

Louisiana Law Review

Volume 46 | Number 1
September 1985

Louisiana Condominium Law and the Civilian Tradition

George M. Armstrong Jr.

Repository Citation

George M. Armstrong Jr., *Louisiana Condominium Law and the Civilian Tradition*, 46 La. L. Rev. (1985)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol46/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

LOUISIANA CONDOMINIUM LAW AND THE CIVILIAN TRADITION

*George M. Armstrong, Jr. **

The Louisiana Condominium Act¹ is a poor stepchild of our civil law heritage. It was almost born out of wedlock, as the Louisiana Supreme Court had declared, even before its conception, that horizontal ownership was illegitimate under a civilian understanding of property.² The legislature nonetheless enacted condominium legislation, producing an Act inspired more by necessity than by development of concepts indigenous to the State's legal heritage.³ Although the Condominium Act has been amended to conform its features to the terminology of the Civil Code, it continues to be recognizable as a relative of the laws enacted by a number of other states and even a casual inspection of its provisions discloses its origins in the National Conference of Commissioners on Uniform State Laws.⁴

This paper will show that Louisiana condominium law need not have had contested paternity and that the concept of horizontal ownership is fully compatible with civilian conceptions of property. It will be shown that development of an indigenous conception of horizontal ownership was impeded by early Louisiana jurisprudence, chiefly in the area of mineral law. The principles established in those early cases were

Copyright 1985, by LOUISIANA LAW REVIEW.

* Associate Professor of Law, Louisiana State University Law Center. Ph.D. Princeton University (1982), J.D. University of Pennsylvania (1981). Professors Winston Day and Lee Hargrave offered many useful comments on an earlier draft of this paper. John LaMaster was my research assistant during preparation of the essay.

1. La. R.S. 9:1121.101 through 9:1124.117 enacted in 1979. The current Act had two predecessors: 1962 La. Acts No. 494 §§ 1-22, and 1974 La. Acts No. 502 § 1. The history of our condominium legislation is discussed *infra* notes 37-44 and accompanying text.

2. *Lasyone v. Emerson*, 220 La. 951, 57 So. 2d 906 (1952).

3. See *infra* note 38 and accompanying text.

4. The Uniform Condominium Act was approved by the Commissioners on Uniform State Laws in 1977. Louisiana adopted a modified form of the Uniform Act in 1979. 1979 La. Acts No. 682 § 1. The 1977 Uniform Act was adopted by Minnesota, Pennsylvania and West Virginia. This Act was revised in 1980 and the revised version has been adopted in Maine, Missouri, New Mexico and Rhode Island. All fifty states have condominium legislation. Most states which have not followed the uniform legislation have adopted modified forms of Puerto Rican legislation, the first such statute in the United States, adopted in 1958, or the 1962 Federal Housing Administration model condominium statute. 7 Unif. L. Ann. 216 (Supp. 1984).

later extrapolated into the area of air rights where they led the courts to inappropriate results. Had the courts recognized that ownership of air above the soil is subject to different policies than ownership of oil below the soil, the resulting jurisprudence might have retained the flexibility to permit development of a civilian approach to condominiums.

My argument is based in part on a criticism of Louisiana jurisprudence and in part on a comparison with French and Spanish law. The French experience shows that horizontal ownership is compatible with a civilian understanding of property and that a civilian system can permit condominium ownership without any special legislation. The Spanish experience is relevant to show how legislation in Louisiana might have reformed our early jurisprudence and developed an approach to condominiums within the framework of the civil law system. In Spain, as in Louisiana, early jurisprudence precluded a regime of horizontal ownership. In Spain, however, the legislature responded to this situation by correcting the jurisprudence and creating a framework for condominium development within the existing body of rules governing ownership in common. Our legislature, on the other hand, reached outside the civilian tradition and adopted a modified form of the condominium legislation in force in common law states.

The principal purpose of this paper is not to criticize the Louisiana Condominium Act. Although there are areas in which our legislation might be revised on the basis of the Spanish model, there appears to be no evidence that our statute fails to serve the needs of purchasers, developers, and the state. This essay is not an academic exercise in the realm of the "what might have been," but rather a plea that future law reform take place in the context of civilian heritage.

THE LOUISIANA BACKGROUND OF HORIZONTAL OWNERSHIP

In 1913 Cas Moss owned a two story brick house situated in Winnfield.⁵ The owner, then an attorney and later a district judge, sold to the Winnfield Drug Company an undivided one-half interest in the lot and building and agreed that "the Vendee shall have the use, without rental, of the lower story of the two story brick building."⁶ Cas Moss kept the use of the upper story to himself and the agreement recited that he "retain[ed] the stairway which is to remain intact and kept as means of ingress and egress to second story."⁷ In 1915 Cas Moss sold his undivided one-half interest to the Knights of Pythias. The background indicates that, since at least 1901, the two stories had been separately occupied.⁸

5. *Lasyone v. Emerson*, 220 La. 951, 57 So. 2d 906 (1952).

6. *Id.* at 955, 57 So. 2d at 907.

7. *Id.*

8. Although the two stories may have been separately occupied before 1901, a deed recorded in that year which effected a conveyance of the property "except the upper story, which belongs to and is of present use as a lodge hall by Eastern Star Lodge," conclusively established separate occupancy by 1901. *Id.* at 958, 57 So. 2d at 908.

After 1901 the occupants of each story conveyed whatever interest in the property they owned several times, and "[a]ll subsequent deeds affecting this property make reference to the two original conveyances."⁹ After the building had been held in this fashion for more than fifty years, Juanita Lasyone, who held the upper story, became dissatisfied with the arrangement and sued for partition. Emerson, who resided below, demurred, contending, among other things, that the conveyances by Cas Moss had severed the building into two horizontal estates.¹⁰

Despite the language in that conveyance which provided that the grantees were to have the "use"¹¹ of the lower story, there was ample basis for determining that a severance had occurred. The document provided that the grantees had a one half interest in the walls,¹² implying that the air space within the walls was separately owned. The grantor retained the stairway, not merely the use of the stairway, to the second floor. Moreover, the agreement provided that the grantee might extend the lower story one hundred feet and hold this structural addition as individual property.¹³

The Louisiana Supreme Court concluded, however, that Cas Moss intended only to convey an undivided one-half interest in the property, to grant a usufruct in the lower story to the Winnfield Drug Company, and to retain a usufruct in the upper story for himself.¹⁴ Even if horizontal division had been the intention of the parties, Louisiana law could not countenance such a state of affairs.¹⁵ The court found it necessary to reach this conclusion after determining that the parties were owners in common and therefore either of them could request a partition.¹⁶ The owners of the lower story requested a partition in kind, but the court found that this horizontal division of a building was not possible because the "various forms of tenure of real property permitted in common law states which are irreconcilable with the provisions of the Civil Code cannot receive the sanction of our courts."¹⁷

In fact the supreme court had sanctioned the heresy of horizontal ownership twenty-one years earlier in the case of *Price v. Town of Ruston*.¹⁸ In that instance Mrs. Price, the owner of a two story building, sold the right to build a third story atop her structure to the Benevolent and Protective Order of Elks. Encountering financial difficulties, the Elks borrowed \$3,500 from the Ruston Building and Loan Association

9. Id.

10. Id.

11. Id. at 958, 57 So. 2d 908.

12. Id.

13. Id.

14. Id. at 958, 57 So. 2d 908.

15. Id. at 960, 57 So. 2d 909.

16. Id.

17. Id.

18. 171 La. 985, 132 So. 653 (1931).

“secured,” in the words of the court, by a “mortgage” on the third story.¹⁹ The controversy from which the case arose involved an attempt by Mrs. Price to exercise a right of first refusal in a foreclosure sale of the third floor to the Town of Ruston. The point, however, is that Mrs. Price, the Town of Ruston, the Building and Loan Association, the Elks and the supreme court all treated the upper story as a separate piece of property.

In *Lasyone* the court concluded that horizontal ownership was incompatible with a civilian understanding of property on the basis of both article 505 of the Louisiana Civil Code of 1870 and the famous mineral rights case, *Frost-Johnson Lumber Company v. Salling's Heirs*.²⁰ Article 505 provided that “The ownership of the soil carries with it the ownership of all that is directly above and under it.” It did not provide, however, that matter above and below the soil was inalienable by the owner, and article 506 complimented this notion by stating that the soil owner’s property in buildings on his ground was only a rebuttable presumption.²¹ In fact, Louisiana jurisprudence had permitted a person to own a building on the land of another since at least 1874.²² This right implied the ability of the owner of the ground to alienate rights in the air above the soil.

*Frost-Johnson Lumber Company*²³ involved an attempt by the grantor of land to reserve ownership of the minerals below the soil. The minerals were oil and gas, and the case concluded that oil and gas in place are insusceptible of ownership.²⁴ Any attempt to retain ownership reserves in the grantor only a right to explore for and extract minerals.²⁵ The court reached this conclusion on the basis of the misconception, widely shared at the time, that oil and gas were migratory.²⁶ Its purpose may have been to give Louisiana land owners the benefit of the ten-year prescriptive period applicable to the non-use of servitudes. The authors of the numerous opinions in the case might be surprised to learn that they have been credited with adhering to a civilian rejection of horizontal ownership.²⁷ Not only were no civilian authorities cited

19. *Id.* at 987-90, 132 So. at 655.

20. *Lasyone*, 220 La. at 959-60, 57 So. 2d at 909.

21. “Horizontal ownership of buildings and ownership of individual apartments was implicitly recognized by the Louisiana Civil Code of 1870.” A. Yiannopoulos, Property § 97, at 295, in 2 Louisiana Civil Law Treatise (2d ed. 1980).

22. *Augustin v. Dours*, 26 La. Ann. 261 (1874).

23. 150 La. 756, 91 So. 207 (1922).

24. *Id.* at 858, 91 So. 243.

25. *Id.*

26. *Id.*

27. *Lasyone*, 220 La. 951, 57 So. 2d 906. Professor Daggett has written of the holding in *Frost-Johnson*, “In the main, however, the nonownership theory was grounded upon the simple civilian concept of land tenure which recognizes but two kinds of estates in lands — full ownership and servitude.” H. Daggett, *Mineral Rights in Louisiana* 2-3 (1939). Professor Daggett was wrong, I believe, in attributing the holding of *Frost-Johnson* to civilian notions. Nonetheless, her error has influenced two generations of Louisiana law students. Estates may be limited to full ownership and servitudes without precluding the possibility of separate horizontal ownership interests.

for the proposition that the subsoil could not be separately owned, but the court noted, "we find with much satisfaction that our jurisprudence is in complete harmony with that which prevails throughout the land."²⁸

Had the Louisiana Supreme Court been inclined in *Lasyone* to permit horizontal ownership, it could have distinguished air rights from mineral rights by following the line of jurisprudence which permitted ownership of buildings separate from the soil below.²⁹ Residents of separate floors would then be secure in their continued ownership of the separate parcels of air space which comprise their individual property. However, permitting separate ownership of air rights would not resolve conflicts over property which the parties continued to own in common. In even a simple condominium arrangement involving a single structure, the exterior walls, stairs, structural support, plumbing, and heating and cooling apparatus, not to mention the ground beneath the building, are generally common property of the apartment owners. The occupants require assurance that a disgruntled member of the community will not upset the scheme by bringing an action for partition of the common property.

Any co-owner of property has a right to demand partition,³⁰ and an agreement between owners that there should never be a partition is void.³¹ Moreover the right to partition cannot be prescribed against.³² The only codal provision which would appear to require a person to remain in perpetual co-ownership is Louisiana Civil Code Article 1303 which prohibits partition "when the use of the thing held in common is indispensable" to the co-owners such as "an entry which serves as a passage to several houses, or a way common to several estates, and other things of the same kind."³³

There appears to be no reported case in which Louisiana courts have been asked to apply article 1303 to require ownership in common of property necessary for the enjoyment of separate estates. In the only case which has cited this provision of the Code, the supreme court held that judicial partition in kind of an oil field was impossible but a co-owner might effect partition by licitation.³⁴ The case could be read to

28. *Frost-Johnson*, 150 La. at 858, 91 So. at 243. The Court cited the jurisprudence of the United States Supreme Court, and the American and English Encyclopedia of Law which in turn cites numerous common law cases.

29. Long before the revision of 1978, the law considered buildings to be separate immovables when they belonged to someone other than the owner of the soil. "[T]he assumption of horizontal indivisibility of immovable property was discarded and courts began to hold that buildings were susceptible of ownership and other real rights as separate immovables." A. Yiannopoulos, *supra* note 21, § 94, at 287.

30. La. Civ. Code art. 1289.

31. La. Civ. Code art. 1297.

32. La. Civ. Code art. 1304.

33. See also, L. Oppenheim, Successions and Donations § 92, at 174, in 10 Louisiana Civil Law Treatise (1973).

34. *Gulf Refining Co. of Louisiana v. Hayne*, 138 La. 555, 70 So. 509 (1916).

hold that a co-owner may always obtain partition by licitation, for the court states that "where equality cannot be had by a partition in kind, the partition must be by licitation."³⁵ Moreover, article 1303 only requires that property remain in indivision if it is "indispensable" to the enjoyment of the separate estates. This provision might protect the apartment owners from partition of the plumbing and ground beneath the building, but it probably would not save the tennis courts, swimming pools, and commonly owned hot tubs from judicial auction.

The two legal pillars on which the modern condominium scheme stands, separate ownership of air rights severed from the soil³⁶ and compulsory indivision of the common property which serves the individual apartments, were absent from Louisiana law at the beginning of the 1960's. The condominium form of ownership was becoming more popular at that time, especially in states with significant urban populations. Special legislation was not necessary outside Louisiana to enable condominium development because the common law permitted ownership of air rights separate from the soil, and owners of property in common could contract to hold it in indivision.³⁷

To encourage condominium development Congress amended the National Housing Act in 1961, authorizing Federal Housing Authority insured mortgages for condominiums in states where that form of ownership was authorized by local law.³⁸ The following year the Louisiana legislature adopted the Horizontal Property Act.³⁹ The impetus for this legislation was the availability of mortgages rather than local demand as Louisiana experienced little condominium development prior to 1970.⁴⁰

Apparently, the legislature was not inclined to reinvent the wheel and relied on neighboring legislation, adopting Arkansas' condominium statute verbatim. Unfortunately the Act, as adopted, contained an embarrassing reference to the right of persons to own an apartment "as joint tenants, as tenants in common, as tenants by the entirety or in any other real estate tenancy relationship recognized under the law of this state."⁴¹ Louisiana legal scholars demanded that the Act be declared unconstitutional as an incorporation of foreign legal principles by ref-

35. *Id.* at 559, 70 So. at 511.

36. The owner of a modern condominium has exclusive ownership of only a cube of air space suspended above the ground.

37. 4A R. Powell, *The Law of Real Property* ¶ 611, at 642-43 (1982). See *Yeshiva University v. Edelman*, 176 N.Y.S.2d 534, 16 Misc. 2d 931 (N.Y. Sup. Ct. 1958) (holding that an agreement between co-owners that no partition action would be commenced was valid). On separate ownership of air rights, see 4A R. Powell, *supra*, at ¶ 263.5[1][C]; *Madison v. Madison*, 206 Ill. 534, 69 N.E. 625 (1903).

38. 12 U.S.C. § 1715 (Y) (1982).

39. See Theriot, *Louisiana Condominium Act of 1974*, 35 La. L. Rev. 1203 (1975) for an account of this saga.

40. *Id.* at 1204.

41. La. R.S. 9:1125 (1965), 1962 La. Acts No. 494 § 5.

erence.⁴² Ironically, Arkansas had copied Puerto Rican legislation, altering the civilian terminology in that statute to suit common law needs.

The Louisiana Law Institute undertook a study of the Horizontal Property Act in 1971.⁴³ Although the available correspondence indicates that the revision committee was interested in incorporating the experience of Latin American countries into its study, neither the archival records nor the text of the Act as proposed in 1974 discloses any civilian influence on that statute. The Act of 1974 remained in force until 1979 when the legislature adopted the present Act.⁴⁴

CIVIL LAW TRADITION

Although modern scholarship maintains that horizontal ownership of immovable property was generally prohibited under Roman law,⁴⁵ civilians searching for antecedents to the contemporary rules permitting individual ownership of apartments have discovered a handful of texts indicating that some dwellings combined separate ownership of living space with common ownership of passages and doorways.⁴⁶ A Spanish scholar has found that "this form of ownership appears to have been known in the middle ages and the cause seems to have been the difficulty of living within the precincts of the city walls. Medieval ordinances of Italian and French cities such as the *coutume* of Orleans, for example, deal with this kind of property."⁴⁷ In Scotland, individual ownership in apartments combined with a common interest of each owner in the ground, structural support, and roof seems to have been well established by the beginning of the nineteenth century.⁴⁸

The French experience is most relevant to Louisiana owing to the influence of the Code Napoleon upon the Louisiana Civil Code. Using the same codal provisions contained in the Louisiana Civil Code of 1870, the French fashioned a rationale for horizontal ownership. Ac-

42. Pascal, Louisiana Legislation of 1962: A Symposium—Civil Code and Related Legislation, 23 La. L. Rev. 41 (1962); Comment, The Condominium: Apartment Ownership in Louisiana, 37 Tul. L. Rev. 482 (1963). The offending language was amended by 1968 La. Acts Ex. Sess. No. 17 § 1.

43. Unpublished correspondence of the Louisiana Law Institute.

44. 1979 La. Acts No. 682 § 1.

45. "According to traditional Romanist doctrine, immovable property is not susceptible of horizontal division; buildings and other constructions having their foundation in the soil necessarily belong to the owner of the ground." A. Yiannopoulos, *supra* note 21, § 94, at 286, and sources cited therein.

46. "Another text of Ulpian, not very clear (D. XLIII, 17, Uti possidetis, 3 and 7) serves as an antecedent to conclude that, in Rome, at times the superstructure was given to different persons in the different stories of one building with common use of an exit to public places." A. Ventura - Traveset y Hernández, *Derecho de Propiedad Horizontal* 13 (1976).

47. *Id.* at 14.

48. D. Walker, *II Principles of Scottish Private Law* 1262-63 (1970).

according to Aubry and Rau, the task of constructing a doctrine governing co-ownership of single things fell to treatise writers who used "the statutory principles furnished by the titles on ownership, successions and partnership contract."⁴⁹

The task of treatise writers developing a concept of apartment ownership was facilitated by the absence of a prohibition on alienation of the subsoil. French Civil Code article 552, which corresponds to article 505 of the Louisiana Civil Code of 1870, provides that the ownership of the soil includes "the ownership of what is above and beneath it." Planiol states, however, that "Mines form an immovable property distinct from the surface. There are therefore two superimposed properties existing upon the same spot, the ground and the mine. Each of them may be sold, mortgaged, seized, etc., separately from the other and conformably with the general rules applicable to landed property."⁵⁰ French article 553, corresponding to article 506 of the Louisiana Civil Code of 1870, was interpreted to create only a presumption that the owner of the soil owned all superficies. They are presumed to belong to the owner of the soil "if the contrary is not proved," and as Planiol states: "The contrary is thus possible, that is to say, the buildings may belong to a person other than the owner of the soil"⁵¹

The possibility of horizontal ownership provided the first necessary legal pillar for condominiums in France. The second pillar, forced ind-division of common areas, was also built by interpretation of codal provisions similar to those in the Louisiana Civil Code. French Civil Code article 815 provides: "Each co-owner may request at any time the partition of the common property, unless it is subject, by its nature or designation, to a forced undivided ownership." French authorities maintain that the co-ownership of things which are indispensable accessories "for the common use of two or more estates belonging to different owners, the very designation of these things imposes on them the state of forced undivided coownership."⁵² Planiol notes that the soil, main walls, roofs, out buildings, and toilets of structures in which individuals own separate dwellings are owned in common.⁵³

Condominium ownership developed in France on the foundation of the same legal principles which were available to Louisiana jurisprudence. The legal systems of the two jurisdictions probably used these codal provisions differently owing to contrasting economic and social conditions. Our judges understandably viewed the state's endowment of mineral resources as an important factor in Louisiana property law and it

49. 2 C. Aubry & C. Rau, *Droit Civil Francais* § 221, at 385 (P. Esmein 7th ed. 1961) in 2 *Civil Law Translations* (J. Mayda trans. 1966).

50. 1 M. Planiol, *Treatise on The Civil Law* ¶ 2403 (1959).

51. *Id.* at ¶ 2525.

52. 2 C. Aubry & C. Rau, *supra* note 49, § 221, at 393.

53. M. Planiol, *supra* note 50, at ¶ 2522.

is not surprising that any discussion of division of property first considered the possible impact of the jurisprudence on mineral rights. In France, on the other hand, the need for urban housing following the First World War was an important factor which influenced interpretation of these codal provisions. Thus, no special legislation was necessary in that country to permit condominium ownership.

The French experience demonstrates that Louisiana might have developed through case law horizontal ownership of dwelling space without distorting any principles of the civilian tradition. The Spanish experience, in contrast, shows that a legislator may create a civilian framework for condominium ownership when existing jurisprudence is an obstacle as it was in Louisiana. Legislation was necessary in Spain because the courts obstinately refused to apply a codal provision which permitted separate ownership of floors in a building.

Article 396 of the Spanish Civil Code of 1888 began, "when the different stories of one house belong to different owners, if the owners of the property do not establish the bases on which they should contribute to necessary works and there exists no agreement on this, the following rules should be observed: . . ." Early jurisprudence of the Supreme Tribunal consistently interpreted this provision to permit only a form of co-ownership of buildings, probably because the article appears in the title on ownership in common (*comunidad de bienes*). Setting aside the judgment of a trial court which denied a suit for partition of a horizontally divided building, the court wrote: "Among co-owners of houses whose different stories belong to different owners there exists a community of ownership to which Article 392 refers . . ." ⁵⁴ The trial court's denial of dissolution "on the grounds that ownership in common does not exist" conflicts, the Superior Tribunal continued, with the provisions regulating partition of common property. In another case the court found that article 396 "cannot be the basis for a claim that a house held in indivision be divided in the form here provided for this would in every case change the form of the co-ownership." ⁵⁵

Commentators considered this interpretation of the Spanish Code incorrect. The original inadequacy of the first article 396, aggravated by jurisprudential interpretation, permitted authorities to "sieve hold of the doctrine that ownership by floors was a form of ordinary ownership in common (of *comunidad juris romani*) and tending to apply to it the rules of the latter . . . fundamentally injured the institution . . ." ⁵⁶ Judges and legal authorities "became obsessed with the idea that horizontal ownership was a form of ownership in common. . . . The second obsession of our jurists was the action of partition with which the owner of

54. Judgment of the First Chamber pertaining to Civil Matters of the Supreme Tribunal, 18 March 1897.

55. Judgment of the First Chamber pertaining to Civil Matters of the Supreme Tribunal, 14 June 1895.

56. A. Ventura - Traveset y Hernández, *supra* note 46, at 33.

one story could petition for the cessation of the state of indivision"⁵⁷

Interpreting horizontal ownership as a type of ownership in common need not have entailed a right to partition in every case because the Spanish Code, like those of France and Louisiana, provided that there could be no partition of property "when to do so would render it unserviceable for the use to which it is assigned."⁵⁸ Authorities interpreted this provision to mean that a co-owner could request partition by licitation where partition in kind was not feasible.⁵⁹

The intransigence of the Spanish courts to horizontal ownership is surprising in view of the common occurrence of this form of property as a matter of custom.⁶⁰ It is even more surprising inasmuch as the *Ley Hipotecaria* of 1871 recognized the practice of separate ownership of stories and apartments, providing that a mortgage of a separate story or unit should be recorded in the Registry's folio for the building which contained the apartment.⁶¹

SPAIN'S STATUTORY RESPONSE

Spanish jurisprudence inhibited the growth of the condominium form of ownership because the courts construed horizontal ownership as a form of ownership in common and permitted any member of the condominium community to seek partition of the building by licitation. Following the Spanish Civil War, the growth in demand for urban housing encouraged the government to revise article 396.⁶² As revised,

57. *Id.* at 19.

58. Código Civil Español art. 401 (14th edition).

59. "No co-owner shall be obligated, by the sole fact that the property is not divisible, to remain in the community, but on the contrary, may ask at any time that it be dissolved, not dividing the thing or adjudicating it all to one with indemnification of the others, but selling it and dividing the price." D. José María Manresa y Navarro, *Comentarios al Código Civil Español* 492 (1934). See also, Calixto Valverde y Valverde, *Tratado de Derecho Civil Español* 259-60 (1925).

60. A. Ventura - Traveset y Hernández, *supra* note 46, at 20.

61. *Ley Hipotecaria* art. 8 para. 3. "There shall be considered as one parcel, for purposes of inscription in the Registry under one number: . . . Every urban parcel and every building, though it belong in defined proportions, apartments or stories to different owners, in full ownership or less than complete ownership."

62. The different floors or locations of a building or its parts susceptible to independent use by reason of having their own exit to a common area or public thoroughfare may be the object of separate ownership which shall carry an inherent right of coownership over the other elements of the building necessary for adequate use and enjoyment such as the soil, roof, foundations, halls, walls, drainage, stairs, porter's quarters, elevators, corridors, cupboards, plumbing, and servitudes.

The parts in coownership shall in no case be susceptible of division and may only be alienated, seized or burdened jointly with the specific particular part to which it is inseparably annexed.

On case of alienation of a floor or area, the owners of the others, under this title only, shall not have the right of *tanteo* or of *retracto*.

This form of ownership is regulated by special legal provisions and, insofar as these regulations permit, by the will of the parties. Código Civil Español art. 396 (14th edition); see also A. Ventura - Traveset y Hernández, *supra* note 46, at 33-34.

the Spanish Civil Code provided for separate ownership of dwelling units with ownership in common of areas necessary for enjoyment of these units. The parts held in indivision could not be partitioned. Codal provisions regulating horizontal property remained a part of the title regulating ownership in common. The legislature merely created a new type of ownership in common for property which was attached to parcels of separately owned property and could not be partitioned.

This statutory modification protected the owners of floors in divided buildings and permitted them to agree upon allocation of expenses connected with maintenance of the structure. It was probably adequate regulation for any structure involving no more than three or four residential units and demonstrates that simple condominium arrangements do not require an elaborate statutory framework.

Construction of larger condominium projects brought more sources of friction between residents and increased the role of real estate developers who, in Spain as in the United States, imposed building regulations which were not always in the interests of purchasers.⁶³ In 1960 the government enacted the Horizontal Property Act which retained the concept of the condominium as a species of ownership in common while providing a statutory framework for self-government by the co-owners.⁶⁴ In this respect, Spain's horizontal property legislation is similar to Louisiana's regulation of matrimonial property.

The *Exposition de Motivos* of the law maintains that the legislature developed a new form of ownership on the basis of concepts of common ownership. Horizontal property is a modification of ownership in common (*comunidad de bienes*). The development of this institution tended to emphasize the characteristics which distinguish it from ownership in common. The reform of 1939, the *Motivos* state, recognized the individual ownership of units, leaving the common property as an accessory. The Horizontal Property Act of 1960 increases individual control over the separately owned property inasmuch as the purpose of the common

63. There was an explosion of condominium development in the 1950's. "The diffusion [of this form of ownership] has been so great that one may state with absolute certainty that the majority of urban owners live today in this relatively new legal institution." Luis Muñoz Gonzalez, *La Propiedad Horizontal* 7 (1979). "[T]hat which was little more than fifteen years ago a novelty in Spanish cities, horizontal property, is practically the only form in which new buildings take refuge." Batista, *Comunidad Para Edificar*, 53 *Revista de Derecho Privado* 99 (1969).

The *Exposition de Motivos* notes that consumer protection had become necessary by 1960, observing that the 1960 law offers great attention to the rights and duties of co-owners:

Until now . . . this matter has been given over almost entirely to private autonomy as reflected in the bylaws. These frequently were not the fruit of free negotiation by the parties but, ordinarily, they were dictated . . . by the promoter of the construction enterprise. Those entering the régime of horizontal property being limited to acquiescing.

64. Ley de Propiedad Horizontal, num. 49/1960, 21 July 1960, de la Jefatura del Estado.

elements is to serve the apartments and not the other way around. One Spanish commentator observes that this law uses existing legal norms to regulate a novel social development.⁶⁵ "In truth, horizontal property is *sui generis*; it has initiated a distinct modern discipline with regulation distinct from ownership in common."⁶⁶

Creating the Horizontal Property Regime

A Spanish horizontal property regime exists whenever ownership of parts of a building is divided among different proprietors and other areas are held in common. Conveyance of an upper story to another person by one who had owned the entire building would create a regime of horizontal ownership subject to the Horizontal Property Act.⁶⁷ No agreement or public act is necessary. A simple condominium scheme is possible within this framework without any written agreement defining the rights of the owners and without any registration; a salutary flexibility which the Louisiana Condominium Act lacks.⁶⁸

The Spanish law permits, but does not require, the co-owners to formalize their respective rights by executing a charter (*título constitutivo*) of the regime which contains much the same information which Louisiana's Act requires in a declaration of condominium.⁶⁹ If the apartments have not yet been sold the developer would prepare this document. Although the charter must be registered to affect third parties, Spanish authorities state emphatically that registration creates no new legal entity and failure to register does not alter relations among the owners.⁷⁰ In fact the Spanish regime of horizontal property is not a legal entity.⁷¹

65. 2 F. Puig Peña, *Compendio de Derecho Civil Español, Derechos Reales* 279 (1976).

66. *Id.* at 278.

67. A. Ventura - Traveset y Hernández, *supra* note 46, at 193.

68. La. R.S. 9:1122.101, and 1122.105 specify the contents of the declaration.

69. Ley de Propiedad Horizontal, num. 49/1960, Art. 5, 21 July 1960, de la Jefatura del Estado.

70. A. Ventura - Traveset y Hernández, *supra* note 46, at 193, citing a decision of the Supreme Tribunal:

The *título constitutivo* to which Article 5 of the law refers does not give birth to the horizontal property which is derived from the law itself when the acquisition of different stories occurs. The cited Article has another significance, that of joining and regulating those rights which the law grants to the owners of the different stories.

See also, J. Caballero Gea, *La Propiedad Horizontal: La Problemática Judicial* 42 (1983).

The juridical statute of ownership neither creates a distinct social entity of the components with patrimony different from its members nor does it modify the elements which belong to each of them from the moment of acquisition. The régime of horizontal property pursues no object other than directing those rights which already belonged to the co-owners. . .

71. Some Spanish authorities believe this state of affairs to be disadvantageous. "Recognition of the legal personality of the Board of Owners . . . would not be badly received." R. Pascal, *Propiedad Horizontal*, 60 *Revista de Derecho Privado* 867, 875 (1976).

Although other provisions of the Spanish Act permit the condominium community to sue and be sued and to transact business in its own name,⁷² the community as such has no authority other than that which the individual owners would have acting alone.⁷³ As a consequence of this absence of legal personality, co-owners may sue one another for violation of the charter or regulations and are not dependent on the board of co-owners to protect their rights.⁷⁴

As a form of co-ownership, the Spanish condominium arrangement is a legal relationship among the parties, not a distinct entity. In this respect it is similar to a spousal community or community of heirship under Spanish law. Louisiana, in contrast, permits the association of unit owners to incorporate so that for some purposes owners relate to one another as shareholders and must redress grievances through the Association of Owners.⁷⁵

Property Subject to the Régimé

In Spain, as in Louisiana, government of the régime is founded on two basic documents: the charter or declaration of condominium and the bylaws. Under current Spanish practice, the charter will ordinarily be promulgated by a developer.⁷⁶ In Louisiana the declaration may only be executed "by the owner of the immovable property to be conveyed" to the condominium régime.⁷⁷ Inasmuch as the Louisiana Civil Code permits separate ownership of floors only within the framework of the Condominium Act,⁷⁸ and the declaration of condominium creates the régime,⁷⁹ the declarant is always the owner of the entire immovable property. In Spain, on the other hand, the charter does not constitute the régime because horizontal ownership is permitted outside the law on horizontal property.⁸⁰ The apartment owners may collectively and

72. See *infra* notes 133-137 and accompanying text.

73. J. Caballero Gea, *supra* note 70, at 48.

74. See *infra* notes 136-137 and accompanying text.

75. La. R.S. 9:1123.101 (Supp. 1985). Although there is no jurisprudence on this point, a condominium unit owner probably has standing to bring an action under Civil Code articles 667-669 for causing him inconvenience in his use of the property. If the unit owner's complaint is the failure of his neighbor to abide by the provisions of the declaration or bylaws, redress should be limited to corporate channels. La. R.S. 9:1123.102(11) (Supp. 1985), La. R.S. 1123.115 (Supp. 1985). La. Civ. Code art. 436 provides,

The estate and rights of a corporation belong so completely to the body, that none of the individuals who compose it, can dispose of any part of them.

In this respect the thing belonging to a body, is very different from a thing which is common to several individuals, as respects the share which everyone has in the partnership which exists between them.

76. J. Caballero Gea, *supra* note 70, at 42.

77. La. R.S. 9:1122.101 (Supp. 1985).

78. La. Civ. Code art. 492.

79. La. R.S. 9:1122.101 (Supp. 1985).

80. A. Ventura - Traveset y Hernández, *supra* note 46, at 67-68 and accompanying text; Código Civil Español art. 396 (14th edition).

unanimously execute and register a charter,⁸¹ or it may be executed by a developer who owns the entire property. A Louisiana condominium unit owner's association may amend the declaration by a decision of sixty-seven percent of the allotted votes,⁸² whereas Spanish unit owners must unanimously concur in any amendment.⁸³ Bylaws in Spain and Louisiana are ordinarily adopted by majority vote.⁸⁴

In both jurisdictions the most important feature of the declaration or charter is delineation of the individual units and assignment of each unit's share in the common property.⁸⁵ In Spain, any alteration in the designation or use of the common property requires amendment of the charter.⁸⁶ The Louisiana Act requires only a vote of the association to redesignate common areas.⁸⁷ Louisiana law provides substantially more flexibility to the condominium community. One dissenting vote in a Spanish board of owners may block useful alterations of the common elements. The only remedy of the majority is legal action against the dissenter alleging that he is acting with fraud or against the interest of the community.⁸⁸ The procedure is cumbersome even if it is successful, and Spanish commentators complain that the law on horizontal property relies excessively on judicial enforcement of majority interests.⁸⁹ The requirement of unanimity of owners is, however, a characteristic of the regime of ownership in common. This characteristic is appropriate when co-owners of a pasture are deciding whether to lease mineral rights but not appropriate where the purpose of the common property is to serve separately owned apartments.

The same problems occur if a unit owner acquires an adjoining apartment and wishes to connect the two dwellings. Louisiana does not require him to obtain approval of the association, provided he does not impair the structural integrity of the building.⁹⁰ Spanish authorities, in contrast, are preoccupied with the effect of such an alteration on the distribution of voting power within the residential community because votes are allocated by floor space.⁹¹ These authorities require the owner

81. J. Caballero Gea, *supra* note 70, at 42.

82. La. R.S. 9:1122.119 (Supp. 1985).

83. Ley de Propiedad Horizontal, num 49/1960, art. 16, para. 1, 21 July 1960, de la Jefatura del Estado; Muñoz Gonzalez, *supra* note 63, at 203.

84. The Louisiana Act does not specify the number of votes needed to amend the bylaws. The declaration or articles of incorporation might, of course, require a super majority. La. R.S. 9:1123.102 (Supp. 1985). Spanish law requires a majority of the owners and a majority of the vote as allotted by floor space.

85. La. R.S. 9:1122.105 (Supp. 1985). Law on Horizontal Property art. 5.

86. Ley de Propiedad Horizontal, num. 49/1960, art. 16 ¶ 1, 21 July 1960, de la Jefatura del Estado.

87. La. R.S. 9:1123.102(6) (Supp. 1985).

88. J. Caballero Gea, *supra* note 70, at 121.

89. A. Ventura - Traveset y Hernández, *supra* note 46, at 56.

90. La. R.S. 9:1122.113(3) (Supp. 1985).

91. Ley de Propiedad Horizontal, num. 49/1960, art. 4, 21 July 1960, de la Jefatura del Estado.

to obtain the unanimous consent of the board.⁹² Approval is also required because alteration of a wall between units modifies common property.⁹³

Governance of the Regime

Louisiana entrusts government of the community to the collective unit owners.⁹⁴ If a condominium unit owners' association is organized as a corporation, the board of directors may exercise any powers conferred on them by statutes, articles of incorporation, and bylaws. Using a corporate structure, the association may confer considerable authority on the directors and free itself of responsibility for management of the community.⁹⁵

The owners of apartments, constituted as the board of owners, also govern a Spanish condominium community; however, there is little organizational similarity between this board and its Louisiana counterpart.⁹⁶ The board is not a legal entity, and it does not delegate authority to any executive body. Final authority for all decisions resides in the owners acting collectively. If the horizontal property community is large enough to require budgets of expenditures and revenues, these may be prepared by committees, but they must be approved by a majority of owners.⁹⁷ A Louisiana condominium association organized as a non profit corporation may amend its bylaws by action of the directors or members,⁹⁸ whereas such amendments in Spain require action by a majority of owners.⁹⁹

There are other consequences to classifying the community as a corporation or as a form of ownership in common. A disgruntled Louisiana condominium owner, dissatisfied with a bylaw adopted by a majority of the directors or members, has no redress unless he can allege that the rule is illegal. Recent judicial decisions in Florida upholding condominium regulations which exclude children from the complex prove that regulations severely disadvantageous to a minority of owners may nonetheless be valid.¹⁰⁰ In Spain, however, where the com-

92. Muñoz, *supra* note 63, at 30; J. Caballero Gea, *supra* note 70, at 125.

93. See *supra* note 86 and accompanying text.

94. La. R.S. 9:1123.102 (Supp. 1985).

95. La. R.S. 12:224 (1969).

96. Ley de Propiedad Horizontal, num. 49/1960, art. 13, 21 July 1960, de la Jefatura del Estado.

97. Muñoz, *supra* note 63, at 246. The law makes no provision for an executive committee. A model charter defines the functions of any executive counsel and the board of owners.

98. La. R.S. 12:222 (1969 and Supp. 1985).

99. Ley de Propiedad Horizontal, num. 49/1960, art. 16, para. 2, 21 July 1960, de la Jefatura del Estado.

100. *Star Lake North Commodore Ass'n v. Parker*, 423 So. 2d 509 (Fla. Dist. Ct. App. 1982). See also *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975) (approving regulations which prohibit unit owners from drinking alcoholic beverages in common areas).

munity is a form of ownership in common, a regulation which has a disproportionate impact on some owners is viewed as having the effect of excluding them from enjoyment of the common property, and judicial intervention is more easily obtained. If Louisiana law interpreted the condominium as a form of ownership in common, our courts might follow the same analysis.¹⁰¹

Spanish law on horizontal property permits any owner to bring suit challenging a decision of the majority which is illegal or contrary to the charter.¹⁰² In addition, a group representing at least a quarter of the owners may challenge a decision which is "gravely prejudicial" against them.¹⁰³ Summarizing the jurisprudence on this point, Muñoz defines "gravely prejudicial" as "an injury in an obvious and important manner to the interests of one or more owners" such as a decision to limit the supply of heat, supplied from a common source, to a few hours each day.¹⁰⁴ Thus, a gravely prejudicial regulation need not even be discriminatory, only damaging to the interests of some owners, limiting their enjoyment of the property.

Relations Among Unit Owners

Collective Action

In Louisiana the condominium association acquires authority over the deportment of individual residents through its power to make regulations, to levy fines for their violation, and to obtain injunctions against continuing violations.¹⁰⁵ Because condominiums are a recent phenomenon in Louisiana, there is little experience with attempts to enforce these regulations through the courts. In Florida, where condominiums are more common, courts have permitted associations to regulate common areas¹⁰⁶ and activities entirely within the owner's dwelling spaces provided the regulations are not illegal, discriminatory, retroactive, vague or otherwise deficient.¹⁰⁷ Florida courts have upheld regulations which

101. See *LeBlanc v. Scurto*, 173 So. 2d 322 (La. App. 1st Cir. 1965).

102. *Ley de Propiedad Horizontal*, num. 49/1960, art. 16, para. 4, 21 July 1960, de la Jefatura del Estado. A decision is contrary to law when it infringes a prohibition or imperative precept contained in the law on Horizontal Property. A decision is contrary to the charter when it does not respect a group of provisions which specify the rights and obligations of the co-owners relating to the use or purpose of the building in its entirety, its administration, conservation, and repair. Muñoz, *supra* note 63, at 75.

Muñoz, *supra* note 63, at 75.

103. *Ley de Propiedad Horizontal*, num. 49/1960, art. 16, para. 3, 21 July 1960, de la Jefatura del Estado.

104. Muñoz, *supra* note 63, at 75.

105. La. R.S. 9:1123.102(11) (Supp. 1985)

106. See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

107. *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346 (Fla. 1979).

limit occupancy to people of certain ages,¹⁰⁸ prohibit leasing of units¹⁰⁹ or ownership of pets,¹¹⁰ and restrict occupancy to members of a single family.¹¹¹ In addition, there is no reason to suppose that the association could not bring suit on behalf of all the owners in the event that one resident was conducting an activity in his dwelling which threatened the health or safety of others members or inconvenienced them in the use of their property even if regulations did not specifically prohibit the activity.¹¹²

A Spanish horizontal property community has similar rights with a few important distinctions. Although the community may adopt regulations on the use of dwelling units, misconduct of a member is viewed conceptually as an injury to the enjoyment of the common property by other residents, rather than as breach of a rule. Standing to seek redress lies with the other co-owners rather than the rule making body.

Article 394 of the Spanish Civil Code, which applies to horizontal property and to other types of ownership in common provides: "Every participant may serve himself from the common property so long as he deals with it in conformity with its purpose and in a manner which does not prejudice the interests of the community or impede the co-owners from using it according to their right." The law on horizontal property also specifically prohibits the owner from carrying out activities in the apartment or elsewhere in the property which are "damaging to the property [as a whole], immoral, dangerous, inconvenient or unsanitary."¹¹³ Finally, in keeping with the ready access to judicial authority which the law offers the co-owners, the board of owners may obtain an order expelling the malefactor for as long as two years.¹¹⁴

The control which this law gives the condominium community over the private conduct of their neighbors cannot merely be attributed to Spanish moral sensibilities. The power which the community enjoys to control conduct anywhere on the premises is a feature of the concept of this community as co-ownership, for condominium residents are more restricted in their conduct than leasehold tenants. The Spanish draft law

108. *Id.* at 351; *Star Lake North Commodore Ass'n v. Parker*, 423 So. 2d 509 (Fla. Dist. Ct. App. 1982).

109. See *Barnett and Klein Corp. v. President of Palm Beach - A Condominium, Inc.*, 426 So. 2d 1074 (Fla. Dist. Ct. App. 1983) (where a regulation was applied in a discriminatory fashion).

110. See *Winston Towers 200 Ass'n v. Saverio*, 360 So. 2d 470 (Fla. Dist. Ct. App. 1978) (regulation could not be retroactively applied).

111. *White Egret Condominium, Inc.*, 379 So. 2d at 346 (regulation was inconsistent and ambiguous).

112. La. Civ. Code arts. 667-669.

113. Ley de Propiedad Horizontal, num. 49/1960, art. 7, para. 3, 21 July 1960, de la Jefatura del Estado.

114. Ley de Propiedad Horizontal, num. 49/1960, art. 19, 21 July 1960, de la Jefatura del Estado.

on horizontal property required notoriety of the owner's misconduct as a condition for disciplinary measures.¹¹⁵ This provision would have followed the Law on Urban Leases which permits expulsion of a tenant who is *openly* engaging in immoral, dangerous, inconvenient, or unsanitary activities.¹¹⁶ However, the legislator deleted the requirement of notoriety from the law as enacted.¹¹⁷ Moreover, the Law on Urban Leases permits a landlord to terminate the lease of a tenant who "intentionally" damages the property. The Horizontal Property Law does not require intent.¹¹⁸ One author concludes, "the objective ambit of the Law on Horizontal Property for application of the sanction is much broader than that recognized by the Law on Urban Leases."¹¹⁹

Immoral activities are particularly troublesome grounds for eviction from the condominium. Generic definition of immoral activities is difficult and the courts have proceeded on a case by case basis.¹²⁰ Unit owners have been expelled for conducting a trade in prostitution, for providing a place of assignation for couples, and for conducting illegal gambling activities.¹²¹ Such activities need only occur to be grounds for exclusion, they need not have publicity.

An activity in one unit would only be inconvenient to neighbors if it had consequences outside the apartment. Such activities deprive or hinder other residents in the normal and adequate use and enjoyment of the property and include noise, vibration, production of gases, odors, dust, or the like. Unsanitary activities are also grounds for eviction.¹²²

If any of the foregoing grounds for expulsion exist, the board of owners notifies the offending resident that he will be disciplined unless he desists.¹²³ Notification is a condition precedent to judicial action. Spanish commentators consider the system "agile and flexible" as the board may proceed to court any time after notifying the resident.¹²⁴ The court may allow the offender additional time before hearing the case and, after finding the owner responsible for the acts alleged, may expel him from his home for as long as two years. Expulsion is justified, according to one authority, for an injunction "prohibiting the harmful or disruptive activities solves nothing for these will continue notwithstanding the prohibition."¹²⁵

115. Muñoz, *supra* note 63, at 118.

116. Ley de Arrendamientos Urbanos, Art. 114 (7a)(8a).

117. Muñoz, *supra* note 63, at 118.

118. *Id.* at 120. An act is damaging if it "diminishes the patrimonial value of the property, interpreting 'property' as the combination of common and private elements which compose it. The damaging activity should have repercussions in the common areas or in the floors or units of the other owners."

119. *Id.*

120. *Id.*

121. *Id.* at 123.

122. *Id.* at 124.

123. *Id.* at 130-32.

124. *Id.* at 128.

125. *Id.* at 129.

An owner who has been temporarily expelled loses only his right to live on the premises. He may lease or sell the apartment, and the new occupant takes possession as though no violation had occurred.¹²⁶ An owner out of possession, whether by choice or expulsion, remains liable for his share of repairs and common expenses. If the malefactor returns to the premises and commits the same offense, he may once again be expelled for as long as two years.¹²⁷

Individual Action

Louisiana condominium dwellers are owners of contiguous property and shareholders of a corporation. Any damage which an owner causes should be categorized as a harm to one of these two relationships. Although residents own certain property in common, this property is managed by the corporation. Inasmuch as the responsibilities of the incorporated unit owner's association include regulation of commonly owned property and assessment of fees, an owner's breach of misconduct in either of these areas is an injury to the corporation, not damage to particular owners. Conduct by one resident which causes direct injury to a neighbor should be categorized as a breach of an obligation of neighborhood, the tort of nuisance. A resident should be able to obtain redress of a nuisance on the same conditions as the owner of a detached house.¹²⁸ Misuse of the common areas or violation of a condominium regulation is an injury to the corporation and only harms other residents indirectly, unless the activity amounts to a nuisance. Louisiana corporate shareholders have no standing to sue one another to redress this indirect injury.¹²⁹ The shareholder may only sue the offender on behalf of the corporation in a derivative action.¹³⁰ Similarly, the unit owner's association might sue a member to compel payment of delinquent assessments, but these arrearages are not an injury to any other member in his individual capacity.¹³¹

126. *Id.* at 148.

127. *Id.* at 147. "In light of the possibility of repeated infractions it would be desirable to adopt solutions similar to those provided in foreign legislation, some of which permit forced sale of the floor or unit or imposition of strong economic sanctions, including imprisonment of the malefactor."

128. *Robichaux v. Huppenbauer*, 258 La. 139, 245 So. 2d 385 (1971); *Hillard v. Shuff*, 260 La. 384, 256 So. 2d 127 (1971).

129. *Ault & Wiborg Co. of Canada v. Carson Carbon Co.*, 181 La. 681, 160 So. 298 (1935).

130. La. Code Civ. P. art. 596. Similarly, an individual unit owner may not sue officers of the condominium association for breach of corporate responsibilities. Where unit owners and the association sued former officers of the association for entering self-dealing contracts, a Florida court held that the allegation charged a breach of fiduciary duty which only the association could vindicate. *Avila South Condominium Association v. Kappa Corporation*, 347 So. 2d 599 (Fla. 1976).

131. Provisions of the non profit corporations statute relating to subscriptions for shares are applicable by analogy. La. R.S. 12:211(C) (1969) states, "subscriptions for shares . . . may be enforced by the corporation in its own name. . . ."

The board of owners of a Spanish condominium has no powers other than those of the apartment owners acting collectively.¹³² The board is not a legal entity. The law gives this group no status which the co-owners of property would not have outside the statute. "[T]he community constituted in a regime of horizontal property lacks the attributes of legal personality, for in principle it is the members who compose it and not the group as such which are subjects of rights and duties"¹³³ Consequently there is no distinction between an injury to the board of owners and an injury to the property owned in common.

The Law on Horizontal Property authorizes the owners to elect a president to act for them in court.¹³⁴ His sole function is to represent the community, and he has no authority to act unilaterally on its behalf.¹³⁵ The board of co-owners must in each case authorize the president to act. Moreover, the authority of the president of the community to sue on its behalf does not exclude standing by other owners.¹³⁶

The Spanish interpret an owner's violation of the charter through immoral, damaging, or unsanitary conduct in an apartment or by unilateral modification of the common elements as damage to the property owned in indivision. It is injury to each owner and each may bring suit against the offender. "[T]he fact that Article 12 of the law specifically confers on the president of the community legal representation is not an impediment to each owner exercising steps necessary to defend the interest in the common property, including suits against the president and the other co-owners. . . ."¹³⁷ An owner suing to redress injury to common property, whether it is actual property damage or merely misconduct of another resident diminishing his enjoyment, must act for the benefit of the condominium community.¹³⁸ As the interest which has been injured is his interest in the common property, he must divide any award of damages among the co-owners. However, he need not allege that he is suing on behalf of the community.

An owner also has interests in his separate property apart from his stake in the community. Contiguous neighbors may injure one another's separate property without harming the common property or impairing

132. J. Caballero Gea, *supra* note 70, at 55.

133. *Id.* at 56.

134. Ley de Propiedad Horizontal, num. 49/1960, art. 12, 21 July 1960, de la Jefatura del Estado.

135. Muñoz, *supra* note 63, at 22.

136. J. Caballero Gea, *supra* note 70, at 77.

137. *Id.* In a decision of the Supreme Tribunal of 28 April 1966, ratified on 23 April 1970, the Court established that the owners in a community may undertake all types of actions for compensation or indemnification for injury which has been caused to them both in reference to their individual units and to the common elements "for those damages in the former and in the latter instances affect individual rights, which necessarily require use of the common property." Muñoz, *supra* note 63, at 22.

138. J. Caballero Gea, *supra* note 70, at 79-80.

the enjoyment of the community as a whole. In such cases the aggrieved owner brings suit on his own behalf,¹³⁹ and the president of the board of owners is without standing.¹⁴⁰

Conclusion

Louisiana might have developed a civilian approach to condominiums. This paper has shown that neither of the two legal principles which distinguish the condominium are necessarily alien to civilian thinking. Louisiana courts might have recognized horizontal division of immovables above the ground without impairing any important policies of mineral ownership. It might also have been recognized, as it was by French authorities, that commonly owned property should remain in compulsory indivision when it serves the interests of separate estates. Unlike the experience in France and the common law jurisdictions, where condominium legislation was needed only to regulate problems of community governance and to attack abuses of purchasers by developers, Louisiana required legislation to alter basic concepts in our property law before it could have condominium ownership.

Finding this need for legislation, the Louisiana legislature might have drafted it in the interstices of the Civil Code, adapting an institution such as ownership in common to meet new economic and social needs of urban living. The Spanish experience demonstrates that the features of a condominium scheme which is based on a modified concept of ownership in common can be quite different than the characteristics of a community in which the residents are corporate shareholders.

One of the distinguishing features of the Spanish approach is the ease of constituting a horizontal property régime. In Louisiana expensive legal talent is invariably required to prepare and register the declaration and bylaws. In Spain the régime exists as soon as the stories are sold separately. The community may operate without bylaws on the basis of the same codal articles which regulate relations between other types of co-owners. Analyzing the condominium as a form of ownership in common carries the disadvantage of allowing one dissenting resident to prevent any modification in the common property. However, this same characteristic of the Spanish system protects minorities from oppressive regulations which a majority might enact, permitting judicial challenge on the ground that the regulation limits their enjoyment of common property. As a form of common ownership, the community also has more ready access to courts to adjudicate internal disputes between owners than the shareholders of a Louisiana unit owners' association. As previously noted, some Spanish authorities maintain that the role of courts in sorting out disputes among co-owners is too significant, par-

139. D. José Maria Manresa y Navarro, *supra* note 59, at 440.

140. J. Caballero Gea, *supra* note 70, at 62.

ticularly in a large condominium community where the residents may be constantly bickering before a judge if they are permitted to appeal every prejudicial decision of the majority. Corporate decisions in Louisiana enjoy more internal finality than decisions by a board of owners in Spain.

The universal capacity of the residents of a Spanish horizontal property community to sue and be sued by one another may be the least desirable characteristic of conceptualizing the condominium as a type of ownership in common. If the source of contention involves the entire community, one resident should ordinarily take action against another only when the executive authorities of the condominium have declined to assert the community's interests. In such cases a Louisiana condominium resident could probably meet the requirements for a shareholders' derivative action. Importing this aspect of Spanish horizontal property to Louisiana might encourage litigation without offering any additional protection to residents.

This examination of Louisiana condominium law in a civilian perspective is not intended to advocate adoption of the Spanish approach to horizontal ownership. Although some of its features might benefit Louisiana law, there are others which are inappropriate for condominium communities containing hundreds of residents. The latter should be managed as corporations. This comparison is offered to encourage comparative analysis of law as a basis for future legal reform so that we can, when we choose, build on the foundation of our own legal traditions.