstances may make litigation a preferable process. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (advocating the advantages of the judicial process over ADR).

est developments.⁸ As urban areas grow, residential, commercial, and retail developments consume an increasing amount of property located within a convenient distance from where most people work. Land prices rise as fewer convenient or "well-located" sites remain available.⁹ Additionally, as development expands, land use regulation becomes more restrictive thereby increasing the cost of property development.¹⁰ As the cost of home ownership escalates, many people seek less expensive alternatives. Since residential rent payments are generally not deductible, the deductibility of mortgage interest payments is another reason for the popularity of condo and co-op ownership. In certain urban areas such as New York City, regulatory restrictions on rent provide an additional incentive for owners to convert their rental properties to condo or co-op ownership.¹¹

Sociological factors have also propelled the growth of condos and co-ops. More families today are comprised of two working spouses.¹² Additionally, people are increasingly enjoying an array of leisure and recreational activities. Cable television, satellite television, videos, the Internet, exercise, and yoga classes satiate one's leisure hours. Today's lifestyles leave individuals with less time and desire to address the many obligations that accompany private home ownership. Many homeowners seek to escape the responsibility of maintaining a home, such as care of a lawn, exterior painting, and repairs. As medical science has elongated life expectancy, an increasing segment of the popula-

⁸ See generally 1 PATRICK J. ROHAN & MELVIN A. RESKIN, *CONDOMINIUM LAW & PRACTICE* §§ 1.01-.02 (1998).

⁹ See Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 839 (1984) (noting that residential property is an item few Americans can afford and that "[g]rowing urbanization, economic factors, and increasing commercial demands for land may soon render the United States a largely 'landless' society").

¹⁰ See Linda Wintner, Note, *An Argument for an Antitrust Attack on Exclusionary Zoning*, 50 BROOK. L. REV. 1035, 1052 (1984) ("[Z]oning can be carried out in either of two ways: directly, by prohibiting or restricting land use, or indirectly, by setting minimum requirements that increase costs and limit the number of potential purchasers."); see also DANIEL R. MANDELKER, *LAND USE LAW* 201 (1982) (providing a detailed examination of exclusionary zoning).

¹¹ See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Cases and Consequences*, 69 CORNELL L. REV. 517, 556 (1984) ("Landlords seeking to escape the strictures of rent control may try to convert their rental properties to condominiums.").

¹² See Anita Hattiangadi, Letter, *The Overworked American?*, THE CHRISTIAN SCI. MONITOR, Sept. 3, 1998, at 12, available in 1998 WL 2370385 (finding 70 percent of married couple families have two working spouses).

tion has watched their children "leave the nest" and they no longer wish to be saddled with the financial and physical obligations of maintaining a large home. Additionally, some people purchase condos or co-ops because they desire enhanced security. Many people live in co-ops because the common co-op requirement that purchasers be approved by governing boards affords them greater control over who may become their neighbors. The fact is that the co-op and condo form of ownership has experienced an immense rate of growth.¹³

II. GENESIS OF OCCUPANCY CONFLICTS

Purchasers of a condo or co-op ("unit") purchase subject to covenants, conditions, and restrictions embodied in a condo's declaration, by-laws, and house rules or in a co-op's certificate of incorporation, proprietary lease, by-laws, and house rules (collectively "restrictions").¹⁴

Purchasers typically focus on a unit's location, size, configuration, price, general physical condition, and their ability to finance. Unfortunately, purchasers often "gloss over" restrictions that directly impact their private use and enjoyment of the unit and the common areas within the building or community. Many unit purchasers have previously lived in rental apartments or private homes and have never experienced the types of restrictions imposed upon them in a condo or co-op. Accordingly, many purchasers do not focus upon such restrictions until after they have sold or vacated their prior residence, closed on their new

¹³ See Rabin, *supra* note 11, at 536 n.94. The author noted that a study by the U.S. Department of Housing and Urban Development revealed that conversion of rental housing has increased dramatically since 1970. Particularly, "in the period 1977 through 1979, 260,000 units were converted, 71 percent of the decade's total." *Id.*; see also Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 276 n.11 (1997) (noting that estimates showed that in 1990, there were 4,847,921 condominium units and 82,000 cooperative units in the United States).

¹⁴ See Louise Hickok, Note, *Promulgation and Enforcement of House Rules*, 48 ST. JOHN'S L. REV. 1132, 1132 (1974) (noting that enforcement of condo rules often leads to litigation); see also 1 ROHAN & RESKIN, *supra* note 8, § 3.03; Patrick J. Rohan, *Cooperative Housing: An Appraisal of Residential Controls and Enforcement Procedures*, 18 STAN. L. REV. 1323, 1323 (1966) (questioning whether purchasers should be forewarned of the extent to which restrictions may deplete their rights as individual owners); Richard Siegler, *Agreements for Apartment Alterations*, N.Y. L.J., Nov. 4, 1998, at 3 (noting that restrictions on alterations to the unit are typically found in either a co-op's proprietary lease or a condo's by-laws).

unit, and settled into their new home.¹⁵

Most occupancy conflicts involve quality of life or financial issues. Common quality of life conflicts include, *inter alia*, disputes relating to repairs, alterations,¹⁶ leasing and subletting,¹⁷ noise, parking facilities, ownership of pets,¹⁸ use of units for commercial or professional purposes, incivility, use of common areas, and exterior decor. Common financial disputes include, *inter alia*, failure to pay maintenance, common charges, special assessments, fines or penalties, restrictions on resale or transfer, and access to books and records.¹⁹ Occupancy conflicts usually involve disputes between a unit owner and an association, a unit owner and a management agent, a unit owner and a sponsor, an association and a contractor, or a lender and a sponsor.

Even occupants who purchased their units with knowledge of restrictions may encounter occupancy conflicts because of human nature and the close proximity to one's neighbors. Condo and co-op occupants frequently interact with each other as they enter their building's lobby, elevator, parking lot, or common recreational facilities. The closer the proximity and the more frequent the interaction, the greater the opportunity for personality clashes to evolve.

Moreover, occupants who dwell under a rental regime of ownership, generally perceive that their building is owned and operated by people or companies with professional real estate experience and expertise. In contrast, occupants living under condo or co-op regimes know that ownership and operational decisions are being made by individuals who may have no profes-

¹⁵ See Armand Arabian, *Condos, Cats, and CC&RS: Invasion of the Castle Common*, 23 PEPP. L. REV. 1, 1 (1995) (noting that many new owners may be completely unaware of condo rules and regulations until they move in and discover that they are bound by a plethora of intrusive restrictions).

¹⁶ See, e.g., *Marren v. 215 E. 79th St., Inc.*, 614 N.Y.S.2d 104, 104 (App. Div. 1994) (finding a proprietary lease rightfully required plaintiff to request written approval from the lessor before making structural alterations).

¹⁷ See, e.g., *Bailey v. 800 Grand Concourse Owners, Inc.*, 604 N.Y.S.2d 562, 562-66 (App. Div. 1993) (reinstating a co-op owner's cause of action for damages stemming from illegal and excessive sublet fees).

¹⁸ See *Board of Managers v. Rubenstein*, N.Y. L.J., Feb. 8, 1993, at 30 (N.Y. Sup. Ct. Feb. 8, 1993) (holding that a local pet law aimed at rental tenants and landlords did not apply in the context of condominium owners).

¹⁹ See *In re Reisman*, N.Y. L.J., Nov. 17, 1993, at 28 (N.Y. Sup. Ct. Nov. 17, 1993) (holding that petitioners were entitled to "unfettered unrestricted access to all of the corporate books and records" held by a co-op board).

sional real estate expertise or experience.²⁰ When an occupant knows that decisions involving property management are being made by the accountant, stockbroker, professor, store owner, and matrimonial attorney who are members of the association's governing board ("board"), occupants are often less willing to accept and respect decisions by the board, i.e. occupants are more likely to question judgments made by non-real estate professionals. Occupants are also more likely to question a decision when they know it is made by a physician or attorney rather than a professional owner. Accordingly, the self-governing nature of a condo and co-op regime of ownership also contributes to an atmosphere that is conducive to internal occupancy conflicts.

Given the growth of condo and co-op ownership, the close proximity to neighbors, lack of professional ownership, human nature, and unit owners' failure to consider occupancy restrictions prior to purchase, it is hardly surprising that there has been a significant increase in occupancy conflicts. This has resulted in enormous expenditures of time and money by condo and co-op occupants and associations.²¹ While many disputes are resolved through discussion and negotiation between the parties, the record reflects a tidal wave of litigation involving condos and co-ops over the last ten years.²² While experts may disagree as to the proximate causes of such increased litigation, there is little disagreement as to the magnitude of the problem. This material

²⁰ See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1144 (1998) ("Association board members are common citizens all too often lacking in training to manage the associations for which they are responsible.").

²¹ See N.Y. GEN. BUS. LAW Art. 23-A cmt. (McKinney Supp. 1998) (Walter D. Goldsmith, *Real Estate Financing*) (discussing both the increase in volume and the broadening range of issues); GOLDSMITH & LEEDS, *NEW YORK REAL ESTATE PRACTICE GUIDE*, Vol. IV: "Cooperatives and Condominiums," Matthew Bender, 1986; see also J. Linn Allen, *Rage on the Drive: Local Saga May Signal that Condo Disputes are Growing More Vitriolic*, CHI. TRIB., Oct. 11, 1998, Real Estate sec., at 1, available in 1998 WL 2904602 (noting that conflict often arises when condominium boards seek access to individual units for even routine maintenance).

²² See Winokur, *supra* note 20, at 1144; see also Allen, *supra* note 21, at 1 (quoting Charles Steinberg, Chairman of the Chicago Bar Association committee on condominium law, who notes that the relationship between owners and boards of condominiums have grown more acrimonious); Walter D. Goldsmith, *Cooperative and Condominium Disputes*, N.Y. L.J., Oct. 21, 1994, at 3 (advocating the use of ADR as a solution to the "explosive growth in litigations involving cooperatives and condominiums"); Jay Romano, *Mediation Instead of Litigation*, N.Y. TIMES, Feb. 15, 1998, sec. 11, at 3 (indicating that the creation of the condominium housing court may lead to increased ADR).

increase of condo/co-op litigation led Judith S. Kaye, Chief Judge of the New York State Court of Appeals, to institute a pilot program establishing special co-op/condo resolution parts of the Housing Court.²³ The pilot program involves segregation of co-op and condo cases from routine landlord-tenant cases and the assignment of such cases to designated judges in each county.²⁴

Co-op organizations have opined that special parts in the Housing Court dedicated solely to resolving disputes involving condos and co-ops were necessary on the grounds, inter alia, that "[c]o-op cases are generally more intricate than typical landlord-tenant matters"²⁵ and often "tie up landlord-tenant courtrooms for hours—resulting in a bottle neck for more easily resolved cases."²⁶ One co-op spokesperson complained that "housing court judges haven't really grasped that there is a fundamental difference between disputes in co-ops and those in rental buildings. . . . In co-ops, the tenants are also the owners. And a judge can't just apply landlord-tenant law willy-nilly without thinking about that difference."²⁷ The pilot program is intended "to bring litigants to amicable settlements without the need for a trial," by having condo and co-op matters handled by judges and court attorneys who have expertise in the legal, business and practical aspects of condos and co-ops operations.²⁸

III. APPLICABLE JUDICIAL STANDARDS

As the courts have become inundated with occupancy conflicts, standards governing such issues have evolved. In *Levandusky v. One Fifth Avenue Apartment Corp.*,²⁹ the New York State Court of Appeals held that the actions of the board of directors should be evaluated pursuant to the business judgment rule, which governs disputes between shareholders and corporate directors.³⁰ In *Levandusky*, an occupant sought to enlarge

²³ See Romano, *supra* note 2, at 3.

²⁴ See *id.* Two court attorneys will also be appointed to assist each judge. See *id.*

²⁵ *Id.* (quoting Allen Thurgood, executive director of the Coordinating Council of Cooperatives).

²⁶ *Id.*

²⁷ *Id.* (quoting Marc Luxemburg, an attorney and the president of the Council of New York Cooperatives).

²⁸ *Id.*

²⁹ 553 N.E.2d 1317 (N.Y. 1990).

³⁰ See *id.* at 1319.

the kitchen area of his unit.³¹ The occupant asserted that the co-op's architect orally approved the alterations.³² The occupant's architect's plans required the removal and replacement of certain pipes, but these plans did not reveal that the steam riser would be relocated.³³ After the co-op board approved his plans, the board learned that the occupant intended to relocate the steam riser.³⁴ The board denied the occupant permission to move the riser, and modified its prior approval by conditioning approval on submission of an acceptable plan. The occupant nevertheless proceeded with the alterations.³⁵ The board issued a "stop work" order, and the occupant commenced an article 78 proceeding to have the order nullified.³⁶ The New York Court of Appeals held that the co-op board had acted in furtherance of the purposes of the co-op, within the scope of its power, and in good faith. Therefore, it concluded that the courts should not substitute their judgment for that of the board's.³⁷

Levandusky established a three prong test. In order for board action to be insulated from an occupant's challenge, the board action must be undertaken: "(i) in furtherance of the purposes of the co-op; (ii) within the scope of its authority; and (iii) in good faith."³⁸ *Levandusky* has been perceived as a decision that has empowered and protected co-op and condo boards. Unfortunately, some condo and co-op boards seem to ignore *Levandusky's* caution that judicial review would be available to an occupant who demonstrates a "breach of fiduciary duty in the form

³¹ *See id.*

³² *See id.* Levandusky claimed that he had told the co-op's architect that he planned to realign a steam riser in the kitchen area. *See id.* The architect claimed that Levandusky did not mention the realignment. *See id.*

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.* The co-op board cross-petitioned for an order requiring the occupant to put the steam riser back in its original location. *See id.* The supreme court granted the occupant's position and dismissed the counter claims. *See id.* On reargument the court withdrew its decision, dismissed the occupant's petition, and granted the board's petition. *See id.* at 1320. The appellate division, modifying the judgment, reinstated the supreme court's original decision. *See id.* "[T]wo Justices dissented on the ground that the board's action was within the scope of its business judgment." *Id.*

³⁷ *See id.* at 1322. The court held that "unless a resident challenging the board's action is able to demonstrate a breach of . . . duty, judicial review is not available." *Id.*

³⁸ Richard Siegler, 'Levandusky' Updated Again, N.Y. L.J., Nov. 6, 1996, at 3 (citing *Levandusky*, 553 N.E.2d at 1321).

of bad faith, acts outside the board's authority or discriminatory acts."³⁹ Once an occupant "demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority," the burden of proof shifts back to the board.⁴⁰

A large number of courts around the country have adopted a standard of reasonableness, rather than the business judgment rule.⁴¹ For example, a Florida court, in *Hidden Harbor Estates, Inc. v. Norman*,⁴² held that an association may not adopt "arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners."⁴³ *Norman* implied that the association bears the burden of proof of demonstrating the reasonableness of a particular restriction.⁴⁴

In *Nahrstedt v. Lakeside Village Condominium Ass'n*,⁴⁵ the California Supreme Court adopted a reasonableness standard consistent with a California statutory mandate that "covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable."⁴⁶ The jurisdictions which apply

³⁹ Richard Siegler, *The Aftermath of 'Levandusky'*, N.Y. L.J., Mar. 2, 1994, at 3. For cases applying this test, see, for example, *Board of Managers v. Fairway at N. Hills*, 603 N.Y.S.2d 867, 869 (App. Div. 1993) (noting "that the members of an initial board of managers of a condominium [owe a fiduciary duty and] must perform their duties in 'good faith'"); *New York v. Metz*, N.Y. L.J., Mar. 10, 1994, at 24 (N.Y. Sup. Ct. Mar. 9, 1994); *Residential Bd. of Managers v. Berman*, N.Y. L.J., Dec. 15, 1993, at 22 (N.Y. Sup. Ct. Dec. 14, 1993) (denying summary judgment for the board on ground there was an issue of fact whether the board had breached its fiduciary duty), *aff'd*, 633 N.Y.S.2d 478 (App. Div. 1995).

⁴⁰ *Levandusky*, 553 N.E.2d at 1323; see also Siegler, *supra* note 39, at 3 (discussing the standard used to review actions taken by condo and co-op boards).

⁴¹ See Patrick A. Randolph, Jr., *Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations?*, 38 SANTA CLARA L. REV. 1081, 1116 (1998); see also Constance L. Hall, Annotation, *Validity and Construction of Regulations of Governing Body of Condominium or Cooperative Apartment Pertaining to Parking*, 60 A.L.R.5TH 647 (1998) (reviewing decisions involving both standards).

⁴² 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975)

⁴³ *Id.* at 182 ("If a rule is reasonable the association can adopt it; if not, it cannot.").

⁴⁴ See Arabian, *supra* note 15, at 12 (noting that the court in *Norman* did not specifically state which party had the burden of proof, but that the court's reasoning indicates the burden would rest on the association).

⁴⁵ 878 P.2d 1275 (Cal. 1994) (en banc).

⁴⁶ CAL. CIV. CODE § 1354(a) (Deering 1994).

a reasonableness standard generally require that a "restriction is 'reasonably related to the association's purposes,' is reasonably within the board's powers, is reasonable in scope, and [is] 'reasonably enacted or reasonably enforced.'"⁴⁷

Regardless of the precise standard employed by various state courts, all standards of review essentially burden the occupant's ability to challenge a particular restriction or action by an association.⁴⁸ The standards reflect a presumption of validity as to association action and have resulted in relatively few decisions wherein association action was overturned. When an association decision is overturned, it is often a result of a governing board failing to adhere to its own controlling documents, i.e. the subject action is inconsistent with a co-op's certificate of incorporation, proprietary lease, by-laws, or house rules.⁴⁹

The courts recognize that a presumption of validity is essential to the orderly operation and fiscal soundness of the common interest developments. Associations could not properly function if decisions could be "Monday morning quarterbacked" by each individual unit owner. Moreover, absent a legal standard which affords substantial protection to officers and directors, it would be difficult to recruit unit owners to serve in positions of leadership.

Since judicial precedent generally supports the decision making powers of associations, associations are reluctant to negotiate amicable resolutions or yield their decision making powers to an arbitration panel.⁵⁰ Both occupants and associations harbor concerns about binding arbitration, because they do not want decisions to be imposed upon them without their consent and they know that rights of appeal from arbitration decisions are substantially circumscribed.⁵¹ As a result of perceived in-

⁴⁷ Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association*, 42 UCLA L. REV. 837, 843-44 (1995) (describing the use of the reasonableness standard in California and other jurisdictions) (quoting WAYNE S. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW § 6.02(a)(3) (2d ed. 1988)).

⁴⁸ See Arabian, *supra* note 15, at 11-15 (explaining that under the reasonableness standard of review the board's actions will be upheld unless they are found to be arbitrary or capricious).

⁴⁹ See *id.* at 18 (explaining that "courts are unlikely to overturn a board decision except in extreme circumstances").

⁵⁰ See Goldsmith, *supra* note 22, at 3 ("Boards may be reluctant to surrender their substantial decision-making powers to an arbitration panel.").

⁵¹ See Scott E. Mollen, *Real Estate Financing Bureau Adapts to a New Market-*

flexibility by occupancy associations, occupants often conclude that they have no choice but to seek relief through the judicial system.

IV. INADEQUACIES OF THE JUDICIAL SYSTEM

The judicial system is ill suited to resolve occupancy conflicts. It has been said that "a picture is worth a thousand words." *360 Owners Corp. v. Diacou*,⁵² provides an extremely valuable "picture" or "window of insight." This case involved a dispute as to whether a plaintiff co-op corporation or defendant shareholders had the obligation to provide window guards in the shareholders' apartment.⁵³ The window guards were required by the New York City Health Code.⁵⁴ The co-op's motion for summary judgment was granted.⁵⁵ The cost of installing the window guards was approximately \$919.⁵⁶ The co-op incurred a legal bill of \$73,547, which it sought to recover from the defendant shareholders.⁵⁷ The defendant shareholders had allegedly paid \$30,000 in legal fees to their own attorneys.⁵⁸ The case was the subject of substantial media coverage including an article in the *Wall Street Journal*.⁵⁹ The article described the lawsuit as "an expensive lesson in keeping things in perspective" and quoted one shareholder as stating: "I'm a man converted. . . . Anything you can possibly do to avoid a lawsuit, do it."⁶⁰ The court ultimately held that the co-op could recover only \$30,000 of the \$73,547 fees that it incurred.⁶¹ While the foregoing example obviously represents an extreme fact pattern, it is illustrative of the general problems relating to use of the judicial forum for resolution of occupancy conflicts.

One problem in litigating occupancy conflicts is the enor-

place, N.Y. L.J., Oct. 22, 1998, at 1 (stating that the results of a survey showed condo and co-op owners are very concerned with board conduct which "is arbitrary, non-responsive, unethical or illegal").

⁵² N.Y. L.J., Feb. 23, 1994, at 22 (N.Y. Sup. Ct. Feb. 22, 1994).

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See Wade Lambert, *Ever Hear the One About the Lawyers and the Window Bars?*, WALL ST. J., Mar. 23, 1994, at A1.

⁶⁰ *Id.*

⁶¹ See *Diacou*, N.Y. L.J., Feb. 23, 1994, at 22.

mous court docket congestion.⁶² The congestion is illustrated not only by the aforementioned Housing Court statistics, but also by a report issued by the Rand Institute for Civil Justice, which predicts that by the year 2020, civil cases in the federal courts will exceed 1,000,000, criminal cases will reach approximately 900,000, and appeals will approach 325,000 cases.⁶³ These numbers illustrate only a part of the story, since federal courts have far more limited jurisdiction than state courts.

While experts may debate the accuracy of projected future case loads, there is no doubt that dockets are heavy and growing throughout our country. This is especially so in major urban areas. As a result, no matter how well meaning, intelligent, experienced, and fair-minded jurists may be, they often lack adequate opportunity to assist meaningful settlement discussions. Although an occupancy conflict may involve a dispute which is paramount in an occupant's life, and the dispute is of extreme importance to the sound operation of the condo or co-op, it may not receive the attention it deserves. This is because judges in major urban areas may have more than 100 matters on their daily calendar, and are often unable to spend more than five to fifteen minutes discussing any particular dispute.

In the few minutes allotted, the condo or co-op occupant and/or the occupant's counsel seek to explain the background of the conflict, the issues involved, and possible solutions. In the same brief period of time, representatives of the co-op or condo and/or its counsel seek to explain their perspective of the background and their views on possible resolutions. There simply is inadequate time for meaningful discussion of the issues, review of pertinent documents and opportunity to have meaningful dialogue between the parties. Moreover, this dialogue often occurs in crowded and noisy courtrooms. Additionally, a judge may lack specific knowledge and experience in dealing with important principles of law, economic issues, and practical ramifications relating to the condo-co-op context.

⁶² See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1996).

⁶³ See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 264-65 (1996) (quoting COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED PLAN FOR THE FEDERAL COURTS (2d prtg. 1995)). *But see id.* at 265 (asserting that "the present situation suggests that claims of a litigation explosion are grossly overstated").

The salient deficiencies of the judicial process also include substantial expense and delay.⁶⁴ The expense and delay is often a direct result of not only court calendar congestion, but of extensive procedural and discovery rights and the appellate process. Moreover, litigation often reinforces and accelerates confrontation and feelings of animosity between parties who have been embroiled in personal disputes well before the conflicts have reached the litigation stage. Parties who are fighting over the need to take remedial action to repair water leaks or the right to make alterations become even more entrenched and angry when they are compelled to write checks for thousands of dollars to their counsel to pursue redress through the judicial system. Emotions reach even higher peaks when parties are compelled to interrupt their work schedules, professional obligations, or family obligations in order to spend hours in their attorneys' offices drafting affidavits or preparing for depositions. The disputants' blood pressure reaches still higher levels when they read an adversarial deposition transcript or affidavit. With every step forward in the judicial process, the emotional hostility and legal bills increase materially.

As the judicial process proceeds further, many parties believe that their integrity, their honor, and their self-respect require nothing less than full engagement on the battlefield. This is especially so once a conflict has become public. Associations often convince themselves that it is necessary to pursue a sacred crusade to establish precedent in order to avoid future chaos. They perceive that compromise would unleash a torrent of additional challenges by other occupants. Similarly, an occupant may be concerned that he or she must appear to be strong in the eyes of his or her spouse, children, and friends.

The hostility may spiral even higher as the adversaries encounter each other in their five foot by five foot elevator, in their hallways, in the lobby of their building, in their parking lots, or at their common area recreational facilities. An occupancy conflict, like an infectious disease, may spread through the condo or co-op as factions evolve. Members of the community will often rush to support their neighbors and friends. While many neigh-

⁶⁴ See Priest, *supra* note 62, at 527 ("Most of our country's major urban courts remain plagued by congestion. Despite the extraordinary legislative and administrative consensus for reform, no single measure has been shown consistently to reduce delay.").

bors will support the association, other neighbors will support the aggrieved occupant. The problems are further compounded by the fact that this bitter litigation journey, in a major urban area, may last from one to three years or longer.⁶⁵ Litigation delays are especially problematic when they involve decisions that should be made in an extremely timely manner in order to avoid adverse consequences.

Technical rules of evidence and controlling judicial precedent may also render the judicial system inappropriate for resolution of occupancy conflicts. All parties may benefit from the ability to cite hearsay evidence. Some witnesses may be reluctant to testify in court and may be beyond subpoena jurisdiction. A controlling judicial precedent may constrain a court and preclude the court's ability to render a decision which adequately considers concepts of general equity and fairness.

Additionally, the judicial process is an open public process memorialized in records which are available to the general public. Each detail of a dispute may be available for consumption by local news media, other occupants, and third parties. Aspects of individuals' personal lives may become the subject of local gossip among friends, neighbors, relatives, business associates, competitors, etc. This is especially so in a day and age when anyone with a laptop computer may access such records by spending a few minutes and tapping a few keys on his or her computer.

There are many consequences to public dissemination of internal conflicts.⁶⁶ An occupant may be labeled as "litigious" and may be rejected when he or she applies for approval by a co-op board in another building at some future time. Today, it is common place for parties to a prospective business transaction to conduct background checks on their prospective business associates. Publication of internal conflicts may have material adverse impact on the value of units in a building or development. Publicity may alert real estate brokers in a community and prospective purchasers to a building's structural or operational problems. Publicity about litigation may cause prospective

⁶⁵ See *id.* at 555 (using Cook County, Illinois, to illustrate trial delay caused by court congestion).

⁶⁶ See, e.g., Patrick M. Livingston, Note, *Seattle Times v. Rhinehart: Making "Good Cause" a Good Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT. L. REV. 547, 558 (1986) (discussing the interest of the courts in protecting a litigant from the potential harm of the dissemination of materials regarding a lawsuit).

purchasers to become concerned as to possible future special assessments or increases in maintenance to pay for the costs of litigation.

Many people are reluctant to purchase a unit in a "residential war zone." Publicity involving occupancy litigation may also unleash problems with a building or development's lender and/or insurance carriers and may even evoke action by government agencies. For example, publication of problems relating to building conditions may provoke inspections by a local fire department or building department and lead to violations being placed on the property. Such violations may concern insurers, lenders, and title companies and may require immediate and expensive remedial action. When people come home after a full day's work, they want their home to be a tension-free respite from conflict. Sometimes, internal conflict is even more emotionally damaging to a non-working family person since such non-working person may be home during both the day and evening and, therefore, may have more interaction with the adversaries.

Further, a substantial amount of occupancy conflict litigations involve claims against governing boards for punitive and other damages that may be excluded from an association's directors and officers insurance policy. In fact, some associations lack directors and officers insurance. Individuals who serve on governing boards and are named as defendants in occupancy litigation, often have to disclose such litigation on their personal financial statements.⁶⁷ Such disclosure may impact their business activities, including their ability to obtain personal credit.

The foregoing catalog of negative litigation consequences is by no means all-inclusive. It is merely illustrative. Experienced practitioners and jurists know that the foregoing problems occur every day of the week and are not unusual. Although he could not have had condos and co-ops in mind, the words of Abraham Lincoln, in the year 1850, seem extremely relevant to today's occupancy conflict context. Mr. Lincoln wrote: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser,

⁶⁷ See Vincent J. Love, *Basics of Accounting and Finance: What Every Practicing Lawyer Needs to Know*, 1064 PLI/Corp. 125, at 161 (1998) (discussing the basics of what must be reported in the note to the financial statement including litigation).

in fees, expenses, and waste of time.”⁶⁸ Judge Learned Hand articulated similar concerns as to the litigation process when he stated:

[T]he price we pay for [unrestrained advocacy], the atmosphere of contention over trifles, the unwillingness to concede what ought to be conceded, and to proceed to things which matter. Courts have fallen out of repute; many of you avoid them whenever you can, and rightly. About trials, hang a suspicion of trickery and a sense of result of depending upon cajolery or worse. I wish I could say it was all unmerited. After now some dozen years of experience, I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.⁶⁹

V. LIMITED USE OF ADR TO RESOLVE CONDO/CO-OP CONFLICTS

Employment of arbitration and mediation techniques to resolve occupancy conflicts has generally been limited. Arbitration clauses will occasionally appear in condominium documents in connection with issues relating to energy consumption or disputes regarding common charges. Rarely, do condo or co-op government documents embody mediation clauses.

Arbitration generally involves a form of adjudication in which a neutral decision-maker renders a binding decision.⁷⁰ In private, voluntary arbitration, parties agree in advance that certain types of disputes or all disputes between parties will be arbitrated. The parties agree to be bound by the arbitrator's decision.⁷¹ An arbitrator's decision may be confirmed or vacated by a

⁶⁸ FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 102 (1986) (quoting Abraham Lincoln).

⁶⁹ Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address to the Association of the Bar of the City of New York (1921). While many people think of ADR as involving arbitration or mediation, other ADR processes include those that are court ordered, such as summary jury trials, early neutral evaluation and judicial settlement conferences; see also ABRAHAM P. ORDOVER, *ALTERNATIVES TO LITIGATION* 4 (1993) (noting “a growing emphasis on interest-based resolution, which “does not focus on which party is ‘right’ ” but rather, “[w]here successful, the case will resolve in a WIN-WIN fashion”). Voluntary forms of ADR include negotiation, mini-trials, and rent-a-judge. See *id.*

⁷⁰ See, e.g., DONOVAN LEISURE NEWTON & IRVINE, *ADR PRACTICE BOOK* § 3.1 (John H. Wilkinson ed., 1990); see also ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 72-308 (1996) (discussing the benefits and drawbacks of alternative dispute resolution).

⁷¹ See *id.*; see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 7 (1992).

court.⁷² However, the standards for vacating arbitration awards are extremely narrow.⁷³ Parties who agree to private arbitration, as contrasted with court annexed arbitration processes, have enormous latitude in designing the arbitration process. Parties may enter into agreements specifying procedural and substantive standards to be used in the arbitration process.⁷⁴ Agreements will typically provide that the arbitrator shall be selected either by the parties, by a dispute resolution organization such as the American Arbitration Association, or by a combination thereof. Some agreements call for arbitrators to be selected by a court. Agreements may also specify the qualifications of the arbitrator. Arbitration procedures permit presentation of witnesses and documents, cross-examination, and arguments to arbitrators.⁷⁵ However, arbitration typically embodies procedural rules which are less formal than the procedural rules used in

⁷² See MACNEIL, *supra* note 71, at 7; see also Stephen H. Kupperman & George C. Freeman, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs*, 65 TUL. L. REV. 1547, 1608-32 (1991) (describing the standards for confirming and vacating arbitration awards).

⁷³ See MACNEIL, *supra* note 71, at 7 (stating "the arbitrator's decision is[] subject to very limited grounds of review") (emphasis added); DONOVAN LEISURE NEWTON & IRVINE, *supra* note 70, § 3.35 (listing such grounds as "fraud, arbitrator collusion, partiality or bias and failure to review material evidence"); Kupperman & Freeman, *supra* note 72, at 1609 ("[O]nly clear evidence of impropriety . . . justifies the denial of summary confirmation of an arbitration award.") (quoting *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982)); see also N.Y. C.P.L.R. art. 75 (McKinney 1998) (governing arbitration in New York).

⁷⁴ See ORDOVER, *supra* note 69, at 114 (noting that the parties "can control such details as how arbitration will be invoked, whether the arbitrator's award will be advisory or binding, whether witnesses will be called and placed under oath, whether briefs will be submitted, and whether the record will remain open after the hearing for the receipt of new evidence"); see also O. Thomas Johnson, Jr., *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. REV. 2175, 2186 (1993) (discussing ways in which parties can agree to different procedural aspects of arbitration, specifically the use of panel arbiters).

⁷⁵ See ORDOVER, *supra* note 69, at 108 ("Ordinarily, most or all of the arbitrator's knowledge and understanding of a case is based upon evidence and arguments presented at the arbitration hearing."); see also Marianne Roth, *False Testimony in International Commercial Arbitration: A Comparative View*, 7 N.Y. INT'L L. REV. 147, 151 (1994) (discussing implications such as criminal liability for false testimony at international arbitration proceedings); John R. Van Winkle, *An Analysis of the Arbitration Rule of the Indiana Rules of Alternative Dispute Resolution*, 27 IND. L. REV. 735, 748-51 (1994) (discussing the aspects of evidence and witnesses in arbitration proceedings).

litigation.⁷⁶

In response to court congestion and in an attempt to achieve enhanced satisfaction with the judicial process, courts have increasingly turned to court annexed arbitration programs. In a court annexed arbitration process, parties are not bound by the decision of the arbitrators and retain a right to a trial de novo.⁷⁷ One of the main reasons parties select arbitration is because of the finality of the decision, and limited judicial review.⁷⁸ Since there are procedural differences between arbitration and trials, it is often unlikely that the same result would be reached in arbitration as in a trial on the same matter.⁷⁹ Additionally, since arbitration is often used to avoid court congestion, it would be self-defeating to have the courts review every arbitration decision. Thus, review is limited to a de novo review which is only used in circumstances where a gross error occurred in the arbitration, such as fraud or arbitrator collusion.⁸⁰

In mediation, a neutral third party assists the parties to resolve a dispute.⁸¹ In contrast to an arbitrator, judge, or jury, a mediator does not have authority to impose a solution.⁸² The parties may, upon mutual consent, ask a mediator to function as an arbitrator by rendering a binding decision.⁸³ Mediation has been the "dominant method of processing disputes in some quarters of the world."⁸⁴ This is particularly true in parts of Asia, where litigation is seen as "a shameful last resort."⁸⁵

As with arbitration, the mediation process has countless variations and requires that the parties agree to participate.

⁷⁶ See ORDOVER, *supra* note 69, at 11 ("Procedure for an arbitration is usually much less formal than at a trial.").

⁷⁷ See *id.* at 109.

⁷⁸ See ORDOVER, *supra* note 69, at 126 ("One of the primary benefits attributed to traditional arbitration is its finality. Once an award is made it may be subjected to only limited additional review, in court or otherwise.").

⁷⁹ See *id.* at 27.

⁸⁰ See *supra* note 73 (discussing the limited review of arbitration awards).

⁸¹ See DONOVAN LEISURE NEWTON & IRVINE, *supra* note 70, § 7.2 ("The process focuses on getting each party's cards out on the table and seeing which cards match to produce a settlement, rather than having a third party decide how the matter will be resolved.").

⁸² See *id.* § 7.4; see also ORDOVER, *supra* note 69, at 13 (stating a party may employ mixed ADR processes such as mediation and arbitration).

⁸³ See ORDOVER, *supra* note 69, at 13 (explaining med/arb in which the mediator can, by contract, act as the arbitrator if the mediation is unsuccessful).

⁸⁴ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29 (1982).

⁸⁵ *Id.*

However, most mediation processes involve employment of a neutral party who performs certain functions. Such functions include: encouraging the participants to communicate; assisting participants in understanding the mediation process; conveying messages between participants; helping participants to set an agenda; providing an appropriate environment for negotiation; maintaining order; assisting the participants in understanding the issues; helping to defuse unrealistic expectations; assisting participants in developing their own proposals, and; assisting participants in their negotiations and in fashioning a settlement that is acceptable to each party.⁸⁶ Perhaps the most significant benefit to be derived from mediation is that it strives for a resolution that is voluntarily arrived at by the parties. Experts believe that parties are more likely to be satisfied with the process and the result and, therefore, more likely to adhere to their ultimate agreement, if the agreement is a result of their own creation.⁸⁷

A typical mediation process begins with introductory remarks by a mediator. These remarks are designed to explain the process, state the ground rules, ensure that there are no conflicts of interest with the mediator, and establish realistic expectations of the process and the parties' commitment to pursue an amicable result. The mediator then encourages the parties to state their perception of the problem.⁸⁸ The process then moves to the information stage where the parties discuss the important issues.⁸⁹

⁸⁶ See generally Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19 (1985) (describing the goals of mediation).

⁸⁷ See Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 40-47 (1984) (discussing the "social psychology of consent" and asserting that the parties' satisfaction with an agreement depend on personal values and idiosyncrasies).

⁸⁸ See Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 161-62 (1998) (explaining the introductory stage of the mediation process, which encourages the parties to describe the dispute from their own perspectives without interference from any counsel that may be present); see also L. Randolph Lowry, *Preparing Your Client for Mediation*, DISP. RESOL. J., Aug. 1998, at 30, 30-36 (noting that the mediation process, in contrast to the adversarial system, allows parties to emotionally express their view of the conflict which increases the chance of settlement because of the lack of lingering resentment); Jeffrey Krivis, *ADR and Suspected Fraudulent Claims*, DISP. RESOL. J., Aug. 1998, at 20, 20-24 (noting that while parties are explaining their views there are no interruptions by the adversary).

⁸⁹ See Bill Minich, *Ensuring that the Programs Succeeds: Employment ADR How*

One of the most attractive aspects of a mediation process is that it affords parties the opportunity to discuss the matter not only with each other, but also in a separate caucus with the mediator. Mediators help the parties to respond to accusations and clarify misunderstandings. The parties, with the help of the mediator, then explore all possible options for resolving the dispute. Hopefully, the mediator may then assist the parties in preparing a writing that embodies an enforceable settlement agreement. The selection of a neutral party who is a skilled and trained mediator, and who is respected by both sides, is essential to a successful mediation process. In many cases, the respect each party has for the neutral party is a pivotal factor in the adversaries' willingness to enter into the mediation process.

Among the important aspects of the mediation process is a pre-condition for an agreement of confidentiality.⁹⁰ Such agreements usually provide, at a minimum, that no statements made in the course of mediation will be admissible in any other action or proceeding and that the mediator may not be called as a witness by either party.⁹¹ Another attractive aspect of the mediation process is that each party usually retains the right to terminate the mediation at any point.⁹² Thus, unlike arbitration and

To's, DISP. RESOL. J., Aug. 1998, at 58, 58-59 (explaining that the mediator will help parties see both the strengths and weaknesses of their positions and through negotiations try to seek a fair settlement).

⁹⁰ See Krivis, *supra* note 88, at 23-24 (observing that the secure environment of mediation allows parties to fully explore their adversaries position before committing themselves to an unfair settlement).

⁹¹ See Krivis, *supra* note 88, at 24 (reasoning that the confidential aspect of mediation will increase the probability of settlements because parties are at ease during the negotiations); Rodney A. Max, *Mediation Comes of Age in Alabama*, 59 ALA. LAW. 239, 240 (1998) (explaining that the parties, attorneys, and the mediator will never be allowed to divulge any statements uttered or positions or actions taken during mediation process unless the confidentiality requirement is waived); see also Tom Arnold, *Why is ADR the Answer?*, 15 COMPUTER LAW. 13, 13-18 (1998) (arguing that the parties have the full control over a mediation because they judge the facts and the law in addition to having the freedom to walk away); Waldman, *supra* note 88, at 162 (noting that another pre-condition is that participants treat each other with respect during the negotiations).

⁹² See Robert D. Benjamin, *A Critique of Mediation-Challenging Misconceptions, Assessing Risks and Weighing Advantages*, 146 PITT. LEGAL J. 37, 38 (1998) (explaining that the mediation process must be voluntary to hold any integrity and must therefore allow parties to withdraw at anytime without any consequence or sanctions); see also Cecilia G. Morris, *Guidelines for Mediation of an Attorney Fee Dispute*, in AVOIDING LEGAL MALPRACTICE 1998, at 1053, 1056-57 (PLI Litig. & Admin. Practice Course Handbook Series No. H0-000B, 1998) (reporting that the final report of the chief judge of the New York State Alternative Dispute Resolution

litigation, the ultimate decision can be made only by the participants themselves. It is often said that in mediation, the parties "own" the process. Additionally, if the mediation process fails, the parties retain their right to pursue relief, either through arbitration, if there is an arbitration agreement, or through litigation. As some attorneys explain to their clients, they retain the right to "hemorrhage" legal fees and to allow the result to be finally determined by an arbitrator, judge or jury who may lack particular subject matter expertise and may not have the opportunity to truly understand the parties' concerns and positions.⁹³ Further, the informality of mediation often minimizes the investment of attorney time and accompanying costs. Moreover, the nature of the mediation process minimizes hostility and animosity and is especially helpful to parties who want to continue their relationship with their adversary.⁹⁴ Given the inherent flexibility and advantages of mediation, it is not surprising that the American Arbitration Association has reported a success rate of 75%-90% in the mediations which it conducts.⁹⁵

For all of the foregoing reasons, several jurisdictions require, or are considering requiring, that mandatory arbitration and mediation clauses be incorporated into condo and co-op governance documents.⁹⁶ Florida has enacted legislation which requires

Project instructs mediators to terminate the proceedings if participants are unwilling to participate and agreement is unlikely to occur).

⁹³ See Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1371 (1998) (noting that parties will decide for themselves the outcome of the dispute during mediation because the focus of the mediation is the interaction of human relationships rather than technical and inflexible legal rules); Ira B. Lobel, *What Mediation Can & Cannot Do*, DISP. RESOL. J., May 1998, at 44, 44 (describing the role of the mediator as simply to establish an environment in which the parties can work together to solve their dispute); Steven R. Wirth & Joseph P. Mitchell, Note, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court Annexed Mediation*, 6 AM. BANKR. INST. L. REV. 213, 216 (1998) (explaining that mediators will elicit solutions from each party and may, if necessary, caucus with each party separately to encourage discussions and solutions).

⁹⁴ See Richard Siegler, *Alternative Dispute Resolution*, N.Y. L.J., Sept. 3, 1997, at 3 (explaining that a mediator in contrast to a judge can decide a dispute based upon his or her own personal knowledge and can be selected by the parties for that reason).

⁹⁵ See Carolyn M. Penna, *Mediation: In the Mainstream?*, N.Y. L.J., Mar. 4, 1993, at 3; see also Lowry, *supra* note 88, at 81 (reporting that 81% of 528 of the largest American corporations prefer mediation to litigation).

⁹⁶ See, e.g., FLA. STAT. ANN. § 718.112(k) (West Supp. 1997) (mandating a provision in the by-laws for nonbinding arbitration); HAW. REV. STAT. ANN. § 514A-121(a) (Michie 1998 & Supp. 1998) (requiring any dispute as to the condominium by-

that individuals initially attempt to resolve condo and co-op disputes before initiating litigation.⁹⁷ The Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") is mandated by the legislature to employ full-time attorneys to serve as arbitrators to conduct arbitration hearings.⁹⁸ Florida legislation mandates that prior to the institution of litigation, parties to an occupancy conflict must petition the Division for non-binding arbitration.⁹⁹ Additionally, New Jersey now mandates that associations provide an alternative procedure to litigation, to resolve disputes involving unit owners.¹⁰⁰ To date, New York has not enacted any legislation which requires use of ADR by associations. Therefore, in New York, occupancy conflicts may only be submitted to arbitration or mediation upon consent of each party.¹⁰¹ Of course, if an occupancy conflict proceeds to litigation, it may become subject to a court annexed ADR program. The Real Estate Financing Bureau of the New York State Attorney General's Office is currently studying the ways that ADR might be employed in the condo/co-op context.¹⁰²

laws to be submitted to arbitration); HAW. REV. STAT. ANN. § 421I-9 (Michie 1988) (requiring dispute of cooperative by-laws to be submitted to mediation). Some states provide the association with the discretion to include such clauses within the governing documents. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 605/32-(a) (West Supp. 1998) ("The declaration or by laws of a condominium association may require mediation or arbitration of disputes in which the matter in controversy has either no specific monetary value or a value of \$10,000 or less"); KY. REV. STAT. ANN. § 381.837(4) (Michie Supp. 1996) (stating that "[t]he master deed may provide . . . [a] procedure for submitting the disputes arising from the administration of the condominium to arbitration or other impartial determination"); MASS. ANN. LAWS ch. 183A §§ 12(a), (b) (Law. Co-op. 1996) (permitting the by-laws to provide for arbitration to determine the fair market value of a condominium unit and to resolve "disputes arising from the administration of the condominium").

⁹⁷ *See* FLA. STAT. ANN. § 718.1255 (West Supp. 1999). The Legislature was concerned that unit owners were at a financial disadvantage in litigation against an association. *See id.* at § 718.1225(3)(d). Arbitration helps to balance the scales. *See id.* at § 718.1225(3)(d).

⁹⁸ *See id.* at § 718.1255(4) (providing that the decision of the arbitrator will not preclude a party from filing a suit).

⁹⁹ *See id.* at § 718.1255(4)(a).

¹⁰⁰ *See* Richard E. Kennedy & Mark D. Imbriani, *The Rights of Tenants in Condominium and Homeowner Association Communities*, N.J. LAW., Jan./Feb. 1998, at 18, 19.

¹⁰¹ *See* Siegler, *supra* note 94, at 3 (explaining the Civil Practice Law and Rules of New York State which mandate that in order for a shareholder or unit owner to be bound in arbitration, a cooperative's proprietary lease or a condominium's by-laws must contain an arbitration clause).

¹⁰² *See* Scott E. Mollen, *Real Estate Financing Bureau Adapts to New Marketplace*, N.Y. L.J., Oct. 22, 1998, at 1 (explaining the Bureau's proposal to be submit-

Where there is no statutory or other regulatory requirement that ADR be employed to assist resolution of occupancy conflicts, co-op and condo governing documents have to be amended through the requisite voting process if associations elect to employ a mandatory ADR process.¹⁰³ An interesting issue is whether an occupant who abstains or votes against an amendment would be bound to comply with a validly enacted arbitration procedure. As one expert has observed, there is no case law which indicates whether a compulsory arbitration provision would be enforceable against a dissenting unit owner.¹⁰⁴ An association could argue that a unit owner is bound to comply with the organization's governing documents, including provisions which permit amendment thereto.¹⁰⁵ A dissenting shareholder might argue that redress to the judicial system is a fundamental right that cannot be eliminated absent a unit owner's consent.

As previously observed, given the presumption of validity that is generally accorded to association action in the judicial process,¹⁰⁶ associations are often reluctant to concede any authority to a mediator or an arbitrator. If, however, associations employ mediation to address occupancy conflicts, they would be able to avoid the significant deficiencies of the litigation process, while retaining their right to seek redress in the judicial system if an amicable resolution cannot be attained in the mediation process. If associations consider employing a mediation process, there are many alternative structures that would facilitate timely, cost effective, and amicable resolutions of occupancy

ted to the condominium task force which includes amending the regulations to require disclosure of procedures for resolving disputes or having the Bureau initiate ADR procedures).

¹⁰³ See Goldsmith, *supra* note 22, at 3 (opining that although an amendment to any governing document in a co-op or condo to include a mediation clause would require a majority of the owners, it is not inconceivable to implement such a clause through board additions to house rules).

¹⁰⁴ See Siegler, *supra* note 94, at 3 (suggesting that a unit owner can be deemed a member of an organization that is bound by governing documents).

¹⁰⁵ See Willard Alexander, Inc. v. Glasser, 290 N.E.2d 813, 814 (N.Y. 1972) (concluding that the unit owner was bound to the arbitration provisions because he agreed to be bound by the organization's by-laws).

¹⁰⁶ See *Levandusky v. One Fifth Ave. Apt. Corp.*, 553 N.E.2d 1317, 1321 (N.Y. 1972) (applying the business judgment rule to board actions which will not override a board's judgment if there is no breach of its fiduciary duty); see also Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 310 (1997) (noting that the business judgment rule reduces cautious risk taking because of the mitigation of liability).

conflicts. Associations could utilize a panel of mediators comprised of unit owners and members of governing boards.¹⁰⁷ Since parties may feel uncomfortable discussing their problems with their neighbors, associations may employ private organizations which provide for alternate dispute resolution services, such as the American Arbitration Association, JAMS/Endispute, National Arbitration & Mediation, or the mediation services of local bar associations. Alternate dispute resolution in the co-op and condo context is at its embryonic stage. However, the potential benefits to be derived from the utilization of ADR procedures in the condo-co-op context are monumental.

VI. CONCLUSION

The unique environment encountered by cooperative and condominium residents enhances the likelihood that disputes will arise involving neighbors, governing boards, and third parties. If an occupant seeks to resolve a dispute through litigation, he or she will risk publicity, incur high costs, experience substantial delay, and have to overcome the presumption of validity accorded to board actions. If an association seeks to resolve occupancy conflicts through litigation, it is likely to incur, *inter alia*, significant expense, publicity, delay, and disharmony within its constituency. Accordingly, it is often preferable to resolve these disputes through alternative dispute resolution.

ADR clauses incorporated into the governing documents of cooperatives or condominiums should structure a rapid, inexpensive, fair, and effective resolution process.¹⁰⁸ They should encourage communication between the parties by requiring a good faith attempt to negotiate. If negotiations fail, such clauses should provide the parties with the opportunity to initiate a mediation process. There should be a provision that if mediation is unsuccessful, the parties may proceed to binding arbitration or litigation.

A well drafted ADR clause should establish a process which

¹⁰⁷ See Siegler, *supra* note 94, at 3 (noting that this comprised group would have insight into the living environment, but one drawback is that persons may not feel comfortable airing their problems in front of neighbors).

¹⁰⁸ See, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 483-86 (2d ed. 1992); ARBITRATION, MEDIATION, AND OTHER ADR METHODS 220 (ALI-ABA Course Study Materials 1993-94) (providing examples of ADR clauses).

reduces the kind of hostility that permeates the litigation process. The reduction of hostility is especially important and beneficial when adversaries live a "few doors apart," interact on a daily basis and will have a continuing relationship for an extended period of time. Moreover, expanded employment of ADR processes will benefit the public at large by reducing judicial "log jam."

Chief Justice Berger opined that "[f]or some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."¹⁰⁹ Similar observations have been proffered by Derek Bok, the former president of Harvard University. Mr. Bok noted that "most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures, and the long and frustrating delays involved in bringing proceedings to a conclusion."¹¹⁰ While neither Justice Burger nor Mr. Bok specifically referred to occupancy conflicts, their comments are descriptive and clearly applicable to the problems which pervade occupancy litigation. While ADR is not a panacea for such problems, it can provide substantial succor.

¹⁰⁹ Chief Justice Warren E. Burger, Mid-Year Meeting of ABA, 52 U.S.L.W. 2471, 2471 (U.S. Feb. 28, 1984).

¹¹⁰ Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 38 REC. A.B. CITY N.Y., at 12-13 (1983).