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Ocean Trail Unit Owners Ass'n, Inc. v. Mead: Democracy or Tyranny - The Supreme Court of Florida Properly Finds in Favor of Condominium Board

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Ocean Trail Unit Owners Ass'n, Inc. v. Mead:
Democracy or Tyranny—The Supreme Court of Florida
Properly Finds in Favor of Condominium Board

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I. INTRODUCTION

The concept of condominium form of ownership draws its earliest codification in the law to the Napoleonic Code of France.¹ Nearly two hundred years later, in the early 1960s, this ownership concept was introduced in Florida when the Florida Legislature enacted The Condominium Act, chapter 711 of the *Florida Statutes*.² Florida’s Condominium Act, although establishing the basic framework of condominium law, was void of requirements for the operation and management of the condominium as well as of consumer protections for the condominium unit owner. Consequently, in the middle of the 1970s, the Condominium Act was significantly revised and renumbered as chapter 718, *Florida Statutes*.³ These revisions added significant consumer protections for unit owners as well as enumerated comprehensive requirements for the operation and management of condominiums by their associations.⁴

1. *Sterling Village Condominium, Inc. v. Breitenbach*, 251 So. 2d 685, 688 (Fla. 4th Dist. Ct. App. 1971), *cert. denied*, 254 So. 2d 789 (Fla. 1971). In addition, while not codified, the legal scholars trace the concept of condominium ownership to early Roman times. *Id.* See FLA. STAT. § 718.111(1)(a) (1993), which provides, with the exception of associations which were already in existence on January 1, 1977, that:

The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit The owners of units shall be shareholders or members of the association. The officers and directors of the association have a fiduciary relationship to the unit owners.

Id.

2. See FLA. STAT. § 711 (1963). Chapter 711 was subsequently repealed and replaced by chapters 718 and 719 of the *Florida Statutes*, which deal with condominiums and cooperatives, respectively. See 1976 Fla. Laws ch. 76-222.

3. FLA. STAT. §§ 718.101-718.622 (1993).

4. See *id.* § 718.102(1), (2) (stating that the purposes of chapter 718 are “[t]o give statutory recognition to the condominium form of ownership . . . [and] [t]o establish procedures for the creation, sale, and operation of condominiums”).

Condominium law in Florida has developed into a sophisticated and orderly real property concept. Yet, the application of condominium law on ownership and enjoyment of real property has not been without its conflicts. There are compromises that must be made for the benefits of the condominium concept. The benefits of community living, which include sharing of maintenance responsibilities, ensuring quality common facilities and amenities, promoting community stability, and providing an organization with central responsibility in managing the operation of the condominium, are offset by the compromise that owners make with the degree of freedom and autonomy they forego to live in such a community.⁵ The condominium association, an entity created by statute⁶ and governed by its board of directors,⁷ is given the difficult task of trying to maintain the delicate balance between preserving the common scheme for the benefit of all unit owners and protecting the rights of each unit owner.⁸ The board of directors is typically composed of unit owners which itself has its advantages and disadvantages.

On the one hand, unit owners appreciate this democratic aspect, whereby a member of their own class can vote to make the choices that presumably the rest of the unit owners desire. On the other hand, unit owners who serve on association boards of directors often lack the expertise which would be desired of a person who represents others and owes them fiduciary duties. This observation, of course, neglects the increasingly prevalent power struggles which arise between unit owners as they attempt to gain control of an association. These conflicts were made evident in the *Ocean Trail* cases,⁹ spanning over eight years of bitter litigation between the Ocean Trail Condominium Unit Owners Association and the unit

5. See *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. 4th Dist. Ct. App. 1975). The court in *Hidden Harbour* stated:

It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Id. at 181-82.

6. See FLA. STAT. § 718.104.

7. See *id.* § 718.111.

8. *Aquarian Found., Inc. v. Sholom House, Inc.*, 448 So. 2d 1166, 1168 (Fla. 3d Dist. Ct. App. 1984); *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 640 (Fla. 4th Dist. Ct. App. 1981).

9. *Ocean Trail Unit Owners Ass'n, Inc. v. Levy*, 489 So. 2d 103 (Fla. 4th Dist. Ct. App. 1986); *Mead v. Ocean Trail Unit Owners Ass'n, Inc.*, 638 So. 2d 963 (Fla. 4th Dist. Ct. App. 1993), *quashed by* 650 So. 2d 4 (Fla. 1994).

owners. In a surprising (to some), albeit logical interpretation of the Florida Condominium Act, the Supreme Court of Florida held that the unit owners who had prevailed in their suit against the association were responsible for the association's attorney's fees in defending the suit because the attorney's fees constituted a common expense.¹⁰ Before all was said and done, more than one million dollars in attorney's fees were incurred between the two sides with many residents spending much of their retirement savings in the process.¹¹

This comment reviews the *Ocean Trail* litigation in the context of Florida condominium law and analyzes the impact of the Supreme Court of Florida's comment-worthy decision. Part II provides a general overview of the relevant portions of the Florida Condominium Act, chapter 718 of the *Florida Statutes*, dealing with association organization and powers. Part III discusses the three appellate opinions issued in the *Ocean Trail* litigation. Part IV analyzes some of the possible implications that the Supreme Court of Florida's decision may have on condominium law and practice. Part V identifies some possible measures that could ameliorate the impact of the decision on unit owners, and Part VI concludes briefly.

II. CONDOMINIUM POWERS UNDER CHAPTER 718 OF THE *FLORIDA STATUTES*

The Condominium Act provides that the governing body of the condominium association may be elected with varying notice and election procedures and requirements.¹² As such, the condominium association is analogous to a quasi-government, applying democratic principles.¹³ Since board members are democratically elected, owners' dissatisfaction may be heard by the results in the next board elections.¹⁴ Another method by which dissident owners may display their disapproval of board action is by bringing a lawsuit against the association.

This latter remedy is derived from section 718.111 of the Condominium Act¹⁵ which provides the association with the authority to sue as well as

10. *Ocean Trail*, 650 So. 2d at 8.

11. See De' Ann Weimer, *Condo War Over Ruling Protects Boards From Challenges*, PALM BEACH POST, Nov. 19, 1994, at 9B.

12. See FLA. STAT. § 718.112.

13. *Id.* §§ 718.111-.112.

14. See FLA. STAT. § 718.112(k) (providing for recall and removal of directors from office with or without cause by the vote or agreement of the majority of all voting interests, and prescribing the procedure to be followed).

15. *Id.* § 718.111.

be sued with respect to the exercise or nonexercise of its powers.¹⁶ This authority necessarily contemplates that judgments may be granted and entered against the association.

A condominium association is treated like other profit or not for profit corporations¹⁷ that own property. If a judgment against the association is not satisfied, then the property of the association would be subject to execution and levy. Therefore, by opting to bring a lawsuit against the association to challenge board action, owners must realize the implication that may arise if a judgment is entered in their favor.

Essentially, owners must be cognizant that they, as individuals, comprise the membership of the association, and thus, any action seeking monetary damages against the association amounts to bringing an action seeking monetary damages against themselves individually. The issue that ensues as a result of the membership of a condominium association winning a monetary judgment against the association is how such a judgment should be satisfied. A condominium association is unlike most other corporations since a condominium association does not operate a business that receives cash flow from sales or services; rather, for the most part, it obtains its

16. *Id.* § 718.111(3). Subsection 3 provides:

The association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available.

FLA. STAT. § 718.111(3).

17. *See id.* § 718.111(2) (providing that “[t]he powers and duties of the association include those set forth in this section and those set forth in the declaration and bylaws and chapters 607 [The Florida Business Corporation Act] and 617, as applicable, if not inconsistent with this chapter”).

revenues exclusively from assessing its members.¹⁸ As such, a judgment entered against the association because of improper board action would either be satisfied from the proceeds payable under an errors and omissions insurance policy (if any), assessments collected from the members, or the property owned by the association would be subject to execution and judgment.¹⁹

III. HOW ONE ASSOCIATION BOUGHT AND PAID FOR A LAWSUIT

The three reported *Ocean Trail* cases demonstrate how the condominium form of ownership contains latent flaws which can manifest themselves in ways that, to some, may seem inequitable to the unit owners. One of its problems can be reduced to the following basic scenario. First, the association's board of directors decides to undertake some action or expenditure. Second, the unit owners challenge the association's authority to undertake such action, and the dispute proceeds to litigation. Third, one side prevails, incurring substantial attorney's fees in so doing.

If the prevailing party is the association, then, assuming the court does not award attorney's fees, a special assessment levied against the unit owners to pay for the association's attorney's fees does not seem so inequitable. In fact, section 718.303 of the *Florida Statutes* currently provides for an award of reasonable attorney's fees to the prevailing party in suits between an owner and an association.²⁰ It is not uncommon for the prevailing party in litigation to seek payment of its fees and costs from the losing party and, most likely, the association will recover its attorney's fees from the unit owners who lost the litigation. However, if the unit owners are the prevailing party and seek payment of their fees through the association, they will likely end up writing themselves a check because the unit owners fund the association. Section 718.303(1) currently provides that a unit owner who prevails in an action against an association is entitled to reimbursement for special assessments levied by the association to pay its litigation expenses.²¹ It is unclear how or whether section 718.303(1)

18. *Id.* § 718.115(2) (stating that “[f]unds for the payment of common expenses shall be collected by assessments against unit owners in the proportions or percentages provided in the declaration”). See also *id.* § 718.103(7) (defining “common expenses” as “all expenses and assessments which are properly incurred by the association for the condominium”).

19. This note will not address the possibility of instituting any malpractice actions or claims against any party who might have given the board of directors incorrect or improper advice which might have led to the judgment granted against the association.

20. FLA. STAT. § 718.303(1).

21. *Id.* § 718.313(1).

would be applied when the unit owners as a class prevail in a suit against their association or when a substantial majority of the unit owners prevail or even when a significant number of unit owners prevail; this issue is discussed in Part IV A of this comment, *infra*. At the time that the *Ocean Trail* litigation commenced, section 718.303(1) did not include its current provision entitling a prevailing unit owner to reimbursement for litigation assessments.

Furthermore, the association has the power to levy and enforce special assessments to pay judgment liens on the association.²² If the litigation expenses are not paid to the association, a claim of lien would probably be the next step for the unpaid parties. Thus, regardless of whether the unit owners win or lose in litigation against their own association, they will end up paying for both sides' attorney's fees.

In *Ocean Trail Unit Owners Ass'n, Inc. v. Levy*,²³ the unauthorized act was a land purchase, and the association's attorney's fees, which the unit owners ended up paying, totaled approximately \$194,000.²⁴ In retrospect, one has to wonder whether the unit owners would have been better off not contesting the board's action. At least then they would have had a real property asset to show for their special assessment payments. The owners must now realize that the price of democracy is high.

A. *Ocean Trail Unit Owners Ass'n, Inc. v. Levy*

On March 7, 1985, at a general meeting, the Ocean Trail Unit Owners Association, the master association for the five building complex known as Ocean Trail Condominium, took control of the association's board of directors from the developer, Campeau Corporation Florida.²⁵ The first owner-board of directors was elected, and within a week the trouble began. On or about March 13, 1985, the newly-elected five-member board entered into a written contract to purchase a parcel of land adjoining the condominium complex.²⁶ The parcel was owned by Campeau and was originally intended to be the site of a sixth condominium building, but Campeau later

22. *See id.* § 718.111(4) (granting associations the power to make and collect assessments and to lease, maintain, repair, and replace the common elements); *id.* § 718.115(2) (granting associations the power to make assessments to pay common expenses). A judgment lien against the association as an entity would be a common expense.

23. 489 So. 2d at 103.

24. *See id.* at 103-04.

25. *Id.* at 103.

26. *Id.* at 103-04.

decided not to build a sixth building.²⁷ The board sought to add the parcel to the condominium complex.²⁸ The association's counsel advised the board of directors that because Ocean Trail Unit Owners Association was a homeowners' association and not a condominium association, it had authority to purchase property without bringing the matter to a vote of the unit owners;²⁹ furthermore, the board of directors was advised that under the association's bylaws and declaration it could levy a special assessment to fund the purchase without unit owner approval.³⁰ Relying on this advice, the association, based solely upon a vote of the board of directors, entered into the \$914,000 contract without taking any formal vote of the unit owners.³¹ The board made a special assessment to fund the purchase, and each of the 602 units in the complex was assessed \$1518.44.³² This transaction was closed within two weeks, on March 25, 1985.³³

Several owners challenged the board's action on grounds that the board had no authority to undertake the purchase without bringing the matter to a vote of the owners.³⁴ The articles of incorporation and the bylaws of the association permitted the purchase of additions to the common elements only in accordance with the declaration of condominium.³⁵ However, the declaration of condominium of each building in the complex was silent on the association's power to purchase real property.³⁶ The owners sued the association and the developer, seeking a declaratory judgment regarding the authority of the association to enter into the agreement to purchase land, and to rescind the agreement.³⁷ The Circuit Court in and for Palm Beach County granted the plaintiff owners partial summary judgment on their claim for a declaratory judgment, holding that the purchase of the adjoining parcel

27. *Id.* at 104. See also Petitioner's Initial Brief at 3, *Ocean Trail Unit Owners Ass'n v. Mead*, 650 So. 2d 4 (Fla. 1994) (No. 91-00350).

28. Petitioner's Initial Brief at 3, *Ocean Trail* (No. 91-00350).

29. This article will not address the question of whether the association should have been governed by the current version of the Condominium Act, chapter 718 of the *Florida Statutes*, which was amended subsequent to the association's 1985 purchase of the subject parcel.

30. Petitioner's Initial Brief at 3, *Ocean Trail* (No. 91-00350).

31. *Ocean Trail*, 489 So. 2d at 104.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Ocean Trail*, 489 So. 2d at 104.

37. *Id.*

“materially altered and modified the appurtenances to the Plaintiffs’ units.”³⁸ Under a 1984 change to section 718.110(4) of the *Florida Statutes*,³⁹ unanimous consent of the owners was required before the association could purchase the property.⁴⁰ The association appealed.

The Fourth District Court of Appeal affirmed per curiam the Palm Beach County Circuit Court’s partial summary judgment for the individual owners. Judge Glickstein concurred specially, explaining the factual background of the case, and the reasons for the court’s holding. Citing section 718.110(4) of the *Florida Statutes*, as well as *Beau Monde, Inc. v. Bramson*,⁴¹ and *Tower House Condominium, Inc. v. Millman*,⁴² Judge Glickstein stated that the association had no authority to enter into the purchase agreement without obtaining the unanimous approval of the owners.⁴³ The court also decided to wait until testimony was presented before ruling on the rescission claim.⁴⁴ Ultimately, the purchase was rescinded by the Palm Beach Circuit Court. Thus, the newly-formed condominium association had committed its first unauthorized act. More challenges by the owners were to follow.

B. *Mead v. Ocean Trail Unit Owners Ass’n, Inc.—The Fourth District Court of Appeal’s Decision*

After the purchase of the adjoining parcel was rescinded, the association recovered \$630,000 of its purchase price from the seller.⁴⁵ Some of

38. *Id.*

39. FLA. STAT. § 718.110(4) (Supp. 1984). Section 718.110(4) provides:

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

Id.

40. *Id.*

41. 446 So. 2d 164 (Fla. 2d Dist. Ct. App.), *review denied*, 453 So. 2d 43 (Fla. 1984).

42. 410 So. 2d 926 (Fla. 3d Dist. Ct. App. 1981).

43. *Ocean Trail*, 489 So. 2d at 104.

44. *Id.*

45. 638 So. 2d at 963. The original contract price was \$914,000; it is not clear whether the association recovered all of its purchase money.

the owners sued to obtain refunds of the \$1518.44 special assessments⁴⁶ which had been made to fund the rescinded purchase.⁴⁷ The association, apparently faced with a loss due to the rescinded purchase litigation, made a claim against the association's errors and omissions insurance carrier.⁴⁸ The claim was eventually settled for \$275,000.⁴⁹

After obtaining the proceeds of the rescission and the insurance claim settlement, the directors first paid their lawyers a fee of \$175,000, as well as some other costs.⁵⁰ The owners who had sued and obtained judgments for a refund of the prior special assessment were paid from the balance left over.⁵¹ The balance was insufficient to make refunds to all of the owners.⁵² Because of this shortfall, the association made a special assessment of \$500 to cover the refunds of the prior special assessment for the rescinded purchase.⁵³ The new special assessment was not well received by the owners, who again brought suit as a class, seeking a declaratory judgment that the \$500 special assessment was unauthorized.⁵⁴ The owners later added a claim for breach of fiduciary duty by the directors in settling with the insurance carrier and also for its disbursement of the insurance proceeds.⁵⁵ The trial court granted judgment for the association, holding that the special assessment, the insurance settlement and the disbursement were proper and authorized by the articles of incorporation and the bylaws under the provisions for common expenses.⁵⁶ The owners appealed.

The Fourth District Court of Appeal reversed, holding that the \$500 assessment was a direct product of the first unauthorized act of the association's directors, and therefore was just as unauthorized as the prior land purchase agreement.⁵⁷ The court stated:

It is immaterial that this second assessment was not used to make the purchase itself, but instead merely to pay costs and expenses directly related to the fact of the purchase. It was a natural and entirely

46. *See Ocean Trail*, 489 So. 2d at 104.

47. *Mead*, 638 So. 2d at 963.

48. *Id.* at 964.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Mead*, 638 So. 2d at 964.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Mead*, 638 So. 2d at 964.

foreseeable consequence of the directors' folly. Directors cannot be at once unauthorized to do some act and at the same time [be] authorized to impose assessments to pay for the consequences of the unauthorized act.⁵⁸

The court also held that the disbursement of the \$275,000 insurance settlement was improper because it reimbursed some, but not all, of the unit owners.⁵⁹ This violated section 718.116(9)(a) of the *Florida Statutes*, which provides that no unit owner may be excused from paying his share of common expenses unless all other unit owners are also proportionately excused.⁶⁰ The court questioned how the settlement could have been approved when it was insufficient to cover the attorney's fees and fully reimburse all unit owners for the prior assessment.⁶¹

The court explained that, were it to hold otherwise, it would, as a court of equity in a declaratory judgment action, be "allow[ing] persons who suffer from some unauthorized act to pay for the privilege of doing so."⁶² Nevertheless, on motion for rehearing, the Fourth District Court of Appeal certified the question to the Supreme Court of Florida.⁶³ The supreme court was not persuaded by the reasoning of the district court of appeal.

58. *Id.* The court cited *Scudder v. Greenbriar C Condominium Ass'n, Inc.*, 566 So. 2d 359 (Fla. 4th Dist. Ct. App. 1990), and *Rothenberg v. Plymouth No. 5 Condominium Ass'n*, 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987), for the proposition that the propriety of an assessment is tied to the purposes for which it is made, and that the purposes must be authorized by some power granted to the association. *Mead*, 638 So. 2d at 964. "To state it as simply and directly as we can, an association's power to impose assessments on unit owners for common expenses is limited to authorized expenses, and does not extend, as is the case here, to unauthorized acts by the directors." *Id.*

59. *Id.* at 964-65.

60. FLA. STAT. § 718.116(9)(a).

61. *Mead*, 638 So. 2d at 965. The court stated that the association could have done three things when faced with the shortfall from the insurance settlement: 1) renegotiate the attorney's fees; 2) reimburse all of the unit owners in full and partially pay the attorney's fees; or 3) pay the attorney's fees in full and reimburse the unit owners partially, but equally. *Id.*

62. *Id.* at 964.

63. *Id.* at 965.

C. *The Supreme Court of Florida's Decision*⁶⁴

On November 10, 1994, the Supreme Court of Florida answered the following question certified by the Fourth District Court of Appeal:

WHETHER A CONDOMINIUM ASSOCIATION CAN ENFORCE A SPECIAL ASSESSMENT IMPOSED TO PAY JUDGMENTS, ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH A LAWSUIT BROUGHT BY UNIT OWNERS AGAINST THE ASSOCIATION IN WHICH THE ASSOCIATION'S PURCHASE OF REAL PROPERTY WAS INVALIDATED AS AN UNAUTHORIZED ACT AND SUBSEQUENTLY RESCINDED.⁶⁵

The court answered the question "yes," quashing the decision of the Fourth District Court of Appeal and remanding with instructions to affirm the final judgment.⁶⁶ The court disagreed with the district court of appeal's holding that the \$500 special assessment to cover the litigation costs incurred in rescinding the unauthorized land purchase and to partially refund the special assessment to purchase the land was not authorized.⁶⁷ Justice Wells stated that the Fourth District "erroneously ignore[d] that the special assessments were collected in order to pay valid judgments against the Association."⁶⁸ Under section 718.115(2) of the *Florida Statutes*, a condominium association is empowered to make special assessments against unit owners to pay for common expenses.⁶⁹ The court reasoned that because condominium associations may sue or be sued with respect to the exercise of their powers,⁷⁰ judgments may be entered against the association subjecting its property to execution and levy.⁷¹ Protection of the condominium's common elements is a valid purpose for making special assessments. Furthermore, section 6.5 of Ocean Trail's declaration of condominium provided that liens upon the common areas shall be paid as

64. *Ocean Trail Unit Owners Ass'n, Inc. v. Mead*, 650 So. 2d 4 (Fla. 1994).

65. *Id.* at 5-6.

66. *Id.* at 6.

67. *Id.*

68. *Id.*

69. FLA. STAT. § 718.115(2). "Common expenses include the expenses of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the documents creating the condominium, or the bylaws." *Id.* § 718.115(1).

70. *Id.* § 718.111(3).

71. *Ocean Trail*, 650 So. 2d at 7.

a common expense.⁷² The court held that the reasons for the judgment against the association were irrelevant; what mattered was the existence of judgment that would imperil association property to the detriment of all unit owners.⁷³ The court noted that "a unit owner's duty to pay assessments is conditional solely on whether the unit owner holds title to a condominium unit and whether the assessment conforms with the declaration of condominium and bylaws of the association, which are authorized by chapter 718, *Florida Statutes*."⁷⁴ Unit owners could not refuse to pay a valid assessment; their remedy for unauthorized actions by the association's directors consisted of voting them out of office or, if justified, bringing an action for breach of fiduciary duty.⁷⁵ The Supreme Court of Florida distinguished *Scudder*⁷⁶ and *Rothenberg*,⁷⁷ on which the Fourth District Court of Appeal based its decision, in that those cases merely determined whether a particular expenditure was proper, and did not involve "*lawful judgments* rendered against the association for unlawful expenditures."⁷⁸ With regard to the questioned insurance settlement, the court held that the settlement and subsequent disbursement did not require court approval, and was within the discretion of the association's directors.⁷⁹

Justice Kogan concurred in part and dissented in part with the opinion.⁸⁰ Although he agreed with the majority's holding with regard to the propriety of the insurance settlement and disbursement, he noted that the effect of the court's ruling was to make unit owners who prevailed as plaintiffs in an action against the association pay their own judgment.⁸¹ He agreed with the Fourth District Court of Appeal's logic that the association's board could not perform an unauthorized act and at the same time be authorized to impose assessments to pay for the consequences of the unauthorized acts.⁸² Justice Kogan referred to a phrase in the definition of "common expenses," which the majority did not mention in its opinion: "[a]s noted by the district court, section 718.103(7), defines 'common expenses' as 'all expenses and assessments which are *properly incurred by*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. 566 So. 2d at 359.

77. 511 So. 2d at 651.

78. *Ocean Trail*, 650 So. 2d at 8.

79. *Id.*

80. *See id.* at 8 (Kogan, J., concurring in part and dissenting in part).

81. *Id.* at 9.

82. *Id.*

the association for the condominium.”⁸³ According to Justice Kogan, the expenses for which the \$500 special assessment was imposed were not common expenses because they were improperly incurred due to the association’s unauthorized act.⁸⁴ He rejected the association’s argument that the board of directors had acted in good faith, even though the board of directors based its action on advice of counsel when it committed the unauthorized act of purchasing the adjoining parcel. Justice Kogan found no such defense available under the Condominium Act.⁸⁵

Justice Kogan referred to the 1991 amendment of section 718.303(1)(e), which although inapplicable to the current case because of its later effective date,⁸⁶ was consistent with his argument that once an association’s act is challenged by a unit owner and is held to be unauthorized, the association has no right to enforce assessments against the successful owner to pay the litigation expenses incurred in defending the unauthorized act.⁸⁷ Section 718.303(1)(e), as amended, provides that a unit owner who prevails in an action against his condominium association has a right to reimbursement for any special assessments imposed by the association to fund the litigation.⁸⁸

83. *Ocean Trail*, 650 So. 2d at 8 (Kogan, J., concurring in part and dissenting in part).

84. *Id.*

85. *Id.*

86. Section 718.303(1) was amended by the Laws of Florida 1991, ch. 91-103, § 14, which became effective on April 14, 1992. *See* ch. 91-103, § 14, 1991 Fla. Laws 722, 743.

87. *Ocean Trail*, 650 So. 2d at 9 (Kogan, J., concurring in part and dissenting in part).

88. The current section 718.303(1) provides, in relevant part:

(1) Each unit owner, each tenant and other invitee, and each association shall be governed by, and shall comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws and provisions thereof shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against:

- (a) The association.
- (b) A unit owner.

....

(d) Any director who willfully and knowingly fails to comply with these provisions.

....

The prevailing party in any such action . . . is entitled to recover reasonable attorneys fees. A unit owner prevailing in an action between the association and the unit owner under this section, in addition to recovering his reasonable attorney’s fees, may recover additional amounts as determined by the court to be necessary to reimburse the unit owner for his share of assessments

Justice Kogan interpreted the 1991 changes to section 718.303(1)(e) to mean that an association's assessments due to litigation over its actions would be properly incurred common expenses unless and until such time as the litigation results in a finding that the association's acts were unauthorized.⁸⁹ The majority's decision seems to contradict Justice Kogan's interpretation of the rights afforded to unit owners under section 718.303(1)(e). The majority opinion did not mention this section, and it is possible that the court's holding that unit owners must pay assessments to fund the association's litigation expenses could be limited in application to cases prior to the effective date of section 718.303(1)(e). This is probably not the correct view, however. Although the amended statute entitles a prevailing unit owner to a refund of an assessment to fund the association's litigation expenses, it does not preclude the unit owner's from being required to pay, in some form other than an assessment, for the association's expenses. As discussed further below, the association's litigation expenses are still common expenses, and the unit owners could be forced to either pay or lose their interest in the common elements through foreclosure.

IV. IMPLICATIONS

A. *If the Unit Owners Sue Their Association as a Class and Prevail, No One Will Be Left to Pay the Association's Legal Fees*

As mentioned in Part III of this comment, it is unclear how section 718.303(1) of the *Florida Statutes* would be applied in a situation where the unit owners as a class sue their association and prevail or when a significant number of unit owners sue and prevail. The statute's wording only refers to "[a] unit owner" as the party entitled to reimbursement for any special assessments levied by the association to fund its expenses of litigation.⁹⁰ If the entire class of unit owners was entitled to reimbursement for litigation expense assessments levied by their association, how would the association fund the reimbursement? If section 718.303(1) is applied literally, then there will be no one left to pay a special assessment for litigation expenses when the unit owners sue as a class instead of individually. Similarly, if a

levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law.

FLA. STAT. § 718.303(1) (1993).

89. *See id.*

90. *See id.*

large group of unit owners sues and prevails, should the few unit owners who were not plaintiffs bear the burden of paying all the litigation expenses? In such situations, the conflict between section 718.303(1) and section 718.116(9)(a) becomes apparent. Section 718.116(9)(a) provides that no unit owner may be excused from paying his share of common expenses unless all other unit owners are also proportionately excused.⁹¹ It does not seem as though the two statutes can be reconciled. The logical, orderly system of condominium law breaks down at this point. The association is a corporate entity which is supposed to represent its constituent unit owners. When the unit owners as a class sue the entity that is supposed to be their representative, they are suing themselves. If the unit owners are exempt from paying the association's attorney's fees, the unpaid attorneys will have no alternative but to assert their claim by enforcing a lien against the association property, which would probably result in foreclosure of the property. If the association does not own any real property, the judgment could be levied and enforced against the association's bank account. Because the unit owners have a collective interest in the association property or the association's bank account, they will still end up paying for expenses incurred by the association. Thus, although section 718.303(1), if applied literally, would prevent the owners from paying in the form of a special assessment, it will not prevent the unit owners from paying in a different and less acceptable manner.

B. Unit Owners Will Seek to Impose Personal Liability on Directors to a Greater Degree Than Before

The Supreme Court of Florida's decision in *Ocean Trail* could be interpreted as a move to provide more protection for individual directors on the decisions they make, thereby removing one of the major disincentives to serving on condominium association boards. The association's power to make assessments to pay for the costs incurred in defending their actions, whether proper or not, allows directors to cover whatever losses are not paid by their insurers. However, unit owners, now realizing that they will ultimately have to pay for their victory if it is against the association, might begin to sue directors individually rather than as their representatives. Obviously, an action against a director may not be possible if the circumstances do not give rise to a claim for breach of fiduciary duty. Nevertheless, if that is the only way that unit owners can seek relief against what they perceive as wrongful acts by their association's board, suits seeking

91. *Id.* § 718.116(9)(a).

personal liability against directors can be anticipated. Most associations' articles of incorporation indemnify the officers and directors for their actions taken on behalf of the association unless such action was the result of gross negligence or willful misconduct. Assuming the same facts as in *Ocean Trail*, where the directors act on the advice of counsel, it is likely that the association would be obligated to indemnify the directors for their wrongful acts. Hence, the result is the same: the unit owners end up paying themselves.

V. POSSIBLE MODIFICATIONS TO MINIMIZE *OCEAN TRAIL'S* IMPACT ON UNIT OWNERS

A. *Increased Use of Arbitration as an Alternative to Suits Between Unit Owners and Their Associations*

Arbitration and other forms of alternate dispute resolution are becoming increasingly in vogue. Applied to disputes between unit owners and condominium associations, arbitration is a potential alternative which, while not eliminating the problem, would reduce the severity of potential assessments to cover litigation expenses. Disputes between the unit owners and their association should be submitted to binding arbitration using a procedure which is already in place for the recall of association board members⁹² as well as for "internal disputes arising from the operation of the condominium among developers, unit owners, associations, and their agents and assigns."⁹³ Although the voluntary arbitration provision was already in place when the *Ocean Trail* litigation began, the parties did not make use of it. Had they done so, they perhaps could have avoided at least a good part of the total litigation expenses. Chapter 718 currently requires arbitration before a suit can be filed, such that the *Ocean Trail* dispute would, under current law, probably be subject to arbitration.

B. *Establish Mandatory Minimum Required Levels of Errors and Omissions Insurance*

As noted in *Mead*, the association's errors and omissions insurance was insufficient to cover the litigation costs incurred by the association.⁹⁴ Although the shortfall was arguably attributable to the association's decision

92. See FLA. STAT. §§ 718.112(k)(3), 718.1255 (1993).

93. *Id.* § 718.112(1).

94. *Mead*, 638 So. 2d at 964.

to settle for less than the full amount of its expenses, it is possible that the association would have incurred additional attorney's fees if forced to litigate its claim for coverage against the insurer. If a mandatory minimum level of errors and omissions insurance was required, such problems could be reduced if not avoided. This modification in condominium law should be implemented with the insurers providing for the defense of the association. Although requiring an increased amount of coverage would result in higher insurance premiums, which would be a common expense to be paid by the unit owners, the benefits of increased protection in a worst case scenario would more than offset this higher cost. It would also demonstrate fiduciary prudence on the part of the board of directors.

VI. CONCLUSION

The condominium form of real property ownership is intended to operate as a democracy. The association is the government. The board of directors is democratically elected by the owner constituency and is supposed to represent the owners' interests. Ideally, the system should provide for sharing of many amenities in the form of common elements which the unit owners might not be able to afford individually in exchange for the sharing of common expenses. In reality, however, the microcosm of condominium government mirrors the operation of larger-scale democracies: there are power struggles, and the governmental representatives are challenged when they lose touch with their constituency, exceed their authority, and abuse their "taxing and spending powers." The unit owners at the Ocean Trail Condominium learned all too well that the price of democracy is high when they challenged the unauthorized action of their representative association and its board of directors. The Supreme Court of Florida's decision in *Ocean Trail* may to some seem unfair toward unit owners. Nonetheless, the court's holding comports with the logic and letter of Florida's Condominium Act, although it raises a potential conflict with section 718.303(1). The severity of the unit owners' potential exposure can be reduced by taking various measures, but the fact of their ultimate common liability must be recognized as a basic concept underlying condominium law.