CONDOMINIUMS AND THE OLDER PURCHASER

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

PART 2—WEST PALM BEACH, FLA.

NOVEMBER 29, 1978

Printed for the use of the Special Committee on Aging

U.S. GOVERNMENT PRINTING OFFICE

40-759 WASHINGTON : 1979

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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WEDNESDAY, NOVEMBER 29, 1978

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
West Palm Beach, Fla.

The committee met, pursuant to notice, at 9:15 a.m., in room 417, Federal Building and court house, West Palm Beach, Fla., Hon. Lawton Chiles presiding.

Present: Senator Chiles.

Also present: William E. Oriol, staff director; Letitia Chambers, minority staff director; Philip S. Corwin, professional staff member; Richard Farrell, legislative assistant to Senator Chiles; Marjorie J. Finney, operations assistant; and Kaye English, information assistant.

OPENING STATEMENT BY SENATOR LAWTON CHILES, PRESIDING

Senator CHILES. Good morning. We will convene our hearing.

My opening remarks will be brief because I don't wish to take time from our witnesses to repeat points that were made yesterday in our hearing in Hallandale, but I will tell you of my continuing determination to seek action for the bill introduced last year as the Condominium Act of 1978. Yesterday's testimony added new substance to the argument for reintroduction and improvement of that bill and I pledge to you to work with others including Senator Stone and Congressman Mica towards those ends.

We will hear more about the legislation today and we will also hear about the growing need for services to maintain independent living for the oldest members of our aging population. Yesterday I was deeply impressed by the almost unanimous support for in-home services for those who may have one or more disabilities but who do not require institutional care. There was given a report on neighborly cooperation in condominiums—people helping each other—with modest or essential support by the area agency on aging. I want to hear more about this and other things that are happening as the condominium way of life continues to take hold in Florida and in other States of the Nation.

Today, we are going to hear from several panels of witnesses and, after we have concluded those panels of scheduled witnesses, then we will have a town hall meeting portion in which I hope to hear from a number of you who have come to give information today.

Our first panel will be a panel of condominium consumers. Bernard Kantor and Kelly Mann, president of Village Mutual Service. Nan Hutchinson is going to be here. She probably got caught in the traffic a little bit today. She is the executive director of the area agency on aging in Broward County. Nan will be here, but I think we will start off hearing from you, Mr. Kantor.

STATEMENT OF BERNARD KANTOR, VILLAGE MUTUAL SERVICE, CENTURY VILLAGE, WEST PALM BEACH, FLA.

Mr. KANTOR. I actually don't have an opening statement, Senator. I indicated at the outset that Mr. Mann and I are going to deliver a joint report, an outline of which has been submitted to Mr. Corwin, and we will proceed on that basis.

Senator CHILES. That will be fine.

Mr. KANTOR. Our initial item has to do with the formation of the Village Mutual Association and I am going to ask Mr. Mann to cover that part of it.

STATEMENT OF KELLY MANN, PRESIDENT, VILLAGE MUTUAL SERVICE, CENTURY VILLAGE, WEST PALM BEACH, FLA.

Mr. MANN. Senator, like any other organization, when a group of people get together they seek out one another to form some kind of an organization to be helpful to the community, whether it be large or small. This, too, happened with the Village Mutual Association. It was formed in 1969 because at that point and from there on problems with the developer happened on an almost daily occurrence, as I am sure you are well aware. However, the purpose of the organization was solely for the good and welfare of the people of Century Village and out of this committee evolved the desire and the need to help the elderly people who were coming into Century Village and buying condominiums.

Senator, one thing that I personally have learned coming into a senior citizen community is that the senior citizen loses a lot of his viability, his strength, because of his age and therefore needs help and support from those who can do that. In other words, people along in years but who still have the strength and fiber to fight or take action for whatever is involved at that time—it was that Village Mutual has taken up the cudgels for the senior citizens of Mutual Village. I am sure you are aware of the many problems we have with the developers and there is litigation going on but the Village Mutual continued in doing whatever it could for the welfare of the people.

Among its needs after the first year—in other words, in 1970, when the warranties ran out—it supplied an organization of contracts for maintenance of appliances. This worked out very well for the people who live in Century Village, and along with that were the problems as they continued in the litigation because of the fact that our appearance in the courts was not at all helpful. We were not getting, we felt, proper justice in the courts. It was our opinion, and I happen to be one of the founders along with Pat Cahill, that the only way we could possibly accomplish something was through the medium of politics. So we formed the nonpartisan Political Action Committee of the Palm Beaches. That was in the year 1973, and there were only two of us nonpartisan at that time, Pat and myself. But I am happy to relate that today we have with us 24 other condominium complexes and an understanding with Dade, Broward, and Pinelas Counties as to the problems of the condominium owners—not only condominium owners but particularly condominiums and consumerism.

Knowledge Deficient Among Legislators

When we got involved in the political field in the year 1973, we asked the legislators to appear before us and tell us why they wanted the job that they were running for and whatever we could learn from them. We were horrified and we were struck by the lack of knowledge of condominium law on the part of the legislators. It was practically nil; those of us who were involved in this litigation, and therefore made a study of the contracts and the law, discovered very quickly that the legislature had passed condominium laws without knowing what in the devil they passed—without having any knowledge of what they passed. Because of that the condominium owners who today are in a true serfdom—it is something very difficult to get out of because of the word "retroactive." It placed them in such a position that many of them—and these are the words of our developer—faced a strong possibility of losing their apartments, their condominiums, because of the escalation and increased costs, and that is true.

Subsequently, through our committee and the help of other areas, a new legislature in Palm Beach County was established who spoke for the voice of the people. We are happy with the legislators as they are today, except for the part that the law says the contract is a contract is a contract, and it can't be changed insofar as retroactivity. However, I note daily the Supreme Court relies on that fact and makes its changes. Only the other day, in the FTC dealing with the used car dealerships, they requested them to make a radical change, and it is a radical change that is required for the elderly in the community because they are being ripped off horribly.

I think the greatest crime perpetrated against the condominium owners took place in 1960 when the developer, with the assistance of his attorneys, came to the legislature and promulgated laws beneficial only to him. They were not beneficial at all to the condominium owner; they were not even fair. If they were at least fair, the condominium owner would be happy and have stayed with it. But they are so unfair, and that, in my opinion, verges on criminality and conspiracy because of the many things that transpired from then on.

I also have to bring into this, Senator, the local and State bar associations for keeping quiet when the legislature was passing these laws that crucified the people. They certainly, as minions of the law, should have stood up and said something. They should have declared themselves that the law was totally unfair. Later on there were attorneys who were doing just that but the law was already on the books and there was nothing that people could do at that time.

I also have to include the courts because the courts were not listening to the people. I am not an attorney nor did I ever study law, but I have been informed by Florida lawyers and many of our retirees who were lawyers that some of the actions of the courts were unheard of.

Computer Delay Causes Citation

I would like to state one item which emotionally upsets me as to why this ever happened. There was a problem in the courts and our attorneys requested that the moneys be held in escrow. That is one of the

few things that the courts agreed on to make our side look good, so we contracted at the time with a new maintenance company. Because we were a large account, they went into a computer system and, for whatever the reason, the computer was a day late in making its payment. For this we were held in contempt of court with the understanding the amount that was required at that time was $100,000 and with the understanding that within 5 days that $100,000 had to be forthwith and paid or the 165 residents who were involved in that $100,000 would be put in jail, and of course that would come to a fine of $165,000 a day.

Now I must remind you, Senator, that I know you are aware that the senior citizen is vacationing—he is running somewhere—so it was at that time that a good many of those people were all over the world and also on vacation, so it was impossible to make contact within 5 days. But this is the way the court saw it at the bequest of the developer, that we pay out that $100,000 in 5 days or pay $1,000 a day fine, or $165,000. I have yet to find an attorney, be he in Florida retired or what, who could understand such a deal from the court, but then again this was the way it went in those years.

At the same time that the court was threatening to put these people in jail, hardened criminals were walking the streets free. They were not troubled by the threat of jail which did trouble the senior citizen. Were it not for the fine, he might have sat in jail, but he did not have the $165,000 a day.

What I am trying to point out is the other impossibility that the senior citizens—the condominium owners—face early on. True, in 1975 through ours and others efforts, many of the laws have been changed.

Senator CHILES. Has that situation improved now?

Mr. MANN. For us it has not improved at all, because of the word "retroactive."

Senator CHILES. All right. Then would you mind getting to that word—that is what we are going to try to deal with in this legislation, hopefully.

Mr. MANN. Hopefully, yes, because I think the Congress needs to do something, otherwise it is going to be terrible for the aged; they cannot stand this constant increase in the cost of living. Many of them are on welfare; many of them are on stamps—even to the point one day on TV where the developer himself made a note that the time will come very shortly when he will own all those condominiums.

Now I cannot for the life of me see how the Congress can let a thing like that happen. Yes; there is a bill that is coming up in this session before Congress this year under the new session, and it deals very well with the problems of the condominium owner. I have only one suggestion to make on that bill where it deals with net lease and gross lease.

We find that with the law as it is and our developer as he is, that he will tear that point down. It will not help us at all unless that bill reads "all leases," so there should be no doubt as to what the Congress means when they say "all leases." This is what is required in that bill; other than that I think the bill can stand up. We find in our minds that there is really no difference because we pay the developer for the

rec lease as opposed to some areas where the people pay directly to the expenses of the rec lease.

Senator CHILES. But there is a difference, is there not, in the net lease, where the developer has just an unconscionable windfall in which he has no obligation to pay the taxes or the maintenance or the replacement costs, as opposed to a lease in which the developer has an obligation, just to take a selected instance, to replace or pay taxes and to pay maintenance? That is a different situation. I doubt very seriously if we are going to get the courts to void those kinds of leases.

Mr. MANN. I believe it is a matter of semantics because indirectly, in the final analysis, you are doing the same thing. Whether as a gross or a net, you are paying for it either way.

"NET VERSUS GROSS LEASES"

Mr. KANTOR. Senator, I just would like to comment briefly on that issue—the net versus the gross leases. First of all, here in the Florida Legislature that distinction has not been made in some recent statutes that came down. But very fortunately, our Palm Beach County delegation was sufficiently alert to warn us of what was going on. Consequently, we made a maximum effort to have that changed, and it was changed so that the statute read "leases" rather than "net,"—net or gross leases.

Your distinction between the net and the gross leases is slightly inapplicable to our situation here, especially in Century Village. What we have attached to our gross leases are many, many unconscionable paragraphs or parts of a lease. Of course the escalation clause itself, as you know, is tied to the Consumer Price Index increase for major cities, which means that it is considerable from year to year. It does not go back to the base year 1969 when the original recreational lease rent was established at Century Village; rather, it is added on year after year after year. In fact, what actually occurs is a geometric rather than an arithmetic increase which we sustain each and every year. Consequently, it is entirely feasible that in the near future we will literally be priced out of our condominiums through the recreation rent increase itself.

It is equally certain that very shortly, should this prevail, that the recreation lease increases will equal and exceed what we now make as our mortgage payments, including taxes. So the gross lease situation especially as it applies to Century Village, must be addressed by the Federal Government in the Condominium Act of 1978, and we hope that it will come out of committee with those corrections that will prevent it from being amended to death on the floors of Congress.

We don't have much hope that it is going to be passed in this session or in the next session. We realize full well that it is almost a political maneuver, that it is expeditious at this time to present such an act. I don't say that it was presented facetiously or whimsically. I do say it was promulgated with the full knowledge that it would have no way of passing for a variety of reasons, but we won't go into that.

Kelly, do you have anything more to say on that, or shall I go into the problem?

Mr. MANN. Yes. I just want to point out one area. We chose one. In complete fairness, there are too many and it would take up too much

time. Under the heading of "indemnification clause," our contract reads that in the event of litigation—win, lose, or draw—you pay the developer's legal fees and all the costs involved. Now if anyone can tell you that that is a fair ruling—this is truly unconscionable along with many other unconscionable events that have taken place and have pushed the condominium owner into the ground.

Do you want to take it, Bernie?

Mr. KANTOR. As long as Kelly mentioned some of the problems we are having with the developer, I would like to continue from the indemnification clause. Of course I would suggest to this particular hearing that the hearings conducted by the Federal Trade Commission in 1975 be made a part of this record. Much of what we are going to say here today, and a great deal more, was taken as depositions and statements at the FTC hearings in 1975.

FULL DISCLOSURE NOT MADE

Another problem, though, that we have with the developer, getting back to the problems, is that we received no full disclosure at purchase. I don't know how that has been rectified since the early days of the condominium boom here in Florida, but suddenly the people of Century Village, several years after having purchased, were confronted with an item called community services which we suddenly found we had to pay for as a separate entity. It was not placed under the long-term recreation lease; a new position was created for it under an item called a management maintenance contract.

Now, in this contract we were called upon to pay additional sums of money—additional sums over and above the already escalated recreation lease rental—for such items as buses and trams, security, main road maintenance and repair, lighting of main roads and entranceways to Century Village, when actually at the time of purchase, at the time agreements were signed for these condominium units, we were assured that we would be subjected only to a lump sum monthly payment and this monthly payment would cover all of the items that I have since mentioned. In fact, the selling point was:

> You don't need a car in Century Village—buses and trams are free. Consequently, you can save a great deal of money, not only by insurance rate reductions, the purchase of the car itself, but also in car maintenance and repairs, gasoline, et cetera.

Also, so many of the elderly people resettling in Century Village were no longer able to drive; they needed a means of transportation and the buses and trams afforded them that means. Consequently, it was a tremendous selling point in getting people relocating down in south Florida to purchase in Century Village. However, we found later, as I stated at the outset of this session, that we have paid, and paid dearly, for that. In fact, part of the ruling that the court made was that we would be subjected to $1,000 a day fine and possible jail sentences.

Of course it would have been much better at that time to have said: "Put us in jail; let's see what happens." I don't think they could possibly have done it, but you are dealing with elderly people and the elderly person says: "How much longer can I live?" You have to keep

in mind that each day elderly people grow older and older; it does not follow the same pattern as with younger people.

Senator CHILES. Now that we have Nan Hutchinson with us, we will get back into our panel discussion. I want to get all of these points that you have. I would like to get some interaction here if we can, because I think that will prove most productive.

Mr. KANTOR. All right.

Senator CHILES. Nan, we are delighted to have you here. We know of the work you have done over the years for the elderly. Do you want to introduce your group?

Stay right on your outline where you are, Mr. Kantor, because we want to get all these points.

STATEMENT OF NAN HUTCHINSON, EXECUTIVE DIRECTOR, AREA AGENCY ON AGING, BROWARD COUNTY, FLA.

Mrs. HUTCHINSON. We apologize. We were sort of delayed in some traffic with not very clear directions—not from your people.

I would like to introduce these people whom I have brought today from Broward County. The one lady that you see on your list, Hilda Bergenfeld—her husband died in the last couple of weeks and therefore she is not here, but Len Weisenger will be delivering her remarks. Gladys Borenstein, Al Garber, and Lucille Stang.

Mrs. Borenstein will talk about the growing need of public services in condominium residences, and Mrs. Stang will talk about the loss of transportation services at one particular condominium. All of these are similar problems with Broward County and particularly to the condominium, Senator.

Senator CHILES. Why don't we just get on to transportation now? That is an area that you were just covering, Bernie, and what you found as I understand is what appears to be the sales pitch that "Don't worry, we are providing transportation." There was transportation out there at the time, was there not?

Mr. KANTOR. Yes; there was.

Senator CHILES. But then you found out that it was not being provided by the developer, that it was something you all had to pay for in addition to that.

RETROACTIVE INCREASE CITED

Mr. KANTOR. It was much more reprehensible than that, Senator. Not only did we find out later that we had to pay for it but our developer had told us that he had been magnanimous in having subsidized us for previous years but, since situations arose, what he would do for us is not only add on the increase for the upcoming year, but he made us pay retroactively each and every increase from the day the papers were signed. So we found that instead of getting an increase of 1 year's rate for buses and trains, transportation, security, road maintenance, lighting, insurance, et cetera, it was compounded in that we received an increase reflecting 4 years and, in some cases, 5, 6, or 7 years' increase at one time. That was in addition to the escalated portion of the recreation lease rentals. So you see it compounded, it built up.

Senator CHILES. Can you tell me what that would break down for an apartment? In other words, what has the increase been, what that means to the owner of an apartment or a condominium?

Mr. KANTOR. Very well. Very fortunately, Judge Poulton determined until the case was adjudicated—and we have litigation on this point in court right now—until this point was adjudicated that the Village Management, Inc., a fully owned subsidiary of Century Village, Inc., would perform these services at cost. Currently it is costing each unit owner between $7 and $8 and change per month. At the time, however, he wanted an advance of approximately $20 per month per unit. That was for the transportation end of it.

Each year we fight him on what he terms his "operational deficiencies" in providing bus and tram services to us. Consequently, we pay so-called one-shot sums of from $5 to $8 each per year to cover operating losses as presented to the court by management. Naturally, the same kind of increase prevailed for the escalated portion of the recreation lease rent. On the one hand he told us that we were being subsidized and on the other hand, the moment he sold the last condominium unit at Century Village he made it retroactive to 1969. So some persons paid the escalated portion alone in amounts, ranging from $8 and change.

Senator CHILES. This is a month?

Mr. KANTOR. This is per month. Eight dollars and change for relative newcomers to over $22 for those who had been here since 1969.

Senator CHILES. So it went up from $8 to $22.

Mr. KANTOR. That was the range of increases but it went up basically from the base rent, in my case, which was $34.50 per month. It went up to over $50 per month, and currently, including the tram and bus transportation, instead of $34.50 per month, I pay almost $60 per month. That is quite an increase.

Senator CHILES. That is double.

Mr. KANTOR. Almost. That is quite an increase.

Senator CHILES. Now this is covering your rec lease; it is covering your transportation. Is that all of the maintenance?

Mr. KANTOR. No.

Senator CHILES. What other maintenance?

Mr. KANTOR. In addition, we pay from between $26 and $29 for land maintenanace—for maintenance of the common elements.

Senator CHILES. The grounds?

Mr. KANTOR. The grounds, the outside of the buildings; yes.

Senator CHILES. So your total fees are roughly $100 a month, aren't they?

Mr. KANTOR. It varies; yes. It varies from about $78 to $92. That is quite accurate; yes. Roughly that is how it works out.

Senator CHILES. What is your transportation problem that you can relate to us?

STATEMENT OF LUCILLE STANG, BROWARD COUNTY, FLA.

Mrs. STANG. Let me say I came down here as a private citizen with my husband 4 years ago and, because he had a history of a heart condition, we were sold with Hawaiian Gardens because they provided a

courtesy service. There were two buses running several times a day which were going to shopping centers and banks occasionally.

Senator CHILES. So that was your reason for purchasing?

Mrs. STANG. Primarily it was. The brochure itself had a picture of the courtesy bus and all the details that went with it. The courtesy bus was used in the newspaper ads as a selling point, but then after he sold the last apartment, we found that he was removing the two buses completely with no offer of any kind of financial remuneration or otherwise. We went into our individual contracts and those of us who had used lawyers to look into the private contracts found that there was no provision for the courtesy bus at all. It was just used as a come-on in the advertising.

We then found it necessary—I certainly did—to go into public transportation and there, too, we find a very limited schedule—almost nothing on Sunday, no evenings. I found I could not go to school in the evening; I had plenty to do. The community has been growing as has all of Broward County. The situation, as it stands now, means that many times we stand in the buses with very heavy shopping bags. I have seen many elderly people falling in the bus when there is a turn or a short stop.

ADEQUATE TRANSPORTATION LACKING

Also, as recently as last week when I had occasion to go to the Morning Hill Shopping Center, after 2½ hours I finally got my bus because the previous ones had broken down. We had no notice at all of the breakdown; we had no way of knowing. They sent no substitutes. I have checked with transportation. The barn is somewhere up in Hollywood. They never sent out a substitute bus or a substitute driver. This is what we are running into now in terms of public transportation.

The Sunday schedule is very limited. There is one in the morning and one in the evening. There was absolutely no transportation in Broward County at all on Thursday because it was a holiday. At that point I found it necessary to go into the needs beyond my own area and I went into the community needs. I have been doing some volunteer work in the community, particularly with the Jewish Federation of Fort Lauderdale. Sitting there one day, I would say that 80 percent of the calls that came in were for transportation to doctors and pharmacies. None of the large chain pharmacies have any delivery services of any kind.

Finally, we have a nutrition situation similar to the one in Margate. We have no way of getting these people down to the nutrition center. We have a great deal of programing, which is available, a library, an educational program, a recreational program, and a social listing program. We have no way at all of getting these people to the areas.

I went a little bit beyond that to find out what Broward County Transportation was doing, and their claim was that they have less buses than they need because there are no Federal funds to allocate. They required a minimum of 2 weeks' notice to transport anybody and certainly that is not practical or reasonable because we get many calls which are almost emergency calls.

There is no service for inner county delivery. I myself use a doctor in Dade County and have to hire a private car to get me to my own physician because whatever services are available are not available beyond Broward County. I talked to somebody in my area who is in charge of the human services for the aged, and there, too, was very limited transportation and she couldn't promise anything at all.

Lack of Insurance Curtails Services

My impression was that Broward County would handle this kind of thing as a county situation. What I found by spending time in the federation office was that the county transportation service is referring people to the federation office because they cannot fill the need. Federation, on the other hand, has no such service available and one of the reasons they don't have it—I have tried very hard to involve volunteers in my own community and others who could take people to doctors and hospitals and so on, but they refuse to do so because they do not have insurance coverage, which the federation cannot afford.

I inquired about the services the United Way has. They have minibuses doing this. They also require 2 weeks' notice. Now United Way covers $1 million in insurance for drivers and for people that they transport. Federation has no such facilities so there, again, we are left without any point of transportation service. I can just sum it up very briefly by saying, as I see it, our sunshine State will be a sunset State unless we take care of these people in some way.

Thank you very much.

Senator Chiles. Thank you.

So the brochure itself has a picture of the bus.

Mrs. Stang. Yes, with a little explanation.

Incidentally, after he removed the transportation service we went to court and got no place at all.

Senator Chiles. Mr. Mann, maybe we will stay in the condominium area right now and get into some of the services.

Has Century Village made any attempt to establish its own transit service or to have West Palm Beach provide better service?

Mr. Mann. As far as West Palm Beach, yes. The management has arranged, through contract with the county bus service, to give bus service to Century Village itself. The trams are something that management is responsible for.

Mr. Kantor. I might add, however, that we paid for that contract with the county of Palm Beach. The transportation is not given to us at no cost. Now I want to point out a discrepancy in this kind of service, Senator. Although we pay as part of our community services costs for this transportation—buses—each and every senior citizen in Palm Beach County merely has to apply, receive an ID card, and receive the benefits of lowered transportation costs, and this is a service provided by the county. So we are paying twice for it. Tax dollars are used to finance this very wonderful reduced-cost transportation system for elderly persons. But at the same time we are paying for that through our community services fees to management so we are paying twice for the same transportation which I think is an inequity that has to be addressed.

Senator CHILES. I think you are going to tell us something on recreational leases from your standpoint, Mr. Garber.

STATEMENT OF AL GARBER, FORT LAUDERDALE, FLA.

Mr. GARBER. Yes. I reside in Lauderdale Oaks, a condominium development in Fort Lauderdale. I have resided there for about 3 years. When I purchased, it was subject to the existing lease and I was not the original purchaser of the building. I bought from a person. Having been an attorney in New York and retired, and I did a lot of this kind of work, I was knowledgeable on the subject and I realized we had to be subject to that or we just don't buy a unit in our development.

What I am concerned about now is our inability to compel the owner of our leasehold to negotiate with us, and on an arm's-length basis. In our situation, the builder had disposed of his lease to an investor and the investor, I understand, purchased it on the basis of a capitalized amount 10 times the annual of the yield. Three years ago when I purchased, the unit owners paid about $218,000 a year rent for this rec lease. Since then the retro payments by virtue of the acceleration clauses in our leases—mine has not reached that point yet—as each building is complete—there are 19 buildings—it has gone up to about $242,000 if you capitalize that at 10 times. The owner of that leasehold says, "I want $2,420,000 and don't bother me; don't attempt to talk with me unless you are prepared to pay that," so it is a take-it-or-leave-it proposition.

Senator CHILES. This is trying to buy out the rec leases.

Mr. GARBER. Yes. In fact, we are having a meeting tonight seeking to get the vote of the people, whether we should negotiate with him further—negotiate with him on the basis of paying him his price or just live with this kind of lease, where in the year 2030, I think, where we are now paying on the basis of about $30 a month, it will be up to about $300 a month.

Senator CHILES. Do you know what the original cost of the recreational facilities was?

ESCALATED BUILDING COSTS

Mr. GARBER. No; I don't have that, sir. Based on my experience, having been involved in the building operation for some of the big buildings around the country at that time, I think it could have been built for about $15 a square foot. I used to represent people from Palm Beach who have since passed away, people of that character, and the big people in New York. I said many times, I could have built that building there for maybe $1,400,000, and now they are asking for $2,400,000 because they bought it on a yield. There is a difference between a yield and a value of real estate per se—I don't have to explain that unless you want me to, what yield is. I think you have a good background on that subject.

Some of our people say we should not offer more than seven times, eight times, or nine times the annual rent. You cannot explain that the man who now owns it, a big corporation—I think it is the Broklin family—I think they control Seagrams Liquor in Canada. They say

they want to capitalize the sales price—capitalize it 10 times our income. In January, two of the buildings are going to be hiked again. This keeps repeating itself every 5 years until there will just be no limit to it. We cannot negotiate.

I am wondering whether there could not be some legislation enacted requiring arm's-length negotiation with these kinds of owners who are required to sit down with you and negotiate on the basis that is fair and equitable. They certainly should not be able to capitalize and expect us now to pay $2,400,000 in the 3 years that I have been there. It just seems unreasonable, it is unconscionable to be in that bind. We have no way of getting out of the bind.

If this man's leasehold is protected under our Constitution, we cannot knock it out of the books because he has tried to do it a few times and is getting no place. The owner of that leasehold is protected under his constitutional rights, and you cannot advocate a contract in good faith. Unfortunately, our situation is, when the people consult with me about this situation about whether we have some cause of action, I explain to them the purchaser of that leasehold must be furnishing to him a so-called estoppel certificate. It turns out that it was not required, but when the people who built it took it upon themselves to sell off or turn over the operation to the unit owners who had purchased it, they were smart enough to obtain, not only a general release in which the unit owners agreed that they would not have any basis to go after these people, but they also included interpolated clauses stating the validity of this lease—clauses that normally are included in an estoppel certificate.

I don't purport to give advice, but they have to consult somebody who is knowledgeable, and they consulted with our friend Rod Tennyson. He said they had no basis for even contesting the validity of this lease any longer. They signed away whatever rights they might have had to go in there and contest it. We cannot negotiate on an arm's-length basis. I think some legislation is possible, and I think under the Constitution it is possible, to sit down with you and negotiate with you.

That's it.

Mr. MANN. Senator?

Senator CHILES. Yes.

UNCONSCIONABLE PROFITS EVIDENT

Mr. MANN. I would like to add a point to what Mr. Garber has been saying about unconscionability in relation to Century Village where the recreation lease cost the developer $750,000 to build. He now asks the price of $31,500,000. That is a bit unconscionable. I might add that where the cost of this recreation lease per year is approximately $1 million, his gross is over $4 million—representing better than $3 million a year net profit—truly unconscionable in any business in any shape, form, or manner.

Senator CHILES. Section 210 of the bill that we are talking about, I think, would give you some relief.

This section would allow the unit owners, by two-thirds vote, to seek a judicial determination that any lease or portions of leases are unconscionable

if the lease was made in connection with the condominium project, was made while the developer was in control of the association, and had to be accepted or ratified by the purchaser or the association as a condition of purchase.

I think you will find those conditions generally true in all of these leases that we are talking about.

If the lease is for 21 years or contains provisions for automatic renewal for a period of more than 21 years, either contains an automatic rent increase clause or subjects the unit to foreclosure for failure to make payments, and contains provisions that the lessees assume all obligations and liabilities associated with the maintenance and use of the property, then the court shall consider the lease unconscionable.

Several factors are listed for the court to consider in determining unconscionability, including any gross disparities between the obligations incurred and the benefits received, the bargaining position of the parties and the adequacy of disclosures. Upon a finding of unconscionability, the court would have the power to grant remedial relief including rescissions, reformation, restitution, the award of damages, attorneys' fees, and court costs.

In addition, this section would provide that any automatic rent increase clause would be unenforceable, as to future increases in rental payments, in a lease which was entered into prior to termination of developer control, had to be ratified by purchasers, and contains provisions that the lessees assume all obligations and liabilities associated with the maintenance and use of the property.

Ground leases in existence at the time of enactment, made in an arm's-length transaction, are exempted from the provisions setting out certain of the provisions dealing with unconscionability and as well as the unenforceable automatic rent increase clause provisions. However, ground leases are subject to judicial determinations of unconscionability.

So what we are attempting to get at in the Federal bill would give the court a number of areas of potential relief, including the rescission—even payment back—of certain fees if the court found that to be warranted. Now, the premise on which this rests is that the States, under the Constitution, are prohibited from impairing the right of contract. That same prohibition in regard to contract does not apply to the Federal Government as such.

There has been a memorandum from the Justice Department. Their position, as drawn in the bill, would allow Federal courts to have jurisdiction as to whether there was unconscionability in these leases, regardless of the constitutional provision on obligation of contracts, because that provision does prevent the States from impairing the obligation of contracts, but does not prevent the Federal Government from doing that.

Court Test Sought

Now again, I think we want to make it very clear to everyone that what we are talking about, if we can pass this bill, is providing the means wherein we would get a court test. It does not mean automatically that we are going to be upheld in this, it is still a justiciable issue. There is still an issue that I think will find good lawyers on both sides arguing whether this is valid or not. We do know that the State supreme court has ruled that you cannot have this reformation, you cannot go back and void this, so we are stopped there. So this is the next best step that we could take to provide some kind of relief.

Again, it is clear that, in the future, in Florida, the law protects people who are starting off now. But what we are trying to do is find some way of providing retroactive relief. If something like this can

pass, I can guarantee you—as you know, these owners won't be hidebound; they will be willing to negotiate, and those would be arm's-length negotiations. And in many instances that might be the best solution, to buy out the lease, but I think you would find the negotiating on that basis.

Mr. GARBER. I am familiar with that provision. Unfortunately, in our situation the leasehold was sold, and at the time of the sale the developer took it upon himself and very smartly included in the general lease that he pay from the 17 autonomous corporations that owned the various buildings in our place. He had these provisions included in the general lease which normally go into an estoppel certificate. Are you familiar with an estoppel, sir?

Senator CHILES. Yes, sir.

Mr. GARBER. I don't think the people who represented our condominium were smart enough to observe that these provisions were included and these people were just imposed upon. I don't know if they were represented by counsel. I understand they were not, they just took it upon themselves to buy it and they are therefore precluded by these estoppel provisions contained in this so-called general release. Normally if I buy a mortgage for $10 million, I know I am going to get the stock certificate.

Senator CHILES. You know, you may have a situation there in which you have been blocked. We will have a panel of lawyers who will be coming up next and I don't know whether we can touch on this or not, but I see that you have a particular problem.

Mr. GARBER. That is why I would like for you to consider whether there is some legislation that could be enacted requiring the negotiation, whether it is enforceable or not, to require these people to sit—to only sit with you and negotiate with you where we are in this bind. We are in a tremendous bind and we cannot get out of it. We are committed, based on this. There was some fraud committed or perpetrated at the time this lease was made up, and that would be problematical, whether that could be sustained or whether a position was so taken.

LONG-TERM LEASES BINDING

Mr. KANTOR. Senator Chiles, the purchasers at Century Village didn't even have the privilege of signing away their rights. The developer very cleverly appointed the first board of directors of each association. I have forgotten the number of associations that we have, but a great number of them. What he did was appoint the first board of directors from among his own employees to oversee each association until such time as it would become 75 percent occupied—at which time it was turned over to the unit owners. In the meantime, these persons entered into contracts with their employer, Century Village, Inc., binding us to all of the clauses of the long-term lease, the declaration of condominium, the bylaws, and the management agreement.

Senator CHILES. That fits you much more within the definition of what we are talking about in the act, because all of that was in the power of the developer at the time. And that is classically what we are talking about here, why this should be released.

Mr. KANTOR. In fact, we now have litigation in this area where we are trying to prove that not only did the first board of directors violate

their fiduciary responsibility, but they also were totally the tool of the developer. This has been pretty much accepted. Just one other comment on why the Federal Government has got to do something in this area. Responsible Federal agencies, as well as very responsible private agencies, have indicated that because of the escalating production costs of homes within the next 5 years, fully 50 percent of all housing starts will have to be in the condominium area.

Even if it is but 30 percent of all housing starts that will be in the condominium area, I believe the Federal Government has to get something on the books that is going to protect the large number of persons coming under the condominium aegis. Of course, this especially applies to young people who cannot afford to buy one-family or two-family homes.

Senator CHILES. You are now speaking to what we think is the main purpose of the bill, and that is the broader utilization of condominium form of ownership. I think that upon that leg—the bill has several legs—but upon that leg is the one that we have to stress in order to try to get the kind of support in the Congress to pass the legislation. You know that the condominium phenomenon, to start with, was almost a Florida/Arizona phenomenon.

Mr. KANTOR. California.

Senator CHILES. Yes, California.

Now, though, you are beginning to see a tremendous spread of that. I happen to be a double condominium owner now, one in Virgina and one in Florida, so I have a vested interest—you might say maybe even a self-interest—in this. I think you are finding that more and more becoming a form of ownership, so it no longer is the problem that is just a Florida one.

BILL SUPPORT NECESSARY

I think what this bill does, of course, is to try to give the rest of the Nation some protection that we have paid very dearly for in Florida, that all of you paid very dearly for. We are trying to correct these mistakes and to see that unconscionable things do not take place in the future. I hope, for that reason, that we can get stronger support for the bill. I think that we will get hearings this year and I hope we can pass it during this session of Congress.

Mr. KANTOR. I hope so. Will it come out of Senator Proxmire's committee in this session?

Senator CHILES. Well, I think it can. I don't want to offer promises; that would be the wrong thing to do. Senator Stone and I are both going to press for hearings, and Mr. Lehman has already had a hearing promised by the House committee, so we are going to press very hard to try to get hearings on the bill.

Let's go on to our public services now.

Mrs. Borenstein.

STATEMENT OF GLADYS BORENSTEIN, BROWARD COUNTY, FLA.

Mrs. BORENSTEIN. I was going to speak on the things also that I think we find most important in our condominium. I live in the same area as Mrs. Stang and I find transportation is the most important thing, especially to the widows and widowers—the people who are

left alone. A lot of them came down here as retirees in good health with cars and were able to take care of themselves. All of a sudden there is a problem with their health, such as a stroke, a heart attack, blindness, or anything crippling. Then we had those with the death of a mate, and the people were unable to fend for themselves.

Now we do have city buses running, but it is awfully hard for a person who has had a heart attack to stand for 30 minutes to an hour in the sun—maybe 2 hours sometimes—and this happens to us in our area quite often. Then the answer is if you cannot do that, you take a cab. Now cab fares to a doctor runs you between $10 and $20, to go and come, and most of the people in our area have to go to Plantation or they have to go to the other hospitals in our area. They are going to the Holy Cross area which is actually a $20 ride there and back. Most people cannot afford this any longer with the rises in the cost of living today. What we really need is to have private buses that will take our people to and from the doctor without their having a call 2 weeks or a month in advance and make an appointment.

Now I have a little article out of the paper if I may go through this. This is just a dollar-ride program. It starts off beautifully. It says: "If you live in Broward County, are over 62 years old, and you need a ride to the nearest shopping center, never fear—Dial-a-Ride is here." So you call them up and you find out what the Dial-a-Ride program is.

The pilot program providing transportation for senior citizens to nearby shopping centers begins this weekend with the county providing three 15-seat buses for a county that has certainly over 1 million people, starting Friday and continuing only on weekends. Now people don't get sick on weekends or go shopping on weekends; we need something daily to take care of our needs there.

Then each van will operate in a specific area and the county has divided it into three areas, and they have been divided into quadrants. Each weekend, a different quadrant will be served. If your quadrant is served in one week, you won't be able to ride again for a month. So what are you going to do the other 3 weeks of the month?

So once a month you are allowed one weekend. Then you sign up in advance. That is good. If I know that I have an appointment in 1 week or in 2 weeks and I sign up for that, that is fine. But what if I get sick at this point and I need to get to a doctor today?

Use of Paramedics Cited

The only service we have for emergencies is the paramedics. Paramedics are the most wonderful thing in bad emergencies. If you need to go to the hospital, they check with the hospital and then an ambulance is called. It is $40 and up for an ambulance which is prohibitive today. Then you must pay the outpatient cost when you go in, which is certainly $35 or more—just to be checked in under the outpatient provision of the hospital. If they find that you are really ill, then they of course enter you in the hospital and at that point you pay a further fee of over $100 for the entrance into the hospital. This is fine. The paramedics are good for these bad emergencies. But what if a person gets sick and needs a private doctor? They can't wait 3 weeks to see the doctor; they must see the doctor that day.

Now that is where a lot of people in our area come into this. We help our neighbors. Some days in the week I drive the car. My health is pretty good, but is it right for me to have to spend 6 or 7 days a week driving people to the hospital, to their doctors, for prescriptions, for groceries?

We feel that we should have a bus service, or private cars or buses, either by the city, or by our own condominiums. Our own condos took our buses away from us, and we do not have the buses for the people who can't drive and must have them.

Senator CHILES. So you really thought, again, that these problems were going to be covered for you when you first went there?

Mrs. BORENSTEIN. When we bought our apartment we were told we would have the minibus service, and then the minute the last apartment was sold they took them away from us like it was magic. We took them to court, but we were not able to get our buses.

Senator CHILES. Nan, as the executive director of the area agency on aging, tell me what you are trying to do to make some kind of service available.

Mrs. HUTCHINSON. Well, for the benefit of some of these people, the area agency on aging is attempting to provide programs for the elderly in each of their districts. Ours happens to be Broward County. I would like to just briefly say that as far as population goes we were the first area agency to be funded in Florida as a model project in the fall of 1972 in Broward County. At that time when I started, we were told to do three things: To find out what resources were there already; to point out the problems; and to grant problems on a priority basis to meet these needs.

We did this. We interviewed every agency in Broward County. There is an agency here north of us in Palm Beach, and so on. We did interview all the agencies of Broward County to find out where theirs was. Second, we did an in-depth survey. We held seminars. We met in small groups, and large groups. We had task forces. We came up with the data. The needs we found back in 1972 or 1973. This year the only thing was—that shifted a little bit.

Those first three needs have never changed: Health, or anything that relates to that; transportation; and nutrition. This year housing jumped from No. 8 up to No. 4. Then comes home services, activities, information, and counseling. Now everything has gone the same until this year when the housing jumped from No. 8 to No. 4.

Senator CHILES. Why did it jump?

DRAMATIC INCREASE IN ELDERLY POPULATION

Mrs. HUTCHINSON. Well, for the very reason due to the influx that we have had. When we started in 1972, the 1970 census said we had 152,000-plus over 60 in Broward County.

Senator CHILES. That was in 1972?

Mrs. HUTCHINSON. That was in 1970. I was using the census. Today we have 304,000 over 60 in Broward County and this is the growth from 1970 and from 1977.

Now when you talk about trying to do services for the influx that we have had so fast in the northwest section of Broward County in

the past 3 years, almost 4—there are now people reasonably into the northwest where you find Coral Springs, Tamarac, and those cities. Now just in the nine cities you have 69,000 people over 60 years old.

Senator CHILES. I understand about 75 percent of the people in Tamarac are over 60 years old.

Mrs. HUTCHINSON. Senator, 85 percent are over 60 years old.

Now look down 5, 10, years from now. We keep saying that in 5 years 7 out of 10 are going to be elderly people. We are already there and past it. We have 29.7 percent population out of the million in Broward County who are already 60 and over, Senator Chiles.

When you say an area agency is doing the planning and coordinating, yes, we did fund programs on the priority basis. We did start with the nutrition 5 days a week. We have home service, we have home touch. We have them all under one roof and it saves administratively, and in every other way. Within the Older Americans Act money—we have 20 of those 43 buses that came through the Older Americans Act money and not the county.

The county is now purchasing some buses, but they have been a long time doing it, but at least we made some inroads. They have helped us in many ways. They have administered this program. The point is the transportation has again set up an escort service. We had CETA workers. My board of directors or the State could not find any insurance through the State insurance office and we worked for months on this until we had to cancel that program. We need to not only have buses, we need to talk about insurance for volunteers or insurance for those people who are willing to volunteer. In addition to those, we have day care and many other services.

Senator CHILES. Nan, from your perspective, are the federally assisted transportation programs for the elderly becoming more or less unwieldy? I am talking about all of the UMTA funds—Older Americans Act, all of them.

Mrs. HUTCHINSON. We just received seven additional UMTA buses last July that we had had on order for 2 years. The minute we get some, we say we will take 10 more, we will find the match somewhere. It has been so slow that we have not been able to get them. I would say that it is very difficult, either the money is not there or we are not allocated enough of the money that comes to Broward County. The other counties go through the same thing. We could find that match if we could just get the Federal money to do it with.

Senator CHILES. What is the match?

Mrs. HUTCHINSON. Eighty/twenty. Twenty percent we do locally. The cities do their fair share. We have excellent cooperation. That is where all match comes from, from the city and county.

TRANSPORTATION EXPANSION NEEDED

Senator CHILES. Broward County gets now the total of how many buses?

Mrs. HUTCHINSON. Forty-three.

Senator CHILES. What would you say the need is?

Mrs. HUTCHINSON. I would say if we had 100 buses that we could put them into operation and probably still not meet the need, Senator

Chiles. Now I am talking about just for the elderly. I am not talking about total matched transportation. We are talking about those buses. They don't have public transportation buses with lifts on them. These people can't walk to the corner. If they do get to the corner, they cannot get up on these buses.

There has to be a demand/response type of transportation system for the handicapped and for the elderly. We need to do this and we need to do it now because it is just to the place where these people cannot get from the condominiums. This lady who just testified, Mrs. Borenstein, works all day every day, practically taking people to the doctor, to shopping, or to get their prescriptions. I don't know what those 15 or 20 who are depending on her will do when she gets ill, and it could happen very easily. The point is that they are there with the limitation of the equipment that we have and the limitation of funds. Yes, we do all we can and we get it from every source that we can, but it is totally impossible—the programs and, particularly, transportation, which is expensive.

Senator CHILES. Can any of you tell me whether, in your particular complex, there has been an attempt to organize some sort of self-help projects, as opposed to just an individual voluntarily providing it as you are doing, Gladys? Or there is some individual self-help? You know what we are really talking about here is the scope of the problem. I don't know that there is any way that we are going to have the total Federal response, taxwise, to provide for all the needs that exist.

One of the things that I notice is that condos are like small towns, people get together and help people. I want to elicit from you what is taking place in your condominium.

Mrs. STANG. Our attempts at getting volunteers is very difficult, particularly due to the insurance situation. What we have found, which has been really an obstacle in terms of organizing, we have found people who are willing to drive and offer their cars to transport people at a price which is usually less than the taxi service, for example. The problem is—I run into it myself, particularly—I go over the county line. One of the reasons I was interested in this at the Federal thing is because the county for some of us is inadequate. Even if they had enough buses, they would not go beyond the county line.

The people who do this privately are really breaking the law in terms of driving for remuneration; yet we use them and it is really dangerous getting into a car of that kind because they are not covered to transport people. That is as far as we got, even though the price is less than insured transportation is. It is very difficult because we are never quite sure, and if anything should happen, we would be covered and, of course, the person that is doing it. So that has not at all met the need and that is as far as we have been able to get which is very inadequate.

VOLUNTEER AGENCIES UTILIZED

Mr. KANTOR. We have a parallel situation in Century Village where unauthorized persons—from a legal point of view—are transporting residents to shopping areas, to the doctors, for injections, for prescriptions, for visiting, if you will. We also have some very wonderful volunteer agencies within the village that managed to get insurance

for these volunteers so we do have insurance on some of the volunteer drivers who perform this service. I will obtain the names of these organizations and send them to you, Senator. They operate at no profit. I believe that the driver is merely reimbursed for the gasoline that it costs him to transport these needy people; the volunteer agency itself undertakes the cost of the insurance. Although we do have such services, it is still woefully inadequate because of the 15,000 people living in Century Village.

Senator CHILES. What type of volunteer agencies? Church sponsored?

Mr. KANTOR. This is within the village itself. It is a self-help type of organization and I will get the names and send them to you.

Senator CHILES. That would be helpful.

One of the problems is this insurance matter, you know it is a very big problem. The White House has a task force that is looking into that, and they are expecting some proposals and a conference in the White House by March of 1979, with some way of trying to address this insurance problem.

Mr. MANN. Senator, may I add this? While this volunteer system is helpful, it is not the answer because, when you analyze the volunteer system, you are talking about people who themselves are sick; they have their own problems. While they may be OK for today, tomorrow they are laid up or they have to go to the doctor. Many of them are with 99-year leases and they will never live out that 99-year lease, and this is a big problem. Volunteer service is good, but it is not the answer to what the senior citizen needs.

Mrs. BORENSTEIN. Senator Chiles, I would like to say we are not reimbursed for any of our services. We do it and we do not get paid 1 cent. If you call private people, they will grab you for a certain amount of money, but in our area we do not. We do it as a neighborly thing and try to help our neighbors, but, no, we do not have a regular system for this and we are leaving ourselves open in case you have an accident that someone may sue you. Someone was sued by a neighbor because she had an accident after going out of her way to help the people, so this is bad. I say we do need the public service or the county, whatever we can get.

Senator CHILES. Len, do you want to tell us something about home health care?

STATEMENT OF LEN WEISENGER, BROWARD COUNTY, FLA.

Mr. WEISENGER. Yes.

The tremendous cost of health care has fortunately occupied the position of the Government for the past few years. In the meantime, medicare does provide certain health care services on a part-time basis, such as skilled nursing care, physical therapy, and speech therapy. The expansion of these services could also be implemented, including occupational therapy, home services, medical and social services, and medical supplies.

It is true that these services are being provided, and I like to emphasize that it is on a part-time basis. What this reduces itself to is that these services are provided for lots of 2 hours per week per person.

For example, statistically speaking, any time as of the end of September we have provided these services to 6 of the 11 persons, yet we have a waiting list based on that closing date for an additional 300 people.

As you can plainly see, the needs do exist. They become much more emphatic because the population is growing older. Many of these communities that are on the average 15 years old have been started way back in the middle sixties and the health has deteriorated concomitantly with the tremendous increase of the cost of living, and also was accompanied by the erosion of their resources. For this reason, in order to help these people, the Government should expand these services.

I think that the Government should look at the need of the total person. The benefit for the Government, as well as the services for these people who are in need, would be twofold. First of all, these people would be taught to take care of themselves independently. As far as the Government is concerned, I think the cost would be far less than to have to institutionalize them. So as you see, Senator, I think an expansion of these services would be of mutual benefit.

More Chore Services Needed

Mrs. Hutchinson. Senator, if I might just add a little to what Mr. Weisenger has said. He was talking about the home service program that we do have. We have the home chore service that goes in to help with the housework and that sort of thing. We were serving people 60 and 65 when we started. Today we are serving the majority between 70 and 74. Remember they have been there 5 and 6 years, and 5 years from now they will have more problems and less mobility and unable to do for themselves. What we are saying is, we need something now. We have not touched the middle-income group; we have not even touched past the poverty level in this program, Senator. We have not really touched that much of it basically.

Senator Chiles. Well, home care is an area that Senator Domenici on the Committee on Aging and myself have held a series of hearings on, and we are going to go into that again this next year, and I hope we can come up with some legislation. I am convinced that trying to have some in-home services makes a great deal of sense, especially if we are talking about quality of life, because it is ridiculous to force people to be hospitalized or institutionalized in any form when they could have stayed in their own home. I think in many instances you are not doing the taxpayer any favor when we see the prices of the nursing homes and the prices of the hospitalization. We also see these people, many times, just deteriorate very quickly when they are placed in these homes.

Mrs. Hutchinson. We have only four in the county and this is certainly one of the best things that we have found as an alternative to institutionalization. The family can work who needs to work. They have to be supervised 24 hours a day. These people come to the day care center and they don't mind it being called a day care center. What you see when they come and how much improvement they make, the enjoyment they have not only for themselves but what it was for the members of the family, this is one of the best things we have done as an alternative, along with community care legislation that Florida has done.

Mr. KANTOR. Senator, Mr. Weisenger just a moment ago mentioned how the senior citizen's income has been eroded through inflation, through escalation clauses, et cetera. Well, concomitant with that comes all of the fixed-income problems of retirees.

In Century Village we discovered an appalling situation. Not only are people on welfare, but the welfare rolls have increased dramatically in the last year and a half. I don't even want to disclose the number of people on the public welfare rolls in Century Village at this time, but it is fast reaching what can be termed an astronomical figure. It is bread and water for many of these people for the last week of the month. Many of them are much too proud to enlist outside aid. Many of them are much too proud to approach others for help.

What many of our in-village organizations have done is very quietly sustain these people by making funds and food and clothing available to them, and I say "very quietly," because you can well understand the jolt to one's pride to have it known publicly that you are in a situation where you have to accept this kind of help.

MEDICARE SEEN AS INADEQUATE

At the same time, there has developed a greater dependence on medicaid because medicare at this point is woefully inadequate. Its unrealistic schedules for repayment and, I hate to say it, some unfeeling physicians who just won't accept medicare patients, and the hospitals that won't accept medicare patients create additional problems. You do have some unscrupulous physicians who will list additional visits to make up their "fair share" of medicare money.

The high insurance cost for that portion not covered by medicare, the extremely narrow coverage—there is no drug coverage under medicare—compounds the problem. You have no dental or eyeglass services. I think along with all of the health and social services problems that have been mentioned here some kind of an adjustment on the Federal level has to come about. It has to be adjusted to meet the growing needs of a very large segment of the American population.

We have been given additional years to live on this Earth through medical research and scientific advances. For many people those additional years are not the heaven that was promised but a partial hell. I know nobody promised us a rose garden, but neither did they tell us we were only going to get the thorns and not the flowers. So I think, along with what has been said, is this tremendous need for Federal intervention, either through shared costs with the State or through a more realistic medicare program. Even if it means primarily catering only to the needs of those who are least able financially to care for their medical needs, it may mean introducing a sliding scale so that the more affluent may receive less from the medicare program. Something has to be done now to take care of those persons who are suffering enormously at this time.

Senator CHILES. Nan, what kind of long-range planning are you doing? Are you beginning to project? You have just been talking about the citizen aging beyond 65, and now we are talking about that aging and, especially let's say in Broward, where we have this tremendous concentration of our senior citizens in condominiums, the growing need

that is going to be there for services. What kind of long-range planning do you project doing?

Mrs. HUTCHINSON. This is what we are planning and this is what we are recommending—we hope through legislation, through some source of additional moneys. We need all we have now, but with the additional moneys—I think with the population as it is, as you just said, I see a real need for a social services network within the condominium complex. In this system we have done, I will say, this type of multipurpose centers and our little mini centers, but being the sort of townships that you were just talking about I think this is coming to the point where we are going to have to face this and deal with this realistically with condominiums.

I think that a system would include a social worker to provide counseling, information regarding available condominium services and community services. Referrals should be made to available community services and coordination of the social services within the condominium project. I also feel the same is true in our day care center and multipurpose center which goes along with the health screening we are doing, and we are only doing it in two of them because of the physical facilities as well as the money. A nurse should be there to provide health screening, referral.

SERVICES SHOULD BE PROVIDED

I definitely feel there should be a transportation system including vehicles and drivers within these condominium complexes. There should be a recreation/social program coordinator to assure the residents of a viable activity program and one or more service aides to aid disabled residents with their shopping and so on.

I feel that we are beginning, and we are working in the condominiums now because we have helped organize the buddy system—the mailbox system—whereby they check on someone. They have the hall captains that report back to the condominium manager or building manager.

There have been some monitoring systems and I hope you see this next week in St. Pete, this total monitoring system which fortunately I did get OK'd from Sylvania. It cost $125 to set it up as a model in Broward County which would be 200 people that would be monitoring their entire home. For instance, the telephone is the one where it all comes back to the refrigerator, the radio, the TV, the light, the bathroom, and so on. This is the best monitoring system that I found, not only for safety, but for those who are living alone and for those who are physically handicapped. Monitoring systems we are trying to set forth now.

In addition, I feel we are also assisting the volunteers whom we are helping to organize in the friendly visitors, telephone reassurance orders, shopping aides, transportation escorts and, hopefully, this insurance will be worked out so that we can get the CETA workers and get it back into a program. I really feel with this type of network within the project and within the condominiums, I think that these residents will be assured of more comfortable retirement years, in particularly the condominiums that they have chosen.

Senator CHILES. How do you see that sort of total network being undertaken?

Mrs. HUTCHINSON. I think it should go back through AoA. We are doing it now. We could start on a small basis, which I hope to do with or without the money, some way in Broward County, at least take two or three of the condominiums and start this as a model project, because there is the money to do this. It is a matter of writing them and getting them funded.

Senator CHILES. Assuming this pilot proves itself out, and I would certainly think it would, how would you attempt to expand it?

Mrs. HUTCHINSON. Well, the thing that we do with the other programs. People pay what they can afford to pay for the services, and that expands the program.

Senator CHILES. So you have some kind of a fee, on the basis of ability to pay, for some of these services?

Mrs. HUTCHINSON. Yes. I think the title III moneys that are there and you do get some dollars additionally each year. I think the seed money could be put into condominiums with the key people that need to get it started. As Gladys Borenstein has stated, in the condominiums they are willing, several of these people, to volunteer to help supplement and fill in the gaps where we don't have the money to fund these hired people to put on the staff. I think the need is there and I don't want to feel like I am going to have to wait another year to do it. We have more or less sort of started and are in the planning stages for one condominium right now so we hope that we can do this.

Senator CHILES. It sounds like a wonderful array of services and I am sure everybody here would probably like to see that incorporated in all of this.

Mrs. HUTCHINSON. We have the services. Unfortunately, we are not able to serve the numbers that we know are out there and who really need them.

Senator CHILES. I know that that is very true.

POPULATION PROBLEM SERIOUS

Mrs. HUTCHINSON. I would like to make one other point if I may, talking about population. We have a very serious problem and other States like California and Arizona, I am sure, have the same, but being here I know with 4 million coming in here during the 6 months of the season—now I will use one center as an example. We have between 450 and 500 people going through this northwest center every week, and I mean unduplicated people. We run twice that in the months of January and February, right around Christmas time on. These people are getting these services up North; they expect them when they get here. We get money for the population for our census, and what we have been allocated——

Senator CHILES. We try to get you some help but it is awfully hard to get other States to recognize that they are sending us in many instances their problems, and we are having to take care of them.

Mrs. HUTCHINSON. Would there be any way of a formula for the money to come to Florida and some of the other States in addition to our regular amounts that we are appropriated, because we have it and

we have the statistics to show it, so would they not consider it important?

Senator CHILES. Statistics are important, and you have to send them to us. We have to get it to the attention of these other States so they really recognize that we have this kind of problem. It hits us in all areas.

Mrs. HUTCHINSON. I understand.

Senator CHILES. We did some work on this. Senator Stone has done a lot of work in trying to update the census numbers constantly because, again, being a growing State like we are in Florida, if we have to go back and rely on the 1970 census all the way until the 1980 census comes, we will have difficulty. During that time we almost doubled in population of older persons.

Mrs. HUTCHINSON. The three counties in southeast Florida are really catching up because we are getting more.

Senator CHILES. In addition to that, this additional burden of our tourism population that comes down for the winter.

Mrs. HUTCHINSON. In the nutrition program some will come twice and somebody else will come once, but that is not right when you have your own population here year around. They are willing and they do cooperate and they are wonderful, but we need to do something.

Senator CHILES. I want to thank you all for your discussion this morning. I think it is very helpful to us and very helpful to the record we are attempting to build here. We do appreciate your coming very much.

Mr. MANN. May I add one point, Senator?

Senator CHILES. Yes, sir.

Mr. MANN. We have heard a lot said today against our developers, and we will gladly volunteer to have a shootout with our developer, but the concept that we have at Century Village—the recreation concept is a boon to gerontology, because the most important change of the senior citizen when he retires is what he is going to do with his time and with his life. If he is not at all active, he just deteriorates. The concept that we have, there are so many activities for the individual to participate in that if he doesn't, it is his own fault.

I would appreciate, Senator, if you and your committee would give some thought to those people who cannot afford any kind of a condominium, yet build for those people with the same kind of concept and give them the same privileges that those who can afford have.

Thank you.

WORKING ON PROVIDING SERVICES

Senator CHILES. We are already working on that in trying to provide the multiple services within some of our highrise complexes, even where there are rent subsidies in trying to provide all of the services. We are just beginning to deal with that problem.

Thank you very much.

Mrs. HUTCHINSON. May I say just two quick things? You mentioned medi-gap once. I hope you don't dismiss that because we have had so many outreach people that have indicated they have people they are concerned about. They are getting in the mail all of these proposals as well as by telephone. I hope you don't let that go.

The second thing is having been in Washington and having worked on this——

Senator CHILES. We have held hearings on that and we are not going to let it go. I assure you on that.

Mrs. HUTCHINSON. Good.

The other is the White House Conference. What you are doing here in Florida, having the number of elderly that it has, there will be leadership in some States some place, and I would like to say to you, Senator Chiles, being from the State of Florida and with the new Governor, that we do get at the grassroots and not let these issues go awry through the Older Americans Act. All these things that we have been talking about, and talk about them from now on—start at the grassroots and not let the planning just come from the top, but from down here. We could do this with your help and the new Governor-elect, as well as at the local level. That would be of assistance to the State of Florida, as well as getting the data that they need in order to help do the planning.

We would just like to say we are here, the area agency in Florida. We want to help, we would like to assist, and we would like to see the State of Florida take the leadership role in the White House Conference planning.

Senator CHILES. We want your help and we will try to work it out.

Mrs. HUTCHINSON. Thank you.

Mr. MANN. Thank you, Senator Chiles.

Senator CHILES. Our next panel is going to be a panel of State officials and private attorneys. I will ask them to come up and take their seats if they will. Before we get started, we will take a short recess.

[Whereupon, the committee took a short recess.]

Senator CHILES. We will get started again.

We now have our panel of State officials and private attorneys. We will start with Mr. Thomas Pflaum, who is the assistant attorney general, consumer division, Tallahassee. If you have a full statement, we will be glad to put it in the record.[1] You can sort of summarize your remarks so we will get into some questions and answers.

STATEMENT OF THOMAS M. PFLAUM, ASSISTANT ATTORNEY GENERAL, CONSUMER DIVISION, TALLAHASSEE, FLA.

Mr. PFLAUM. I have made available to the committee a written synopsis, or historical sketch describing the attorney general's efforts over a 5-year period to obtain relief for condominium owners from oppressive recreational leases. I do not think it necessary to restate that historical synopsis because it is quite detailed, so perhaps I might simply state my views on where we have been and where we have come.

Senator CHILES. All right, sir.

Mr. PFLAUM. I am here on behalf of the attorney general and the Florida Department of Legal Affairs. As you know, the attorney general has dedicated nearly 5 years of hard-fought litigation, administrative and legislative proceedings, in an effort to provide legal relief from condominium recreational leases.

[1] See p. 102.

Senator CHILES. I think the attorney general has been a tremendous force and power in trying to effect some relief here, and that effort certainly has to be part of the reason that we have come up with the Federal bill. Because, where it appears finally that the courts cut you off from the remedies you could effect in Florida, we now see the need for trying to address this federally.

Mr. PFLAUM. And that is the main point I would like to make. At the risk of overemphasizing our losses, I think I must say that in retrospect, if we stand back and look objectively at the present status of the laws, we have failed. We have been unable to accomplish our ultimate goal, which was and is to generate a Florida Supreme Court decision of good precedential value declaring these recreational leases invalid, or at least reform them. Of course, we have had victories in the sense of successfully assisting individual condominium owners escape from a specific lease usually by "persuading" the developer to negotiate a settlement, or "buy-out" of the leases, but to the best of my knowledge we have never obtained that sought-after appellate decision.

ANTITRUST TIE-IN THEORY REJECTED

As you are aware from other testimony, the Florida courts have basically rejected the antitrust tie-in theory, which, incidentally, I think is still the best theory and remains active in the Federal courts, and have held that the "little FTC" act, section 501.204, Florida statutes, cannot be applied retroactively to leases assumed in the 1968 to 1974 period. In addition, certain Florida appellate courts have gone so far as to hold that the "little FTC" act, which is our principal enforcement remedy, does not even apply to "real property" transactions such as leases—a principle which is wrong but which is currently binding.

Accordingly, although litigation continues, and although we may some day vindicate our theories, the present status of Florida law looks to me a little grim.

And in light of this unresponsiveness by the Florida courts, we must recognize that the economics of continued enforcement of condominium recreation leases is stressing. I have been involved in cases where the rent under the lease has increased 100 percent or more in 5 years, and unless the government intervenes, will probably do so again. As you are aware, these leases typically run for 99 years, many are indeed for a perpetual term which will cause an inflationary bubble of almost inconceivable proportions. My written presentation details the unconscionable elements of these leases, and need not be restated here, but I hope that Congress appreciates how totally unfair these leases are, and how impossible is the economic burden which they impose. Suffice to state unequivocally my belief that, in light of the failure to obtain State court relief, Federal relief is undoubtedly needed.

However, I must note my skepticism that the proposed Federal legislation will generate the necessary national support. Certainly, it appears to me that there is a commerce clause "nexus" between these leases and Federal jurisdiction; I think in a historical sense, as you have pointed out, Congress has often had to intervene when the States have failed to safeguard citizen rights, and I think we have reached

that point now. However, I think we should recognize that these leases are not yet truly "national" problems and that this is perhaps not the era for such remedial social legislation. Perhaps Rod Tennyson might speak more on this strategic issue, but it may be worthwhile for your committee to also consider alternative Federal measures, such as changes in the tax system, which I understand actually promotes these unfair leases, and which may discourage settlement.

In conclusion, let me say that I think we are facing a major social and economic problem caused by the enforcement of condominium recreational leases, that we have failed to obtain the needed State court relief, that the proposed legislation is excellent and undoubtedly needed, and finally, that alternative Federal remedies should also be considered.

Thank you for allowing me to speak to you, and I will be pleased to answer any further questions you may have.

[The prepared statement of Mr. Pflaum follows:]

PREPARED STATEMENT OF THOMAS MARTIN PFLAUM

Mr. Chairman and members of the committee, my name is Thomas Martin Pflaum, and I am appearing today on behalf of Attorney General Robert L. Shevin, who is Florida's chief legal officer. I am the assistant attorney general who has, for the last year and a half, been principally responsible for the attorney general's condominium litigation and related condominium activities. It is a great honor to appear before you to express my views of the severe psychological and economic problems which confront thousands of elderly condominium residents in this State, and which arise from the enforcement of unfair land and recreational leases and management contracts.

As you know, for approximately 5 years the attorney general of Florida has attempted to obtain relief on behalf of elderly Florida citizens, many of whom simply can no longer afford the ever-escalating costs of their land and recreational leases and management contracts. Based on my experience in this area since mid-1977, and my review of the attorney general's previous efforts since 1974, I firmly believe that Federal relief, particularly in the form of remedial Federal condominium legislation, is not only the best means of assisting these tens of thousands of elderly condominium residents but indeed appears to be the only effective relief available.

I believe the most useful contribution I can make to this committee is to fully advise it of the history of the attorney general's efforts to obtain relief on behalf of these elderly citizens. As you will see from my historical summary below, the attorney general's efforts in this area have been diverse, complex, persistent, and only marginally successful. I should acknowledge, of course, that the agency with principal authority (some would argue exclusive authority) over condominium matters is the Florida Department of Business Regulation, Division of Land Sales and Condominiums. Assuming proper support by the Florida Legislature, and given the full disclosure requirements of the current Condominium Act, I think the division will be able to prevent a reoccurrence of the type of massive overreaching and deception which occurred from the late 1960's through 1975. However, it is apparent that not even the division's Jeff Andrews, whose skill and dedication is widely and deservedly recognized, can provide relief to the thousands of elderly condominium purchasers who purchased prior to current legislation.

HISTORICAL SUMMARY

In the late 1960's and early 1970's the condominium market of Florida's housing industry underwent an explosive increase in building and sales, primarily affecting the three lower southeast counties of Dade, Broward, and Palm Beach, as well as the Tampa Bay area. Presumably this surge of condominium development and marketing reflected substantially increased costs of traditional, single-family housing, as well as increases in Florida's retired population. It is these tens of thousands of elderly purchasers, who purchased their units in

the 1968–74 period prior to remedial Florida legislation, who most desperately require Federal assistance.

As you may be aware, the Florida "little FTC" act, which generally prohibits unfair or deceptive trade practices (section 501.204, Florida statutes), did not take effect until 1974. Immediately thereafter, the attorney general, as the act's primary enforcing authority, conducted a series of public hearings to determine what Florida's citizens viewed as their most pressing consumer problems. Problems concerning condominiums were those most frequently voiced. In descending order of importance, their specific concerns were mandatory land and recreational leases and similar arrangements, mandatory management and maintenance contracts, construction defects, and transfer of control from the developer to the condominium association.

These consumer complaints, voiced during the attorney general's original public hearings, clearly illuminated the misrepresentation, overreaching, and nondisclosure then common in condominium marketing. These concerns were later supported by the findings of a study, entitled "Condominiums: Their Impact on the Southeast Florida Housing Market," which was prepared for the attorney general by William Bosher, an economist assigned to the Department of Legal Affairs from the Federal Civil Service Commission, as in intergovernmental fellow.

Based on this data, it was obvious that the situation having the greatest potential hardship to condominium purchasers was the prevalent use of recreational leases. This marketing format arises from the developer's retention from the property submitted to the condominium form of ownership of those areas on which recreational or other common facilities are located. This property is then leased to the condominium association and its unit owner members under a long-term (usually 99 years) lease.

In practical economic terms, these leases were devised by developers and their attorneys in part as an indirect method of financing the sale of the condominium units, and perhaps indeed of concealing the actual cost of the transaction. Many developers have conceded that the competition to sell condominium units in the 1968–74 period placed them in a position of having to advertise the units at a relatively low price, often below their actual value. Accordingly, the device of recreational and land lease was used to permit the solicitation of sales based on a low (e.g., $25,000 or less in many cases) advertised price, thus attracting purchasers without disclosing the fact that the actual investment cost would be recovered by means of the leases. Consequently, the advertised price was often only a small part of the true cost of the investment. In light of the ever-escalating "rent" for the land or the facilities, the actual costs may be two or three times the nominal, or disclosed price. Accordingly, the enormous rent paid under the leases seldom reflects the value of the leased property, which is often unimpressive, but rather the developer's profits on the entire project.

The pernicious effect of these leases can hardly be exaggerated: Under the leases, the unit owners rent certain limited areas of the common elements (such as the swimming pool), and are irrevocably bound to pay rent, whether or not they are able to use the facilities, or even whether or not the facilities continue to exist for 99 years. The leases thus run with the land so that each successive purchaser (and their heirs) are, for all practical purposes, eternally obligated under the leases. In addition, the leases contain lien provisions which permit the developer (and its successors and heirs) to foreclose the unit owners' very dwellings, and often also all other condominium property, for failure to pay the rent under the leases. In addition, and most importantly, the leases contain escalation clauses which permit the developer to continually raise the lease rent, for 99 years, to reflect changes in the Department of Labor's cost of living (CPI) index. (Remarkably, many of the leases even provide that the rent can only be increased to reflect increases in the CPI, notwithstanding hypothetical decreases in the CPI.)

Owners Responsible For All Services

Finally, in addition to all of the other unfair provisions, the leases are generally "net" leases, under which the developer has no obligations or duties whatsoever except to collect the ever-escalating rent from the unit owners. The leases thus provide that the unit owners are responsible for virtually every obligation of ownership, including insurance, taxes, maintenance, repairs, replacement, and servicing, and require the unit owners to return the facilities to the developer, in

the middle of the 21st century, in the same condition as built. Accordingly, the unit owners are obligated to assume the costs of so maintaining, insuring, and replacing the rented facilities, which costs have themselves doubled, in addition to paying ever-escalating rent to the developer, even though the developer has no costs or obligations which would justify such escalated rent.

It is also critical to understand that these palpably one-sided and unfair leases were never executed or accepted by the unit owners. One of the most remarkable aspects of the lease procedure was that the developer, having created the condominium, simultaneously created the condominium association to represent the unit owners. However, since the developer initially is the sole owner of all the units, the developer obviously controls the association and can execute the leases on behalf of himself and on behalf of the unit owners; as both lessor and lessee. In other words, typically the lessee association, controlled by the developer himself, agrees to the lease without any participation at all by the people who are subject to it. Upon purchase of a condominium unit, the owner is required to adopt the lease either automatically and without his knowledge or pursuant to an assignment during closing. Indeed, many of the purchasers were never even provided with the leases and other obligations which they were assuming by purchasing the unit and becoming members of the association. It is obvious, in either case, that the elderly purchasers could not have understood what they were getting into, even if they had the opportunity to review the documents, for the pertinent documents may be over 100 pages of single-spaced, interrelated legal provisions, which even competent attorneys have difficulty understanding. In many cases, purchasers were actually misled about these obligations. For example, purchasers were advised in their purchase agreement of a lease which required them to pay "$15 a month," but were verbally told by the developer's agents that such rent would "never be increased," or would be increased only "a little." In fact, the current inflation rate has caused the rents to increase 100 or more percent for many condominium purchasers since 1972 alone.

The principal oppressive features of such leasing arrangements are thus: (1) Acceptance of individual liability under the lease was made a mandatory condition of purchase of a unit without proper disclosure of such liabilities; (2) the rent was subject to escalation clauses which caused the rent to increase in direct proportion to increases in the Consumer Price Index; (3) obligations under the leases were secured by a lien which could be foreclosed on the unit of any unit owner failing to pay; (4) the lessee unit owners were seldom, if ever, in a position to understand what they were getting into, much less negotiate the terms of the relationship; (5) the rent under the leases has no reasonable relationship to the value of facilities or services provided; (6) the leases were offered and accepted by the developer himself, with no participation by the individual unit owners; and (7) the leases are commonly net leases, under which the unit owners assume all the costs of operating the facilities. As inflation rose at unprecedented rates in the early 1970's, the lease payments for tens of thousands of unit owners have been escalated beyond reasonable limits of affordability, and thousands of elderly condominium owners now suffer legitimate fear of losing their homes by foreclosure. Having worked with many of these elderly unit owners, it is apparent to me that these unfair and unforeseen obligations have caused them great distress and induced in them a sense of helplessness and vulnerability which cannot easily be remedied.

Due to limitations on personnel and resources, it was originally felt that the main focus of the attorney general's efforts to redress these problems should be to use the Florida "little FTC" act, based on two legal theories: (1) The leases constituted a tying arrangement and per se violation of State and Federal antitrust laws, thus making the arrangement an unfair method of competition in violation of the act; (2) the recreational leases were unconscionable at common law at the time of their creation, thus rendering their enforcement an unfair and deceptive act or practice in violation of the act. Both theories contained allegations of misrepresentation, nondisclosure, and deceptive conduct, but did not assert actual fraud.

Attorney General Initiates Test Cases

Accordingly, four test cases were initiated by the attorney general in the fall of 1974. These test cases invoked the administrative enforcement powers of the "little FTC" act by seeking to impose cease-and-desist orders against the allegedly unlawful practices, through administrative rather than judicial

proceedings. Although both antitrust and common law theories were alleged, emphasis was placed on the antitrust tie-in theory. The four projects involved in these cases were Century Village and Golden Lakes Village in Palm Beach County, and Pine Island Ridge and Holiday Springs in Broward County. After a year and a half of jurisdictional litigation, the result was: (1) Century Village obtained a writ of prohibition prohibiting the continuation of the administrative proceeding against it. The effect of the writ was to make it appear that procedural and jurisdictional objections could be more easily overcome if administrative rules were adopted by the Governor and cabinet which specifically covered the tying arrangements. Such rules were proposed by the attorney general and they remained pending until the supreme court's Avila South decision required their withdrawal; (2) Golden Lakes Village removed the administrative proceedings to the circuit court, and a voluntary dismissal was taken by the attorney general as a result of factors described below; (3) Holiday Springs settled with the unit owners; (4) Pine Island Ridge petitioned for bankruptcy and obtained reorganization in the Federal court, based in part on a settlement of the recreational lease dispute under which purchasers were given the option to reject the recreational lease and the rights thereunder.

As described more fully below, these initial efforts to challenge the leases through the "little FTC" act and the tie-in theory were ultimately frustrated by appellate decisions holding that: (1) the act could not be retroactively applied to leases which were executed prior to its effective date, without violating the constitutional prohibition against retroactive invalidation of existing contract rights; and (2) that no tie-in existed under State antitrust laws, because the sale of the units and the simultaneous lease of recreational facilities was essentially a single real property transaction, without two separate products.

In the meantime, private litigation involving the same or similar legal theories was proceeding in both the Florida and Federal courts. Legal theories for challenging the enforcement of land and recreational leases were (and remain): (a) Federal antitrust tie-in theory, based on the fact that the purchase of a condominium unit is mandatorily tied to the acceptance of the lease; (b) unconscionability at common law or under the U.C.C., based on the one-sided, overreaching nature of the leases, the unequal bargaining power of the parties, and the inherently unfair provisions of the leases; (c) the prospective incorporation (contract law) theory under the *Kaufman* v. *Shere* and *Century Village* v. *Wellington* decisions, under which the developer is deemed to have (inadvertently) adopted subsequent amendments to the Condominium Act which invalidated the lease escalation clause; (d) the corporate self-dealing and breach of fiduciary duty theories, arising from the developer's execution of the lease with himself as both lessor and lessee.

Of course, in the 1974 session, the Florida Legislature enacted a complete revision of the Florida Condominium Act. Theretofore, the act had been one of the minimal permissive regulation of the industry, leaving maximum flexibility to developers. The 1974 revision, which formed the basis for the present Condominium Act, attempted to specifically address many of the consumer problems which had become evident by that time. This included a provision which expressly declared unlawful and unenforceable rent escalation clauses based upon increases or decreases in consumer and commodity price indices.

After the 1974 legislation, litigation ensued raising the issue of the constitutional applicability of this legislation (prohibiting escalation clauses) to leases executed prior to the effective date of the statute. The attorney general was involved from the beginning in such litigation, which ultimately resulted in a holding by the Florida Supreme Court that retroactive application of the Condominium Act amendments would unconstitutionally impair the obligations of contract. The decision in this case, usually referred to as the *Fleeman* decision, struck down the retroactive application of the escalation clause prohibition, leaving only its prospective application intact.

No Relief For Purchasers of Condominiums

The court's decision on the "impairment of contract" issue, in conjunction with other cases decided at the same time (e.g., *Avila South*) made it clear that the Florida courts were viewing the sale of condominium parcels and the lease of recreational facilities as a single process, and that the Florida Legislature would not be capable of providing relief to the 1968–74 purchasers. Thus, the legal

underpinnings of the prevailing anti-trust and "little FTC" act theories were negated, at least with respect to the Florida courts.

However, these same negative decisions by the Florida courts included dicta suggesting the doctrine of unconscionability as a remedy for aggrieved unit owners. Both the attorney general and the legislature responded to this dicta. In further amending the Condominium Act, the 1977 legislature enacted an evidentiary provision creating a rebuttable presumption of unconscionability where certain elements were present in a lease, which could be used by litigating unit owners. See section 718.122, Florida Statute (1977). The attorney general similarly proposed, and is now defending, the adoption of administrative rules specifying that the "little FTC" act provides a remedy against the enforcement of leases that were unconscionable at the time of their execution. These unconscionability rules are designed to be useful to aggrieved unit owners both independently or in conjunction with the statutory presumption and in conjunction with common law unconscionability actions.

Prior to the proposal of these rules, the attorney general urged both sides of the recreational lease dispute to lower the emotional level and to engage in good faith settlement negotiations. The attorney general agreed not to initiate new actions during the cooling off period. After a 4 to 5 month period, when the cooling off period failed to have the desired effect, the above-described unconscionability rules were proposed. Simultaneously, the attorney general's office began to review complaints and gather additional information which could be used to initiate new test cases emphasizing unconscionability and corporate self dealing as grounds to invalidate the leases. The proposed rules have been aggressively challenged pursuant to the Administrative Procedures Act, and there is no expectation that they will soon be made effective.

In 1977 and 1978, we initiated as a party plaintiff or appeared in as amicus in numerous trial and appellate condominium cases seeking to obtain a judicial remedy for unconscionable recreational and land leases. The two original cases were *Rothmoor* in Pinellas County and *Plantation* in Broward, both of which have been settled by the unit owners. Other such cases are pending or proposed. Although litigation is still in progress it has become apparent that, with a single exception, our efforts have been noticeably unsuccessful. I use the term "unsuccessful" in the context of our failure to generate an appellate decision striking down or reforming a land or recreational lease on a theory which has ready application to other developments throughout the State. Stated differently, as a practical matter it is not a sufficient solution to the lease problem merely to convince a trial judge to invalidate or reform a specific recreational lease on grounds of unconscionability or self-dealing, (nor to frighten a single developer into settlement) for such "victories" do not have statewide applicability, and cannot be applied to other condominiums without a separate full scale trial on the merits. Therefore, although the attorney general's office has succeeded in individual cases, at least to the extent of forcing a buy-out of the lease on terms favorable to the unit owners, there has yet to be an appellate decision supplying broad legal precedent to solve the land and recreational lease problem. The single exception I noted above was the decision of a Florida appellate court in *Kaufman* v. *Shere*, which held that any recreational or land lease which referred to the Condominium Act of Florida "as amended from time to time" should be construed (by all courts) to mean that the developer had prospectively adopted the later changes in the condominium act prohibiting escalation clauses in such leases. In other words, *Kaufman* v. *Shere* provided a means, with statewide applicability, or circumventing the Florida Supreme Court's decision that the 1974 protective legislation could not constitutionally be applied retroactively to prior leases, for *Kaufman* construed certain language in the leases to mean that the developer prospectively incorporated such legislation. The *Kaufman* decision, however, has yet to be clearly affirmed by the Florida Supreme Court. Moreover, *Kaufman* only provides a partial remedy, for the case is only relevant where a developer or his attorney made the error of using the "magic" language referring to "the Florida Condominium Act as amended from time to time." In most condominium cases, such error was (unfortunately) not made by the developer's lawyer.

Attempts Made to Reform Leases

As demonstrated above, the attorney general has initiated successive attempts to invalidate or reform the unfair recreational land leases in this State. There is

no way of safely predicting the eventual outcome of these efforts, but it can be stated unequivocally that there is no present indication that this office will be able to obtain the desired decisions for many years, if at all. Even aside from the numerous retroactivity problems noted above, the attorney general's efforts to assist condominium unit owners is often frustrated by jurisdictional, standing, and capacity challenges which the parens patrae doctrine only partially answers.

Thus the problem for tens of thousands of elderly condominium residents who cannot reasonably afford private counsel and lengthy litigation can only become more grave. It is self-evident, as a matter of mathematics, that the rent escalation "bubble" must eventually burst, for there is no way that our elderly citizens, living largely on limited social security, pensions, or other such income, can pay rent and assume maintenance costs which escalate so frequently that they essentially double every 4 to 5 years. To take an example from a recent case I initiated (which has since been settled), original annual recreational lease rent which was $21,000 (or $200 per unit) when the 100 unit owners purchased their units in 1972, had, by 1974, jumped to over $26,000; by 1976, the rent had jumped to $34,000, and by 1978, the rent had been "adjusted" upwards to approximately $40,000. In addition, the maintenance costs for these 100 unit owners had a commensurate increase from $24,000 to $40,000. Thus, in this typical development, the total income to the developer for rent and maintenance of the recreational facilities was from 1972 through 1978 approximately one third of a million dollars. This despite the fact that the original cost of the facilities was approximately $50,000 and the 1978 value did not exceed $80,000. Thus the developer obtained over 600 percent profit in the first 6 years of a 99-year lease. Projecting such costs into the future, and assuming only a 6.5 percent inflation rate, we can see that by the early part of the next century, each unit owner (or their heirs or assignees) will be required to pay tens of thousands of dollars per year in rent and maintenance fees. Despite the fact that the facilities leased are only a swimming pool and shuffleboard court, the developer can reasonably expect to be making over $1 million per year in rent, within 40 years. In the aggregate, such yearly rentals will amount to tens of millions of dollars over the 99-year term of the lease, for a single small condominium.

It is obvious that such rental obligations are an impossible economic burden for the individual condominium dwellers, even aside from the severe social and inflationary pressures which such schemes promote. Unconscionability theory, or theories based on corporate self-dealings and breach of fiduciary duties, offer only a prospective and partial solution to this economic disaster, for such theories can only be used after extensive litigation by each and every condominium unit owner in the State. For the poorer of the State's elderly condominium dwellers, such litigation is so lengthy and costly as to be no solution at all. And as has already been noted, the Florida Legislature is evidently incapable of providing a remedy, because of the constitutional prohibition against retroactive impairment of contracts by the State. For that reason, a Federal solution is imperative. I would therefore respectfully urge this committee to support the proposed Federal legislation to prohibit the further enforcement of escalation clauses in recreational and land leases, whenever such leases were executed.

Senator CHILES. Thank you very much.

Next is Mr. R. Jeff Andrews, chief, Bureau of Condominiums, Tallahassee.

STATEMENT OF R. JEFF ANDREWS, TALLAHASSEE, FLA., CHIEF, BUREAU OF CONDOMINIUMS, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS

Mr. ANDREWS. Thank you, Senator Chiles. I also will briefly touch on some of the items that I have covered in my written testimony which is of record here.

Senator CHILES. Again, your statement in full will be included in the record.[1]

[1] See p. 109.

Mr. ANDREWS. I am going to deal basically with 2 of 10 areas that I had designated as problems that we are currently having in Florida. One of those areas has been very thoroughly covered already which is the recreation lease problem. The two areas that I would like to deal with that I think we need to look at on the State level and also on the Federal level are those areas of complexity of documents and the area of problems of community living.

It has been the experience of the division that the problems of community living are very numerous and very difficult, and we are of the opinion that the problems of community living come mostly from a lack of information, education, knowledge, and the kind of material that the purchaser or prospective purchaser has not been privy to and is not getting before he moves into the condominium. As you know, the condominium way of life and the condominium concept is relatively new in the United States, and we have had only a few short years of dealing with it in Florida. We have a lot of people who are choosing this style of living who are not familiar with high density living, the proximity and closeness of neighbors, the democratic rule concept, and the whole concept of condominium living. It is very difficult sometimes for people to accept this way of life.

CONDOMINIUM PUBLICATIONS AND SEMINARS

On the State level we are trying to deal with this through various approaches, publication being one, and seminars another. Hopefully we will eventually get more courses offered in the universities and the colleges in the State to better inform people as to exactly what condominium living is and what they have to deal with as a condominium unit owner.

The other problem which I will briefly touch on is the problem of complexity of documents. As you know, the documents that a prospective purchaser has to go through to buy a condominium are voluminous, verbose, and difficult to understand. They are mostly in legalese, it is very hard for the average person to realize exactly what he is getting into and even if he reads it and thinks he understands it, oftentimes there are clauses or provisions that tie him into unknown obligations, for example, recreation leases.

A new scheme that we now see surfacing is the mandatory social club, where a person buying into a condominium is required to join a social club which has a monthly fee, a recreation clause, and is not prohibited by the provisions passed by the Florida Legislature in 1975. Thus, we have a new scheme developing that we are going to have to deal with and we will probably have to address it through additional legislation.

The complexity of documents is such that even—and I think you heard it in some of the earlier testimony—persons having legal counsel oftentimes do not realize what they are getting into. Part of that problem, of course, is that some of the attorneys dealing with condominiums are not familiar with condominium documents, and it is difficult for them to understand the complexities involved in the documents.

I brought what I think is a good example of a set of condominium documents. I brought it to show what the purchaser is facing when

he buys a unit. This set of documents, as I say, is what I think is a good set—it is well laid out, it is well indexed, it has a glossary, it has an overall index to all the sections and the various parts of the documents. The complexities include such things as a declaration, articles and bylaws, easements, and other complicated items. A purchaser's ability to deal with this is practically impossible, and unless he has an attorney who has done condominium work previously, he is not going to get much help with these documents.

Standardization of Materials Needed

I am not sure what can be done to simplify documents. Florida, as you know, has passed a rather far-reaching disclosure law and I think it has helped, but there still is the problem with the sheer volume of materials that the purchaser has to go through. We are making some approaches to the title companies to see if there is some way we could standardize some of the documents, such as the declaration and others of the more complex items. I think some States may possibly—New Jersey, for example—have the title insurance companies insure the legality of title which is not done in Florida.

These two sections are very important to the division. The approach to dealing with these problems is to attempt to work with the association groups and the other interest groups around the State to accumulate and disseminate as much information as we can about living with and resolving problems in a condominium.

The Federal Government could be of great assistance to the States in this particular area by lending the State the expertise of the Federal agencies concerning the condominium lifestyle and its application to everyday living. It could also fund various informational-type projects such as seminars, educational courses, and encourage through the use of Federal funding the establishment of condominium courses in the universities in the State, special projects for creation of simple pamphlets on condominium living and also to distribute educational-type materials.

If the condominium concept is to work, we are going to have to make more of an effort to provide support to the concept. The Federal Government must make a fairly substantial commitment monetarily to resolve some of the problems and to disseminate information to persons choosing the condominium way of life. Those persons will then be able to purchase a condominium with their eyes open and with an understanding of what they are getting into and an understanding of some of the problems of condominium living.

[The prepared statement of Mr. Andrews follows:]

Prepared Statement of R. Jeff Andrews

In the early seventies the Department of Housing and Urban Development (HUD) commissioned a study on condominium and cooperative living which was produced in finalized form in 1975. In that study it was found that approximately 4 million Americans then lived in condominiums. In the last 3 years there has been a tremendous increase in condominium living and in Florida the condominium concept has spawned a mini-economic boom in condominium units. In 1975, three States—Florida, California, and New York—contained approximately 50 percent of the entire condominium and cooperative housing inventory in the United States. During the past 3 years Florida has not relinquished its share of

the condominium and cooperative market and has increased the total number of units constructed in the State by approximately 30 percent. The total number of condominiums and cooperatives now existing in the State are estimated to be greater than 12,000. As a leading condominium and cooperative State, Florida has approximately 25 percent of the total number of cooperative and condominium units in the Nation.

There are many positive aspects to condominium living that make the purchase of a unit attractive to the older resident moving to Florida for retirement purposes. However, the thrust of this hearing is to determine what the problems are and what might be done to resolve some of those problems. In the last 3 years we should have learned how to prevent the problems that were plaguing condominium and cooperative purchasers in 1975. Unfortunately, the 10 most significant problems for consumers of condominium and cooperative housing that were identified by the HUD study continue to be areas of significant concern to condominium purchasers today. These problems apply equally to all purchasers and especially to the older purchaser. A discussion of the problems as they apply to Florida follows:

(1) *The long-term recreation lease.*—This problem is still with us, although decreasing in total numbers. Florida law now prohibits the use of a recreation lease with a Consumer Price Index escalation provision included. The older leases containing these provisions are being bought out by the associations and settled in other ways by the parties involved. Of the filings stored in the Division of Florida Land Sales and Condominiums file room, approximately 5 percent have recreation leases.

That is not, however, a valid percentage for all condominiums in the State. The older condominiums (pre-1975) were not required to file if sold out, and are therefore not of record with the Division of Florida Land Sales and Condominiums.

The division has requested and has received from the Board of Regents a small amount of money to study the recreation lease problem to determine if there is a formula that can be established for buy-outs and to establish a pattern of negotiation for the buy-out of the recreation lease. Two professors from Florida State University are currently working on this project and will have a completed study by the summer of 1979. The outcome of that study will provide a negotiation buy-out model for use by other associations encountering the same difficulties with the recreation lease.

(2) *Low quality construction.*—This is a problem that seems to creep into the condominium and cooperative housing field when economic times are good and units are selling rapidly. Strong remedial, consumer oriented, legislation is probably the most equitable way to deal with warranty questions on a State level. Florida has addressed the problem by codifying common law warranty provisions through statutory construction.

(3) *Complexity of documents.*—The documents now being provided the purchaser are technical, lengthy, verbose, difficult to understand, and in general beyond the comprehension of an average purchaser. Florida has attempted to simplify the document problem by requiring that a prospectus be provided the purchaser which summarizes the content of the documents. However, the prospectus, as a part of the whole package of documents presented to the purchaser, is often so overwhelming to the purchaser that he does not make the necessary effort to determine what he is purchasing. Additionally, Florida has placed the right of remedy on the purchaser by statutorily providing for civil remedy by the individual. A claim may be brought against the developer for false and misleading information if the improvements do not contain all of the amenities or the promised state of completion of the unit has not been achieved at time of closing on the unit. Simplification of the documents as agreed to by the legal community, the lending institutions, and the consumer, and aggressive legal assistance by the State agency empowered with enforcement of the act, are the most effective ways to deal with this particular problem. The division is actively seeking effective alternatives for simplification and standardization of documents. Initial contacts have been made with the lending and title insurance industries for assistance in this matter.

(4) *Displaced tenants in conversions.*—Some States have taken the approach that displaced tenants must be provided with suitable comparative housing and that the tenants cannot be required to move if they are a certain age or have been a tenant for a certain period of time. Florida has taken the approach that

a person cannot be moved out of his apartment at time of conversion until his lease expires if greater than 120 days or following a 120 day period if less than 120 days. The elderly and lower income families are the ones that suffer the most from displacement by conversion of existing units. There are two answers to this problem: A prohibition against displacement of elderly persons; and construction of low-cost housing for the elderly and low-income families.

(5) *Association operating problems.*—This particular problem is a grave one and necessitates a massive educational program by the States and the Federal Government to inform prospective purchasers and unit owners of the techniques and difficulties of properly operating an association. Often board members and officers are inexperienced and have not dealt with the management and operation of a large corporation such as an association. Frequently, older Americans do not wish to assume responsibilities commensurate with those of the officers and directors of an association. Informational pamphlets, educational seminars, public interest film strips, and similar materials are needed to inform prospective purchasers of the condominium concept and lifestyle. The purchaser that deals from the strength of knowledge will be the unit owner that can positively contribute to the condominium way of life.

The approach of the division to this problem is to reorient the direction of the division toward educational and informational type programs to attempt to assist the associations in bringing its members into active participation of the running of the condominium or cooperative association. The division is not equipped to provide the materials and programs needed to inform prospective purchasers.

(6) *Problems of community living.*—This is probably the most difficult area to deal with of all of the areas listed in the HUD study. There are innumerable difficulties in adjusting to the condominium way of life. They include lack of familiarity with high-density living, multifamily ownership, lack of accurate information on what is purchased, and the rights and responsibilities that accompany that purchase.

The unit owner who has been a tenant expects someone to be available to resolve the problems confronting him, as was the case in the rental situation. The association becomes the surrogate landlord in a complex made up of erstwhile tenants. Therefore, the association must resolve problems. As the association is made up of unit owners and is ultimately controlled by them, each owner must contribute to the resolution of condominium problems.

Often the exhomeowner may have unrealistic expectations about condominium ownership. He may believe that, as he has bought and paid for his property, he may do as he wishes with it. Association rules can limit his activities regarding his unit. It is essential to the purchaser to learn those limits before buying and to understand that majority decisions prevail and that the condominium operates according to its rules and regulations.

The greatest problems confronting the division are problems dealing with unit owner difficulties and community living. The emphasis of the division in the coming year will be to deal with those problems through the associations and other groups who are constantly in contact with the condominium community. The division is undertaking projects on several fronts to develop educational pamphlets, to put together informational seminars and to encourage the publication of materials dealing with condominium living and the condominium concept. As previously noted, division efforts are aimed mostly at unit owners and do not directly affect prospective purchasers. The Federal Government could greatly assist the States by providing expertise and funding for the publication, dissemination, and institutionalization of the condominium concept.

(7) *Misuse of consumer deposits.*—This is an area which has always been a problem to condominium developers and to purchasers alike. Often the developer does not intentionally misuse the deposits but finds that economic problems and lack of proper planning for the development of the project have caught up with him and have caused him to misuse funds that were to be deposited and kept separately as a safeguard to the purchaser's money. In Florida, we have addressed this problem by requiring that 10 percent of the deposit moneys be placed in escrow to be utilized only as a refund to the purchaser or as payment on the contract at time of closing. Ten percent is not adequate for completion of a building and the deposit amount will have to be greater if it is to provide an assurance to the purchaser that he will receive the product as contracted for. Contrarily, a larger deposit amount would be harmful to the small developer and

would inhibit his construction activities. Nevertheless, it is very important to the purchaser that he understand that deposit moneys can be used in different ways depending upon the applicable State enabling act.

(8) *Nonpayment of association dues by the developer.*—This is the one problem of the 10 that is practically nonexistent in Florida. The Condominium Act requires the developer to pay his proportionate share of all units being offered for sale.

(9) *Warranties and engineering reports.*—These problems have been inadequately dealt with in many cases and are controversial legal problems as indicated by the large volume of litigation concerning warranties. A purchaser should evaluate carefully any warranty provisions being provided at time of purchase and should attempt to clarify any language that is vague or unclear in his contract or other documents.

The warranty section in Florida's Condominium Act does not clearly detail the warranties available to the purchaser under the act. Statutory warranties should be detailed clearly and simply, outlining specifically the protections and remedies available to the purchaser.

The most important area in which warranties and engineering reports are necessarily required is in the area of conversion of existing units. In the conversion situation the purchaser is buying an older unit and should be aware of the possible defects and problems that might arise when one purchases a unit in an older building. Florida's law is inadequate and only requires that disclosure be made of the defects, not that they be corrected. It is also inadequate in that the warranty provisions of the act do not apply to the conversion unless the building is less than 3 years old. Effectively that means conversions in practically all cases are not covered by the warranty provisions of the statute. Additional protection for the purchaser under the existing State statute is needed and should provide for absolute warranty periods for the purchaser when buying into a conversion situation.

(10) *Underestimating operating expenses ("low-balling").*—This particular problem is again one of considerable consequence to a purchaser of a condominium or cooperative unit. The solution to the problem presented herein is to require a reserve fund to be established by the developer to cover any misrepresentations as to budget amounts in the first year of operation by the association.

Florida has attempted to resolve this problem by requiring total disclosure of all budget items and, if managed by a management company, a specific breakdown as to the cost, number of employees, and time spent in the services being provided by the management company. As of this date that approach has not been totally effective and problems of low-balling are still apparent in some condominium developments.

Even if "low-balling" is not evident, older Americans on fixed incomes find that the spiraling costs of the association budget due to inflationary factors are devastating. Inflation accentuates the effects of "low-balling" causing the fixed income individual to pay a greater percentage of his income for nonessential items of operation and management of the association.

STATE AND FEDERAL COOPERATION

What, then, is Florida attempting to do about these problems and how can the Federal Government assist Florida in dealing with the problems confronting the condominium industry? The Division of Florida Land Sales and Condominiums has launched an offensive which changes the main thrust and emphasis of the division to that of education and information dissemination rather than caretaker and enforcer of provisions of the act. The basic method of operation of the division will be to deal with the umbrella association groups in providing educational materials to those groups and in assisting them with educational seminars and similar informational presentations for use by the association. Additionally, various condominium interest groups will be called upon to provide assistance in conducting the seminars and producing the materials needed for the educational efforts made by the division. Those groups will include the umbrella Association groups, the Florida Bar Association, the Condominium Advisory Board, the Community Associations Institute, the Building Managers International, and other groups interested in making the condominium concept succeed in the State of Florida. The staff of the division will be greatly involved in dealing directly with unit owner problems and complaints in attempting to answer the numerous inquiries that come into the division on a daily basis.

The Federal Government can assist by providing additional informational items and technical assistance to the division in its efforts to carry out a comprehensive program of information and education dissemination concerning condominium living. Funding will be of utmost importance to the States in attempting to deal with the innumerable problems confronting the condominium community and regulators, such as the division. There is a great need for simplified pamphlets concerning condominiums and cooperatives which can be read and understood by the average purchaser contracting to buy a unit in today's market. The scarcity of good statistical data available to the division is frightening when its thought that approximately 10 percent of the State's population currently lives in condominiums and cooperatives. The Federal Government could be of great assistance in providing staff and funding to bring together valid, reliable, statistical data for use by the division and the condominium industry.

Adequate funding and expertise would provide the necessary ingredients for successfully producing a large scale educational effort that would make all Americans and especially the older Americans aware of the condominium concept and condominium living. Outreach in the form of pamphlets, leaflets, films, college and university courses, and other methods of instruction could be undertaken with the necessary support from the Federal Government. A properly informed condominium unit owner is the key to the successful operation of a condominium and the successful application of the condominium concept as an alternative means of meeting housing needs.

There is not a need for additional regulation by the Federal Government. Another layer of bureaucracy for filing purposes or other reasons is not helpful to the industry. Close cooperation with the State and assistance as needed by the State is what the Federal Government can best offer to the State.

Living in a condominium can be and should be a positive and enjoyable experience. The benefits of shared expenses, recreational facilities, and planned community living are worthy of consideration when purchasing a home. Older Americans can benefit from the condominium way of life is properly informed and protected. The charge to the division and the mandate to the Federal Government is that condominiums be made a part of American life. Through cooperation, coordination, and a commitment to the condominium concept it can be made an essential part of the housing industry

Senator CHILES. Thank you, sir.

Gary, you have had some experience in being a member of the task force that helped to draw this legislation. We are delighted to hear from you.

STATEMENT OF GARY A. POLIAKOFF, OF BECKER, POLIAKOFF & SACHS, P.A., MIAMI BEACH, FLA.

Mr. POLIAKOFF. Thank you, Senator.

I am Gary A. Poliakoff from the firm of Becker, Poliakoff & Sachs. I did participate in the interagency task force in drafting proposed Federal legislation and also conferred on a regular basis with Mr. Pettigrew in his briefings to the White House on the proposed legislation.

I have prepared some 21 pages of testimony and obviously time will not permit me to give it all now, but I would like to highlight some of the major areas, particularly those that cover this matter.

Senator CHILES. The statement will be included in full in the record.[1]

Mr. POLIAKOFF. Thank you.

It has been estimated that in excess of 1 million Floridians reside in condominiums. A substantial percentage of those individuals are senior citizens over the age of 65 who came to Florida seeking carefree

[1] See p. 121.

living in their retirement years. In a number of instances their dreams have been shattered, life's earnings lost, and health impaired by condominium related abuses. In some cases the problems have been caused by the purchasers themselves. In other cases the problems were created by a few unscrupulous individuals, marginal developers, and investors looking for a quick profit. Most of the problems, however, relate directly to the inexperiences of a rampaging industry which grew too fast to enable it to accumulate a history of experiences and solutions which would have provided readily available answers to the problems associated with the operation and maintenance of commonly owned property.

My testimony will focus on the areas of condominium most likely to have a direct effect on the older purchaser. The remarks are based upon 6 years of firsthand experience working with over 100,000 condominium owners in solving the day-to-day problems of community living.

MAINTENANCE OF PROPERTY NO. 1 PROBLEM

To me the No. 1 problem facing the condominium owner is maintaining the commonly owned property, in light of escalation and inflation factors. In fact, as we all read in the newspaper today, since 1967 we have now increased exactly 200 percent in those 11 years and we are paying double today what we were in 1967.

The problem of inflation is not limited to condominium owners. Every segment of the population has had to make adjustments and sacrifices to meet the spiraling costs of living. To the fixed income or retired condominium dweller, however, the gravamen of the problem is accentuated by situations unique to commonly owned and maintained property.

In my opinion, there are eight factors that contribute outside of the normal cost escalation factors to the increasing costs in condominiums, and those are: Lowballing and misrepresentation as to cost of common expenses; misuse of startup funds or capital accounts; construction deficiencies; cost of maintenance of commonly used facilities during construction of phase developments; misapplication of association funds; mismanagement; cost-of-living clauses in compulsory recreational leases and long-term management agreements; and failure to provide adequate reserves for contingencies and long-range maintenance.

I would like to highlight several of these areas.

Lowballing and misrepresentations as to cost of common expenses is a situation wherein, during the developer process, the projected budgets are underestimated, understated and, as a result, the buyer buys anticipating paying so much, and in reality his costs will be substantially higher.

Misuse of startup funds is a process wherein condominium owners are required to contribute a certain amount to the developer and we have found these funds are exhausted by the developer under the control of the association.

Senator CHILES. Gary, what kind of provision does Florida law make now to try to protect against lowballing? Is there anything covered in the act?

Mr. POLIAKOFF. The Florida statutes do require the issuance of a projected operating budget. The Florida statutes do not have the type of provisions in them which I would recommend and have in my conclusion, those which are now used in the State of California. California requires that the projected budget be submitted to the committee and the board reviews the budget in terms of realistic costs of operation. If they find the budget is not realistic, they make the developer revise the budget. Flordia does not require that.

CONSTRUCTION DEFICIENCIES: UNEXPECTED COSTS

The third area relates to the construction deficiencies. With the sole exception of escalation clauses in compulsory leases, the area of abuse which most frequently results in unexpected costs to the condominium owners is that which relates to construction deficiencies. The magnitude of the problem is such that a congressional investigation is warranted in this area alone. In my opinion, the contributing factors which interplay to create market conditions conducive to allowing poor construction practices are the following:

First, real estate investment trusts. You might ask how does the problem of real estate investment trusts tie in directly with the problems of construction defects? The answer is simple. In the rush to loan out as much as possible as rapidly as possible, unqualified builders, with little or no prior experience in the development of multifamily housing, were given the green light to build substandard housing. A thorough investigation of the situation would reveal hundreds of stories of builders borrowing over 110 percent of the cost of construction, pocketing hundreds of thousands of dollars and then abandoning the projects. The counsel for one REIT related the story of a builder who, rejected by a savings and loan, went to a REIT which granted the loan. The REIT then borrowed the money from the same savings and loan which had previously rejected the builder.

Second, failure of municipal inspections. Consumers, often inexperienced in the technical language of building codes, must rely upon the municipal building inspectors for assurance that their home or condominium is built in accordance with all safety requirements. The issuance of a certificate of occupancy is too often looked upon by the consumer as a stamp of approval indicating that the building has in fact met all code requirements and has been constructed in accordance with approved plans and specifications. In reality nothing could be further from the truth. The following excerpts are from the report of the grand jury of Dade County issued on May 1, 1976. The entire report is included in my written statement. Let me read just one paragraph.

> The grand jury heard testimony concerning building inspection practices in Dade County and the city of Miami. One former inspector told us that inspection practices of the last several years have resulted in the construction of buildings which could be blown away in another "1926 hurricane." The evidence we heard support this statement.

Third, lack of building materials.

Fourth, absence of qualified workers.

Fifth, disregard of code requirements by both developers and design professionals. Developers, architects, and engineers are either ignorant of the construction codes or more cost conscious than they are concerned for the safety of the inhabitants and the utilitarian use and maintenance of the structure.

Maintenance Cost Should Be Emphasized

This is extremely important. Developers and architects should place greater emphasis on construction of buildings in a fashion which would assure lower maintenance cost for condominium owners.

During testimony at a recent trial on construction defects at the Bay Colony Club condominium, Charles W. Griffin, a noted expert in the field of roofing, when asked who installs the type of roofs most frequently found on south Florida condominiums, replied, "It's speculator and others who don't have to live with the consequences of their roofs."

It is not uncommon, Senator, for associations to have to assess their members tens of thousands of dollars to replace or repair construction defects. Implied warranties created by statute are of little assistance to the condominium owner since no bonding requirement exists and most developers are shell corporations without assets created solely for the purpose of developing a particular building or project, and when the project is completed they are gone.

The fourth area, the inflationary factor, was that of the cost of maintenance of commonly used facilities during construction of phase development. As a means of promoting large planned communities, developers often constructed elaborate recreational and commonly used facilities prior to the completion of the condominiums which would ultimately support said facilities. When the recession came they stopped construction. As a result, condominium owners found themselves trying to support the cost of communities planned to operate 3,000 or 4,000 units, with 400 or 500 families paying the full cost.

The fifth area is the misapplication of association funds. During the developer period we most frequently find the misuse of association personnel to repair buildings or help with the problems of the sales personnel or the association being charged with the cost of phase development tying into the existing building site. We have actual photographs which would document this statement. After transition, the most frequent problem in misapplication would relate to improper salaries paid to officers and directors and embezzlement of association funds by officers and/or agents. Interestingly enough, the Florida Legislature now requires the bonding of officers or directors controlling the association funds. Those areas of embezzlement that I have been familiar with this year are by managing agents who are not covered by the bonding provisions.

The sixth area, mismanagement. As in any business, mismanagement is a major cause of cost escalation. Unlike the traditional corporate operation wherein mismanagement may ultimately lead to business failure, in condominium the costs of mismanagement is merely passed on to unsuspecting unit owners in the form of higher

maintenance costs. Mismanagement is not necessarily an intentional act. In fact, in most instances it is caused by well-meaning individuals who, out of negligence, ignorance, or outright stubbornness, refuse to admit their limitations when it comes to operating a multimillion-dollar condominium community. The cause of mismanagement may vary depending upon whether an association is developer or owner controlled.

Mismanagement Results From Preoccupation

During the period of developer control we generally find that mismanagement results because of the developer's preoccupation with the development and sales program and not able to devote the time necessary to the successful operation of the community.

We also have unit owner control mismanagement. Leary of professional management, having associated their bad experience during the period of developer control with same, unit owners too often undertake the responsibility of association operations without the benefit or guidance of qualified professionals. Notwithstanding their dedication and good intentions, lay persons whose previous experiences were in the areas of retailing, secretarial, medical, et cetera, cannot be expected to possess the tools necessary to make the decisions necessary to properly operate these multimillion-dollar communities and yet, throughout the United States, inexperienced lay boards and condominium owners on a daily basis make decisions affecting the lives of millions of individuals and billions of dollars in real estate. Unit owners should take an active role in the day-to-day affairs of the association and in the policymaking decisions, but they should act with competent professional guidance.

The problem is further accentuated by the absence of an adequate number of qualified professional managers and independent management companies. This situation was created in part by the use during the early stages of condominium development of management contracts which tied into the development long-term developer management agreements and eliminated the competition in the field. As we began to eliminate these, there were more and more management companies coming into being.

You have heard a lot said about the compulsory recreational leases and their clauses, and I would like to address myself to it from a different aspect—from the viewpoint of the advocates. These leases have been referred to by the author of Florida's 1963 Condominium Act as "perversions" of the act. Although consumer awareness in recent years and efforts by State, Federal, and local agencies have significantly reduced the marketability of leases in new developments, a substantial number of Floridians, particularly senior citizens living in pre-1975 condominiums, are still tied to said leases.

There was a recent article that was published in the Miami Review. The article was, "The Other Side of the Recreational Lease Story." The author was Mr. Bergman. Mr. Bergman is known to those in attendance at this hearing since he was one of the principals involved in the Century Village complex. What he stated was to build a condominium

with recreational facilities requires costing of common areas by one of two generally accepted methods: Dividing that cost by the total number of apartments in a community and then equitably apportioning the cost by adding it to the base price of the units; and prorating the cost of the facilities, their maintenance and supervision, over the expected longevity of the community, and offering the option of a monthly payment without increasing the base unit price. He then contended that the recreational lease offers buyers a method of payment without increasing the basic unit costs. For that reason, the lease provided supportable condominium housing with recreational facilities to buyers who would otherwise not be able to afford them.

Buyers Not Given Choice

I do not agree with Mr. Bergman's position. The facts do not substantiate his statement. In the first instance, buyers were not traditionally given the choice between paying their pro rata share of the facilities cost or electing financing through the vehicle of a recreational lease. Their choice was simple, either purchase with a compulsory lease or buy elsewhere. In fact, Florida statutes prior to 1971 did not require any disclosures as to the existence of the leases and few, if any, purchasers were even aware of their existence.

Furthermore, even if we placed some credence on the proposition that the owners should pay a pro rata share of the cost of the amenities, an individual's pro rata share financed at traditional lending rates would not approach that amount paid under the leasing arrangement. In truth, the standard escalation clause found in the long-term leases used in Florida condominiums acts similar to a mathematical progression. As an illustration, the recreational facilities of one Broward condominium built at a cost of $200,000 returned $300,000 the first year and, based upon an annual cost-of-living increase of 5 percent, will return over $700 million over the term of the lease.

Advocates of leases would have one believe that the predominance of condominiums offering long-term leases provide their owners with extensive recreational facilities. This is very important, Senator. Nothing could be further from the truth. The average recreational facility is not even that similar to one you might find at Century Village or King's Point. The average recreational facility contains little more than a swimming pool, a card room, and a sauna. Instances exist where the recreational lease consists of no more than an easement right across a strip of land providing access to public beaches.

Equally fallacious is the developer's contention that he can provide housing at lower prices by selling the units at his cost and returning his profit over a long period from the recreational lease. The facts indicate that the base price of condominium units with recreational leases do not materially differ from similar units sold at condominiums without leases. Furthermore, a significant number of leases were sold by the developers—we have heard testimony to that effect—within a short period of the developer's completion of the project. This is important because if the developer contends he expects a return on his property over a long period of time, why didn't he break that cost

among the unit owners? They would have been happy to have paid it as part of the initial purchase price.

Adequate Reserves Need To Be Maintained

The final area I mention on the escalation factors is that dealing with the failure to maintain adequate reserves for contingencies and long-range maintenance. This is one of the areas I indicated, I believe, is partly the responsibility of the condominium owners themselves.

A popular board member is one who can state at the end of his term: "We are pleased to advise that maintenance costs for next year will remain at the same level as they have for the past 2 years." Then a new board takes office and discovers that $100,000 is needed to paint the buildings and there are no funds in reserve. Suddenly the owner is assessed $200 to $1,000. I have seen it. Of course they are not in a position to come up with that type of money, but had they planned over a period of time we might not have had the situation. They must maintain reserve accounts in order to eliminate the necessity for special assessments necessary to liquidate prior year's deficits and to meet contingencies.

Evidence of the problem is beginning to manifest itself in the increasing number of foreclosures being filed. In fact, this past year we happened to see the first instances of abandonment of condominiums by owners no longer able to meet the escalating cost of maintenance. In my testimony, which I won't get into, I made several recommendations for resolving the problem and solutions.

It does not really affect the majority of the owners here in the chambers today but I do just want to make one or two comments about what I call coerced ownership—the conversion from rental to condominium—because it is a serious problem.

The tenant purchaser, even under the most favorable of conditions, is still a coerced buyer. For unlike the individual who sought out condominium ownership, the tenant given the choice between ownership and renting had already elected to rent. Then suddenly, often without prior warning, the tenant receives notification that the building is being converted to a condominium. The typical "buy or get out" letter advises the tenant that if he fails to purchase his unit within a given period of time, usually 30 days, his apartment will be sold to one of the hundreds of outside buyers who allegedly have already placed a deposit for available units.

The pressure placed on elderly tenants by the conversion process can be devastating. On occasion anxieties develop. Instances of emotional illness, strokes, and heart attacks have been allegedly caused by the pressures of conversion. To understand the reason, one need only examine the characteristics of the tenants and setting in which conversions often take place. To the elderly tenant who has resided in the same apartment for a number of years, the building and its occupants become the home and family. The familiar neighborhood surroundings and long-term friends and acquaintances provide a feeling of security. To disrupt this setting is to create a major crisis. Thus, the decision whether to purchase or move is not solely an economic one, it is often based upon emotional considerations which distort logic.

SERVICES AND MAINTENANCE PROBLEMS

The problem includes the question of continuing services for those who do not elect to buy and the problems of building maintenance because most conversions do not have any implied warranties as to the conditions of the building, a very serious problem. We find that in older buildings being converted, although the purchaser may think he is paying lower costs, they are in fact higher, because in many instances the entire building system must be replaced after the conversion takes place.

In March 1975, I had the opportunity to testify before the Condominium Task Force of the Department of Housing and Urban Development and at that time I noted, and I quote:

> Any thorough investigation into abuses and/or potential problem areas in the condominium field must evaluate what is today becoming one of the most serious problems—the operations and management of condominium complexes by unit owner controlled boards.
>
> Each day, as more developers relinquish control of condominium associations to the unit owners, a new dilemma is created. Suddenly, lay persons who had previously equated their obligations as condominium owners to that of remitting monthly maintenance payments find themselves responsible for the operation of multimillion-dollar complexes.

Many of the problems of condominium operation stem directly from a lack of understanding of the condominium concept by various coowners and/or an intentional disregard for it. The Florida Fourth District Court of Appeals said it best in dicta in a recent case enforcing the covenants of a condominium:

> Every man may justly consider his home his castle, and himself the king thereof; nevertheless, his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others.

Condominium ownership is not for everyone. The entertainer who feels compelled to rehearse at all hours of the day and night or the socialite who enjoys entertaining 20 guests around the pool on Sunday should each seek housing alternatives other than condominium.

For the older condominium owner, disenchantment with the condominium concept is most likely to result from one of the following areas, and excluded from this discussion are potential problem areas I have already noted.

Senator CHILES. We are running out of time.

Mr. POLIAKOFF. I will just highlight.

One of the main areas is the absence of anticipated services. You have heard some reference to that in some other testimony. They expected buses; they expected amenities.

Another area is children and pets. If you want to start an argument in a condominium, it's not politics or religion you have to be concerned with, it's children and pets. Between them, no single issue is more controversial than is age restrictions. On the one hand the elderly see it as a form of discrimination when applied against them in the job market. On the other, it is a totally permissible means of maintaining a community of congenial residents.

Another area is conflicts in association operation. Association operation is what I refer to as the consumption of condominium leaders. There is a problem in getting individuals to volunteer to serve on boards of directors because of the pressures that are incidental to the community and the abuses that are perpetrated sometimes by the condominium owners themselves.

Let me say in summary that there are measures that could be taken to curb a substantial number of these abuses.

Thank you.

[The prepared statement of Mr. Poliakoff follows:]

PREPARED STATEMENT OF GARY A. POLIAKOFF*

With the advent of the Federal Housing Act of 1961, which provided for the extension of the Federal Housing Administration insurance to condominium projects, "condominium" became a viable form of real property ownership. The almost instantaneous acceptance of the condominium concept by homeowners and the building industry has led to a growth rate unparalleled in the history of housing. The United States Department of Housing and Urban Development projects that nearly 50% of all new housing starts in the 1980's will be condominiums. This phenomenal rate of growth has been attributed to several factors, including the following stated in the "HUD Condominium/Cooperative Study".[1]

"Condominiums offer renters a product which combines some of the best characteristics of a rental project with some of the preferred ownership qualities of traditional single-family housing (e.g., tax incentives).

"Condominiums can provide traditional single-family homeowners the convenience and ease-of-maintenance characteristics of a rental product without foregoing tax benefits or the chance for equity appreciation.

"The rate of new household formations has increased in recent years while the average household size has declined. As a result, the demand for housing has increased while preference for space has declined, thus increasing the attractiveness of condominiums.

"Due to many factors, including rapidly rising land values, the cost of housing has increased at a higher rate than the cost of other products. This trend increased the demand for ownership as compared to renting by increasing the expectations for property appreciation.

"Condominium units can be sold for a lower purchase price than single-family homes.

"Sharply increased property taxes in most metropolitan areas have reinforced the effect of rising land values, and have increased the relative cost of larger homes.

"The increased total household income of many young couples (particularly professionals) has increased their preference for ownership. This increased household income is partially due to a higher female participation in the labor force, which also increases the household's preference for accessibility to both places of work.

The HUD study concluded that while many purchasers find benefits in condominiums, the major consumers have been:

"Retirement-age people with moderate or over-average wealth who would like to live in a warm climate.

"Persons under 65 who wish to move to a smaller, more convenient residence (frequently because their children have left home). Their preference for condominiums will be greater where a capital gain was realized on a previous home.

"New or young households with above-average income who do not expect to have children for at least several years. This group favors condominiums because they combine convenience with equity and tax benefits. In addition, core

* See appendix 1, item 1, p. 157 for additional material submitted by Mr. Poliakoff.

[1] Under mandate issued by the Congress of the United States, the Department of Housing and Urban Development (HUD) conducted a study on condominium and cooperative housing. On August 25, 1975 HUD published its conclusions in a three volume report.

area condominiums might be preferred by this group due to their accessibility to place of work and to other urban activities preferred by young couples.

"Middle-aged households with above-average income and/or wealth without children who would like (a) to move out of rental units in order to build up equity (or who hope for property value appreciation) while retaining the conveniences of rental units, or (b) to move out of single-family housing in order to enjoy the conveniences of condominiums and/or their accessibility features.

"High income and/or high-accumulated-wealth households with or without children seeking a second home in a resort area."

It has been estimated that in excess of one million Floridians reside in condominiums. A substantial percentage of those individuals are senior citizens over the age of 65 who came to Florida seeking carefree living in their retirement years. In a number of instances their dreams have been shattered, life's earnings lost and health impaired by condominium related abuses. In some cases the problems have been caused by the purchasers themselves. In other cases the problems were created by a few unscrupulous individuals, marginal developers and investors looking for a quick profit. Most of the problems, however, relate directly to the inexperiences of a rampaging industry which grew too fast to enable it to accumulate a history of experience and solutions which would have provided readily available answers to the problems associated with the operation and maintenance of commonly owned property.[2]

My testimony will focus on the areas of condominium most likely to have a direct affect on the older purchaser. The remarks are based upon six years of first-hand experience working with over 100,000 condominium owners in solving the day-to-day problems of community living.

I. Factors Contributing to the Escalating Costs of Maintaining Commonly Owned Property

The problem of inflation is not limited to condominium owners. Every segment of the population has had to make adjustments and sacrifices to meet the spiraling costs of living. To the fixed income of retired condominium dweller, however, the gravamen of the problem is accentuated by situations unique to commonly owned and maintained property. The following factors contribute directly to the inflationary costs of community living:

(1) "Lowballing" and misrepresentations as to cost of common expenses

Evidence exists to support the conclusion that some projected operational budgets are understated during the period of developer control and operation. As a result, sales personnel often present to prospective purchasers an estimate of their monthly costs which are far below the amount required to adequately maintain the commonly owned property. In addition to the hardship created when budget figures are increased to a realistic level, condominium owners must often bear the cost of a special assessment levied to liquidate past operational deficiencies created by the low budgets.[3]

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[2] In 1973, perceiving the need for a central source of data collection and dissemination of information geared toward the successful creation and operation of condominiums and Planned Urban Developments, the Urban Land Institute and the National Association of Home Builders, with funding support from the United States League of Savings Associations, the Veterans Administration and the U.S. Department of Housing and Urban Development, created the Community Association Institute. The CAI group, based out of Washington, D.C. is unique in that it is the only group in the country to represent all the segments of the condominium, co-op and homeowner association industry, with membership comprised of Community Association Leaders, Builders & Developers, Association Managers & Management Agents, Public Officials and Association Colleagues, including Accountants, C.P.A.s, Attorneys, Realtors and other professionals. Through research and education, CAI assists all automatic-membership community associations in condominium and planned developments serve their purpose: to preserve the quality of life and protect property values by maintaining the common elements, operating shared facilities and delivering community services.

[3] The unit owners at a 460 unit Miami condominium discovered at the time of transition from the developer to the owners, that during the two year period of developer control and operation of their condominium, an alleged deficit of over Four Hundred Thousand Dollars had been incurred. The matter was ultimately settled with the owners having to levy a Two Hundred Ten Thousand Dollar special assessment to liquidate the deficit.

(2) MISUSE OF "START-UP" FUNDS OR "CAPITAL ACCOUNTS"

Under the current Florida Statutes[4] a developer may be excused from payment of its share of the common expenses on developer owned units providing that the developer guarantees maintenance and/or makes up the deficiency between the amount collected and that expended for common expenses. Most developers collect from purchasers at the closing, a 'start-up' fund or 'capital contribution' equal to a month or two month's maintenance. The purchase of the funds is to provide the Association with a reserve account for contingencies. Many cases exist wherein the developer exhausts said funds in lieu of the developer paying its share on developer owned units.

(3) CONSTRUCTION DEFICIENCIES

With the sole exception of escalation clauses in compulsory leases, the area of abuse which most frequently results in unexpected costs to the condominium owners is that which relates to construction deficiencies. The magnitude of the problem is such that a congressional investigation is warranted. In my opinion, the contributing factors which interplay to create market conditions conducive to allowing poor construction practices follow:

A. Real Estate Investment Trusts

During the past few years, South Florida experienced several billion dollars of foreclosures against major real estate developments (see exhibit C).* The losers in these unregulated schemes were the consumers-taxpayers. In Florida and other states where deposit monies are used in the construction of the condominiums, individuals have collectively lost millions, often representing their life savings, where projects have failed prior to completion (see exhibit D). Bank failures, aborted only because of existing Federal legislation (and paid for by taxpayers), were precipitated by careless, unsupervised investments of depositors' funds in Real Estate Investment Trusts. The fundamental theory underlying operation of REIT's is a return to the advisory group and their law firm of fees based upon the amount loaned as opposed to the profitability of the REIT. The elimination of time proven industry standards and guidelines for lending is, in my opinion, one of the primary reasons for the current rate of failures. Another is greed! Traditional investments were abandoned in favor of the lucrative appeal of the REITs. So long as the boom continued and the prime rate remained at workable levels, the system worked. As soon as a fluctuation occurred in the market, with increased prime rate, the balloon burst. At the bottom of the rubble is the unprotected consumer. A system prescribed by Congress as a means of stimulating the housing industry has come close to destroying that very industry!

How does the problem of REIT's tie in directly with the problems of construction defects? In the rush to loan out as much as possible, as rapidly as possible, unqualified builders, with little or no prior experience in the development of multi-family housing were given the green light to build substandard

[4] Florida Statute 718.116(8): "(8) No unit owner may be excused from the payment of his share of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment, except as provided in Subsection (6) and in the following cases:

"(a) If the Declaration so provides a developer or other person owning condominium units offered for sale may be excused from the payment of the share of the common expenses and assessments related to those units for a stated period of time subsequent to the recording of the Declaration of Condominium. The period must terminate no later than the first day of the fourth calendar month following the month in which the closing of the purchase and sale of the first condominium unit occurs. However, the developer must pay the portion of common expenses incurred during that period which exceed the amount assessed against other unit owners.

"(b) A developer or other person owning condominium units or having an obligation to pay condominium expenses may be excused from the payment of his share of the common expenses which would have been assessed against those units during the period of time that he shall have guaranteed to each purchaser in the purchase contract, declaration or prospectus or by agreement between the developer and a majority of the unit owners other than the developer that the assessment for common expenses of the condominium imposed upon the unit owners would not increase over a stated dollar amount and shall have obligated himself to pay any amount of common expenses."

*For exhibits cited in this statement, see appendix 1, item 1, p 157.

housing. A thorough investigation of the situation would reveal hundreds of stories of builders borrowing over 110% of the cost of construction—pocketing hundreds of thousands of dollars and then abandoning the projects. The counsel for one REIT related the story of a builder who, rejected by a Savings and Loan, went to a REIT which granted the loan. The REIT then borrowed the money from the same Savings and Loan which had previously rejected the applicant.

B. Failure of Municipal Inspections

Consumers often inexperienced in the technical language of building codes must rely upon the municipal building inspectors for assurance that their home or condominium is built in accordance with all safety requirements. The issuance of a certificate of occupancy is too often looked upon by the consumer as a stamp of approval indicating that the building has in fact, met all code requirements and has been constructed in accordance with approved plans and specifications. In reality nothing could be further from the truth. The following excerpts are from the report of the Grand Jury of Dade County issued on May 1, 1976 (see exhibit E for full text of report) :

"The Grand Jury heard testimony concerning building inspection practices in Dade County and the City of Miami. One former inspector told us that inspection practices of the last several years have resulted in the construction of buildings which could be blown away in another '1926 Hurricane'. The evidence we heard supports this statement.

"County officials themselves condemned inspection practices during the period of increased construction in Dade County. A building department official said that to keep construction ongoing an inspector has to inspect 30–36 sites a day. No inspector could properly and adequately inspect that many sites in one day. In other areas we heard that Dade County building inspectors failed even to perform inspections. No excuse, whatsoever, can exist for the County to permit such inaction."

"Instead of requiring thorough, proper inspections, the County gave into the pressure of the building industry. The County should have been prepared to adequately staff the Department during peak periods of construction with trained personnel. It was not prepared. . . ."

"Building department officials told us that often inspectors rely simply on contractors whom they feel they could trust. The sad fact is, however, that the building department cannot be sure that the contractor who secures the building permit will actually supervise the construction. Neither the City of Miami or Dade County Building Departments have been able to insure that licensed contractors are supervising a particular job. This is a sad commentary on inspection practices."

Experience has shown that the findings of the Dade Grand Jury could apply to every municipality in South Florida. According to a newspaper account, a chief building inspector of the City of Tamarac failed the building examination one month before he became Chief Building Inspector (see exhibit F).

An additional factor complicating the situation is the anachronism of our law which 200 years after the Declaration of Independence still ties us to an ancient English concept of Sovereign Immunity. Except for limited protection afforded in the last two years by a legislative enactment, most municipalities and their building inspectors are immune from suits by consumers. Thus, they have no incentive to adequately supervise construction activities. In fact, it may be more profitable not to do so!

C. Lack of Building Materials

During the peak of the construction boom, developers were often forced to accept inferior building materials from secondary sources due to a shortage resulting from labor disputes and supply and demand.

D. Absence of Qualified Workers

The story is told of the construction foreman who gave all applicants for construction positions a simple test. He held up a hammer in one hand and a screw-driver in the other. If the applicant could properly identify the tools he was given a job building highrise buildings. As humorous as the story may seem, it is closer to reality than some would want to admit.

E. Disregard of Code Requirements by Both Developers and Design Professionals

Developers, architects and engineers are either ignorant of the construction codes or more cost conscious than they are concerned for the safety of the inhabitants and the utilitarian use and maintenance of the structures.

Evidence of the problem first appeared at the El Conquistador Condominium project in South Dade. A television investigative reporter, Bob Mayer, noted on his "Not On The Blue Print" series (WTVJ), that the building had substantial building deficiencies. On July 31, 1975 a Circuit Court Judge entered a judgment after trial in favor of the condominium unit owners, due to construction defects, in the amount of $1,174,000.00 (copy of judgment attached as exhibit G). The owners are still in the process of trying to collect on the judgment. In 1976, the trial court did find that assets of the developer were fraudulently conveyed to avoid creditors and ordered the assets sold to satisfy the judgment.

During testimony at a recent trial on construction defects at the Bay Colony Club Condominium, Charles W. Griffin, a noted expert in the field of roofing,[5] when asked who installs the type of roofs most frequently found on South Florida condominiums replied "It's speculators and others who don't have to live with the consequences of their roofs."

It is not uncommon for associations to have to assess their members tens of thousands of dollars to replace or repair construction defects. Implied warranties created by statute are of little assistance to the condominium owner since no bonding requirement exists and most developers are shell corporations, without assets, created solely for the purpose of developing a particular condominium.

(4) COST OF MAINTENANCE OF COMMONLY USED FACILITIES DURING CONSTRUCTION OF PHASE DEVELOPMENTS

As a means of promoting large planned communities, Developers often constructed elaborate recreational and commonly used facilities, prior to the completion of the condominiums which would ultimately utilize said facilities.[6] As a result when the recession hit the construction industry, many condominium owners found themselves paying astronomical amounts to keep the facilities in operation. At one development in Lee County, Florida to alleviate the purchasers' fears of such a situation occurring, the Developer printed a brochure entitled "Questions and Answers About Seven Lakes Country Club Condominium Community". One of the questions asked was, "How do you propose to maintain the golf course and the pavilion on the monthly maintenance fees that are collected from the people who presently reside here?" To which the answer was given:

"We, of course, realize that the income from monthly maintenance fees at the outset will not begin to pay for the upkeep of these facilities. Leisure Technology of Florida, Inc. and Leisure Technology Corp. therefore, are prepared to subsidize the Association until such time as there are enough people residing here to make Seven Lakes amenities self-sustaining. If you multiply an average of $50 a month for monthly maintenance fees by approximately 2,000 units, you can readily see that this will provide enough financial support. But again, our company will subsidize the Association until that time, or until expenses are balanced by income."

In spite of said assurance, the owners' monthly maintenance has continued to escalate, while the amount of developer subsidy has substantially decreased.[7]

(5) MISAPPLICATION OF ASSOCIATION FUNDS

Many developers mistakenly believe that during the period of developer control of the Association's operation that association revenues belong to the developer. Although the developer may in fact pay all expenses of the Association, even those in excess of collected revenues, the effect is similar to that of under-

[5] Charles W. Griffin of Danville, New Jersey, was retained by the American Institute of Architects to write the manual of Built-Up Roof Systems. A civil engineer, Mr. Griffin has a Master Degree from the University of Pennsylvania.

[6] When constructed in 1976, the Environ Cultra Center was designed to serve 3,800 projected units. When the recession hit, only 756 units had been completed. Fortunately, for the unit owners at Environ at Inverrary, Seay & Thomas, the subsequent developer (a fully controlled subsidiary of IC Industries) agreed to subsidize the maintenance for unbuilt units. Owners at other condominiums have not been as fortunate.

[7] I was recently informed that when the Developer learned that the owners had sought legal counsel as to their rights, the Developer threatened to cut-off all subsidies.

estimating the operational budget. Additionally, surpluses may be depleted and deficiencies incurred due to improper expenditures of association funds. The most common abuses include:

(a) Warranty repairs by personnel on association's payroll.

(b) Sales efforts by personnel on association's payroll.

(c) Association charged for construction costs of phases under construction through devices such as that of tying into existing condominium utilities, service lines to job site.

After transition (passage of control from the developer to unit owners) misapplication of funds manifest itself in the following fashions:

(a) Salaries improperly paid to officers and directors.

(b) Embezzlement of association funds by officers and/or agents.[8] [9]

(6) MISMANAGEMENT

As in any business, mismanagement is a major cause of cost escalation. Unlike the traditional corporate operation wherein mismanagement may ultimately lead to business failure, in condominium the costs of mismanagement is merely passed on to unsuspecting unit owners in the form of higher maintenance costs. Mismanagement is not necessarily an intentional act. In fact, in most instances it is caused by well meaning individuals who out of negligence, ignorance or outright stubbornness refuse to admit their limitations when it comes to operating a multi-million dollar condominium community. The cause of mismanagement may vary depending upon whether an association is developer or owner controlled.

A. Developer Control Mismanagement

Developers, fearful that an owner operated association may unreasonably increase maintenance costs, levy special assessments for costly renovations or interfere with the developers' sales program, insist upon association control during the development and sales period. The developers' preoccupation with the development and sales program, however, affords them little time to devote to the association's operation. As a result little, if any, attention is paid toward enforcement of the covenants and restrictions of the community, and efficient and effective operation of the Association.[10]

B. Unit Owner Control Mismanagement

Leary of professional management, having associated their bad experiences during the period of developer control with same, unit owners too often undertake the responsibility of association operations without the benefit or guidance of qualified professionals. Notwithstanding their dedication and good intentions, lay persons whose previous experiences were in the areas of retailing, secretarial, medical, etc. cannot be expected to possess the tools necessary to make the decisions necessary to properly operate these multi-million dollar communities.[11] And yet throughout the United States, inexperienced lay board and condominium owners on a daily basis make decisions affecting the lives of millions of individuals and billions of dollars in real estate. Unit owners should take an active role in the

[8] 718.112(L) added in 1978 as follows: "(L) The fidelity bonding of all officers or directors of any association existing on or after October 1, 1978, who control or disburse funds of the association. The association shall bear the cost of bonding. This paragraph shall not apply to associations operating a condominium consisting of 50 (fifty) units or less; however, any condominium association may bond any officer of the association and said association shall bear the cost of bonding."

[9] See Exhibit "I" for evidence of agent embezzlement.

[10] One Pompano Beach condominium was able to reduce its operational budget by over one third after assumption of control from the developer by merely renegotiating existing contracts for Association services and placing others out for competitive bids.

[11] Unit owners at a Broward condominium when presented with an alternative of spending $750 per unit to repair their roofs, which contract provided for complete removal of the existing roof, or spending only $500 per unit by placing a new top over the existing one, acting without professional guidance, elected to accept the $500 contract. As a result, when their roofs began caving in due to the fact that the structure was unable to support the additional weight, had to recontract for the $750 job. As a result they wasted over $75,000. Another condominium, given the alternative of two painting contracts, one for $60,000 the other for $80,000 elected the lesser. The more expensive contract would have provided much needed weatherproofing. Within one year of the original contract the condominium had to spend an additional $80,000 to repaint, this time using the weatherproofing to stop water intrusion.

day-to-day affairs of the association and in the policy making decisions. But, they should act with competent professional guidance.

The problem is further accentuated by the absence of an adequate number of qualified professional managers and independent management companies. This situation was created in part by the use during the early stages of condominium development of "sweetheart" management contracts which tied in to the development long term developer management agreements. As a result, the independent companies were not, until recently, able to actively pursue condominium management.

(7) COST-OF-LIVING CLAUSES IN COMPULSORY RECREATIONAL LEASES AND LONG-TERM MANAGEMENT AGREEMENTS

Referred to by the author of Florida's 1963 Condominium Act as "perversions" of the Act, and by former Florida Supreme Court Justice Ervin as "long term contracts of adhesion", compulsory long term "net-net" leases with cost-of-living escalation provisions are the single greatest inflationary factor in condominiums which have leases. Although consumer awareness in recent years and efforts by State, Federal and local agencies have significantly reduced the marketability of leases in new developments, a substantial number of Floridians, particularly senior citizens living in pre-1975 condominiums, are still tied to said leases.

Advocates of leases contend that:

"To build a condominium community with recreational facilities requires costing of common areas by one of two generally accepted methods: (a) dividing that cost by the total number of apartments in a community and then equitably apportioning the cost by adding it to the base price of the units; or (b) pro-rating the cost of facilities, their maintenance and supervision, over the expected longevity of the community, and offering the option of a monthly payment, without increasing the base unit price.

"The recreation lease offers buyers a method of payment without increasing basic unit cost. For that reason, the lease provides affordable condominium housing and recreational facilities to many buyers who would otherwise be unable to afford them." [12]

Advocates further contend that, "leasing payments, when compared to mounting equity in the rising value of apartments, provides buyers with tremendous financial equity which far outstrips pro-rated leasing costs." In reaching his conclusion, Mr. Bergman used a formula which increased the initial payment by 10 percent for a five year period, while similarly increasing the owners' apartment value by 10 percent per year.

Bergman's position is not substantiated by the facts. In the first instance, buyers were not traditionally given the choice between paying their prorata share of the facilities cost or electing financing through the vehicle of a recreational lease. Their choice was simple, either purchase with a compulsory lease or buy elsewhere. In fact, Florida Statutes prior to 1971 did not require any disclosures as to the existence of the leases, and few, if any, purchasers were ever told of their existence. Furthermore, even if we placed some credence on the proposition that the owners should pay a prorata share of the cost of the amenities, an individual's prorata share financed at traditional lending rates would not approach that amount paid under the leasing arrangement. In truth, the standard escalation clause found in the long term leases used in Florida condominiums acts similar to a mathematical progression: As an illustration, the recreational facilities of one Broward condominium built at a cost of $200,000, returned $300,000 the first year, and based upon an annual cost-of-living increase of 5 percent will return over $700 million over the term of the lease (see exhibit K).

Advocates of leases would have one believe that the predominance of condominiums offering long term leases provide their owners with extensive recreational facilities. Nothing could be further from the truth. The average recreational facility contains little more than a swimming pool, a card room and a sauna. Instances exist where the recreational lease consists of no more than an easement right across a strip of land providing access to public beaches.

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[12] Comments by George Bergman, Chairman of the National Association of Homebuilders during a Board Meeting, September 14–19, in Denver, Colorado. Mr. Bergman is a principal in the development of the Century Village Complex in West Palm Beach and Delray, Florida.

Equally fallacious is the developer's contention that he can provide housing at lower prices by selling the units at his cost and returning his profit over a long period from the recreational lease. The facts indicate that the base price of condominium units with recreational leases do not materially differ from similar units sold at condominiums without leases. Furthermore, significant number of leases were sold by the developers to third party investors within a short period of the developer's completion of the project. If we can assume that the amount of the sale was equal to the developer's desired return on his investment, we can readily determine that the rate of return under the lease is unconscionable under any theory.

(8) FAILURE TO PROVIDE ADEQUATE RESERVES FOR CONTINGENCIES AND LONG RANGE MAINTENANCE

Although this category of cost escalating factors may well fit within the area of mismanagement, the seriousness of the problem warrants separate treatment. Sound management practices dictates the maintenance of a contingency or reserve fund to handle emergency repairs and long range planning, e.g., painting every four to five years. Such reserves are rarely maintained by either developer or unit owner boards. The developer's rationale is "Why be concerned?" I'll be out of the project long before the buildings need painting, and in the meantime why increase my monthly maintenance?".

A popular board member is one who can state at the end of his term, "We are pleased to advise that maintenance costs for next year will remain at the same level as they have for the past two years". Then a new board takes office and discovers that $100,000 is needed to paint the buildings and there are no funds in reserve. As a result, owners receive in the mail a special assessment for $200, which cost could have been accumulated over a long period, but now must be paid in a single lump sum.

The Board's position is merely a reflection of the prevelant attitude among older condominium purchasers, namely, "I'm not going to live that long, let the next man worry about what's going to happen five years from now." Then five years pass and suddenly they are faced with the problem.

It is this attitude of the older purchaser ("I'm not going to live that long") which makes them most susceptible to the abuses discussed. It's difficult to convince a 75 year old condominium owner as to the merits of reducing a 99 year lease to a 25 year mortgage when, in fact, they feel that they won't live beyond five years.

CONCLUSION

Escalating maintenance costs along with special assessments necessary to defray the costs of the prior year's deficit, repair and replace construction defects, and to meet contingencies, are placing an increasing burden upon fixed income and retired condominium owners. Evidence of the problem is beginning to manifest itself in terms of an increasing number of foreclosures being filed against delinquent owners. In addition, abandonment of condominiums where owners cannot meet monthly expenses is not uncommon.

SOLUTIONS AND RECOMMENDATIONS

A. Education

Prospective purchasers must be better educated as to the full extent of their responsibilities and liabilities as condominium owners. They must understand that as condominium owners they will be responsible for their pro-rata share of the common expense *no matter how great that expense may be.*

B. State Regulatory Control in Lieu of Registration

The authority of State bodies overseeing condominium development must be expanded from "registration" to "regulatory controls."

C. Projected Budgets Should be Subject to Substantiation

The State of California carefully scrutinizes all projected operational budgets in order to verify their accuracy.

D. Enforcement of Criminal Codes

State Attorneys should devote more effort to white collar crimes such as consumer fraud. Cases of embezzlement of Association funds should be prosecuted.

E. Bonding of All Persons Controlling Association Funds

F. Bonding Requirements for Developers, Contractors and Subcontractors to Insure Funding to cover Warranty Programs

G. Enforcement of Building Codes

H. Elimination of Sovereign Immunity

I. Prohibit Use of Purchasers Deposits in Construction

J. Require Adequate Funds to be Placed in Escrow for Subsidizing the Cost of Maintenance and Operation of Common Facilities Which Will be Shared by Incompleted Condominiums

K. Licensing and Certification of Professional Managers

L. Prohibit Use of Recreational Leases and Long-Term Contracts

In the alternative, allow owners an opportunity to cancel all agreements and leases entered into by Developer controlled boards.

M. Provide Funds and/or Guarantee Funding for Purchase of Existing Recreational Leases

During the past year, tens of thousands of condominium owners saddled with unconscionable long-term leases were able to eliminate the leases through purchase agreements. An equal number of owners, particularly the retired individuals on fixed incomes, were unable to purchase their leases due to a lack of funds and/or willingness of traditional lending sources to provide loans for recreational purchases.

N. Compulsory Requirement of Minimal Level of Reserve Accounts

II. Coerced Ownership—Conversion From Rental to Condominium

The tenant purchaser, even under the most favorable of conditions, is still a coerced buyer. For unlike the individual who sought out condominium ownership, the tenant given the choice between ownership and renting has already elected to rent. Then suddenly, often without prior warning, the tenant receives notification that the building is being converted to a condominium. The typical "buy or get-out" letter advises the tenant that if he fails to purchase his unit within a given period of time, usually thirty days, his apartment will be sold to one of the hundreds of outside buyers who allegedly have already placed a deposit for available units.

The pressure placed on elderly tenants by the conversion process can be devastating. On occasion anxieties develop. Instances of emotional illness, strokes and heart attacks have been allegedly caused by the pressures of conversion. To understand the reason one need only examine the characteristics of the tenants and setting in which conversions often take place. To the elderly tenant who has resided in the same apartment for a number of years, the building and its occupants become the home and family. The familiar neighborhood surroundings and long term friends and acquaintances provide a feeling of security. To disrupt this setting is to create a major crisis. Thus, the decision whether to purchase or move is not solely an economic one. It is often based upon emotional considerations which distort logic. Typical of these are the following:

(1) Fear of losing monies already spent for leasehold improvements.

(2) Insecurity about moving to new setting. Justifiably fearing that the new apartment may likewise be converted to a condominium.

(3) Unwillingness to leave friends and family.

(4) Health considerations; closeness to medical facilities.

(5) Concern for spouse, ("What will my wife do without her daily activities?").

(6) Peer pressure, ("If I don't buy, they'll think it is because I don't have the money.")

Economic considerations include the following:

(1) Inability to meet downpayment requirement and/or meet monthly mortgage and maintenance expenses.

(2) Life status (e.g., retired, widowed, etc.) not conducive to long term ownership.

(3) Desire of flexibility afforded by renting as opposed to ownership.

A. TENANT DISPLACEMENT

The difficulty of the tenant in finding alternative housing comparable to that from which he was displaced. In communities with rental shortage, this problem is particularly acute. Incidents exist wherein shortly after moving into a new apartment, the tenant learns that it too is going to be converted.

B. PROVIDING TENANT SERVICES

The problem of servicing the needs of tenants with continuing leases who elect not to purchase is a double-edged sword. If the Developer-convertor continues to provide traditional tenant services using association personnel, the effect is to misappropriate association funds. On the other hand, if the tenants' unit and lease is sold to a third party purchaser, the tenant may be unable to receive the type of services provided for under the lease. This is particularly true in those incidents wherein units are sold to South American investors without forward addresses.

C. BUILDING MAINTENANCE: THE "AS-IS" PURCHASE

Almost without exception, the tenant purchaser is receiving an older building without any warranties. Experience has shown that the owner of a converted condominium unit can anticipate proportionately higher maintenance cost than those paid by the purchasers of new units. Incidents exist wherein tenants have had to spend hundreds of thousands of dollars replacing entire building plumbing and air conditioning systems within months of conversion. Although Florida Statutes now require disclosures as to building conditions, most buyers seem totally oblivious as to their meaning.

CONCLUSION

The coerced tenant purchaser, although paying a lower unit price than is available for comparable new construction, can anticipate higher maintenance costs on building component repair and replacement. The tenant electing not to purchase will experience discrimination practices from tenant-owners, as well as a diminishment of tenant services.

SOLUTIONS AND RECOMMENDATIONS

A. *Tenant Approved for Conversion:* A developer/convertor should be required to obtain the approval of at least a majority of the tenants prior to undertaking a conversion.

B. *Program for Providing Tenant Services:* A program for providing continuing services to tenants electing not to purchase should be mandatory. No sales of tenant units to out-of-state and out-of-country purchasers should be permitted unless provisions are made for local agents to provide the required services.

C. *Warranty Program:* Disclosures of existing building conditions are not enough. The unsophisticated tenant purchaser has the basis for evaluating the cost of maintaining a highrise apartment building. All building components should be warranted to be in good working condition at the time of sale, and warranted for a minimal period of one year.

III. Lack of Understanding of the Condominium Concept

In March, 1975 while testifying before the Condominium Task Force of the Department of Housing and Urban Development, investigating potential abuses in condominiums I noted that:

"Any thorough investigation into abuses and/or potential problem areas in the condominium field must evaluate what is today becoming one of the most serious problems—the operation and management of condominium complexes by unit owner controlled boards.

"Each day, as more developers relinquish control of Condominium Associations to the unit owners, a new dilemma is created. Suddenly, lay persons who had previously equated their obligations as condominium owners to that of remitting monthly maintenance payments, find themselves responsible for the operation of multi-million dollar complexes."

Many of the problems of condominium operation stem directly from a lack of understanding of the condominium concept by various co-owners and/or in-

tentional disregard for it. The Florida Fourth District Court of Appeals said it best in dicta in a recent case enforcing the covenants of a condominium:

"Every man may justly consider his home his castle and himself the king thereof; nevertheless, his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others." *Sterling Village Condominium, Inc.* v. *Breitenbach*, 251 So. 2d 685.

CONDOMINIUM OWNERSHIP IS NOT FOR EVERYONE

The entertainer who feels compelled to rehearse at all hours of the day and night, or the socialite who enjoys entertaining twenty guests around the pool on Sunday, should each seek housing alternatives other than condominium.

For the older condominium owner, disenchantment with the condominium concept is most likely to result from one of the following areas: (Excluded from this discussion are potential problem areas previously discussed)

A. Absence of Anticipated Services

(Excluded from this discussion are misrepresentations made by the developer to prospective purchasers as to promised amenities which were not delivered.)

Too many condominium owners think of themselves as tenants. As such they expect a 'landlord' to always be available to fix the plumbing or take care of problems which develop. The condominium concept will not work until such time as all condominium owners understand that:

(1) They are the owners.

(2) They are responsible for the operation and maintenance of the community.

(3) They must share in the common expense regardless of how high these expenses may be.

(4) They must abide by the covenants and restrictions of the community.

B. Children and Pets

If you want to start an argument in a condominium, it's not politics or religion you have to be concerned with—it's children and pets! Between them, no single issue is more controversial than is age restrictions. On one hand the elderly sees it as a form of discrimination when applied against them in the job market. On the other, it is a totally permissible means of maintaining a community of congenial residents! But try and deny them the right to have their below-age grandchildren stay at the condominium—that's another question.

The controversy may be resolved by the Florida Supreme Court in the case of *Franklin* v. *White Egret*, an appeal from the Florida Fourth District Court of Appeals which held age restrictions to be unconstitutional (see exhibit M). In the meantime, it is a source of constant conflict within condominiums.

C. Conflicts in Association Operation—Consumption of Condominium Leaders

Condominiums are a microcosm of our society. The general attitudes of the population are carried over to the condominium setting.

In society, individuals are paid to perform necessary governmental services. For condominium to work one must find dedicated volunteers who are willing to devote hundreds of hours of their time in the service of their fellow owners. Unfortunately, dissension among owners in a number of communities is creating a situation wherein more and more condominiums are finding it difficult to persuade owners to serve on boards. For those who accept board positions, the abuse they take from the owners they serve is incredible. Although there have been incidents of board members overstepping their authority, the evidence clearly indicates that most abuse is perpetrated by owners against their boards and not vice-versa (this also extends to professionals counseling the board).

When one speaks of 'consumption' in condominium, we are not referring to pneumonia. We are talking about the propensity of condominium owners to wear-out their officers and directors. Unless this trend is reversed, I project a serious crisis in the future in finding individuals willing to serve on the board. Without such individuals, the successful operation of the condominium communities will be in serious trouble.

The internal friction within the community has a direct affect on the health of both the board and association members. Incidents of heart attacks, strokes and

injuries sustained as a direct result of conflicts at condominium meetings are well documented. The most susceptible to illness is the older purchaser.

CONCLUSION

Dissatisfaction among condominium owners stems largely from a lack of understanding of the condominium concept. Condominium owners fail to grasp the full extent of their responsibility and liability as co-owners. Thinking of themselves on terms of tenants, they become distraught when expected services are not delivered. Their hostility is often directed at their neighbors who serve as volunteers on the association's board.

IV. ARE UNIFORM NATIONAL STANDARDS NECESSARY FOR THE BENEFIT AND PROTECTION OF CONDOMINIUM PURCHASERS?

Federal intervention in the regulation of property ownership is never a desirable alternative. However, it becomes a necessary procedure if States fail to act in a responsible fashion to curb consumer abuses. Notwithstanding the adverse publicity of the past several years, in the State of Florida Developers may still:

(1) Use purchasers deposits in the construction of condominiums.
(2) Tie compulsory recreational leases into the purchase of condominiums.
(3) Establish shell corporations to develop condominium projects; providing no security for warranty obligations.

Accordingly, in my opinion, uniform national standards are necessary. The proposed condominium Act of 1978, drafted by an inter-agency task force would curb most of the existing abuses. The guidelines established by the Veterans Administration for condominium loans are also excellent. (See Federal Register, Vol. 40, No. 97, Monday, May 19, 1975). The following V.A. regulations and/or recommendations should be part of any nominal uniform standards:

(1) Prohibit the use of deposits in construction.
(2) Require that the number of units in a condominium be adequate to reasonably support the common elements.
(3) 70% of presales be to persons who intend to occupy the property as their principal place of residence.
(4) Transition from developer to owners take place within 45 days of the conveyance of the first unit.
(5) Establishment of an adequate reserve fund for replacement of common elements.
(6) Bonding of persons handling association funds.
(7) Management agreements be terminable with cause upon 30 days notice.

An additional source of guidance is the proposed Uniform Condominium Act drafted in 1977 by the National Conference of Commissioners on Uniform State Laws. Section 3–105 of the proposed Uniform Law provides the right to terminate contracts and leases entered into by developer boards as follows:

"If entered into before the executive board elected by the unit owners pursuant to Section 3–103(e) takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease to which a declarant or an affiliate of a declarant is a party, or (3) any contract or lease which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3–103(e) takes office upon not less than 90 days notice to the other party. This subsection does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was submitted to the condominium for the purpose of avoiding the right of the association to terminate a lease under this Section."

Senator CHILES. Thank you.

Mr. Tennyson, I understand you are responsible for drafting Florida's FTC. What do you have to say for yourself? You are in a courtroom.

STATEMENT OF ROD TENNYSON,[1] WEST PALM BEACH, FLA.

Mr. TENNYSON. As you know, I started out with the attorney general's office trying to curb some of the abuses in recreational leases, including mobile home parks and townhouses. I was somewhat amazed to find that the proposed Federal act is drafted in such a way that it is quite narrow in what kind of housing it covers. Quite frankly, under the State statutes and the proposed Federal statute, if I represented a developer, I could exclude coverage and do it without too much difficulty, and yet still retain a kind of tie-in of recreation with moderate priced housing.

As I see the problem, we are not just talking about condominiums. There is a trend in housing in Florida where it started, and it is going beyond the lines of the State, and that trend is for developers, who are no longer content to build moderate-priced housing units and sell it for a reasonable profit, to have a continuing income to flow from that development for tax purposes or for just plain moneymaking purposes. The way they do that is, they will file a deed restriction or they will have a lease arrangement. They will use any kind of legal documents in relation to the real property to which the purchaser must, as a condition of sale for the moderate-priced housing, also accept the developer's services, and I have seen various services in documents. Of course, there is recreation, which we have all seen, but I have also seen insurance, cable TV, management services, vending machines, laundry facilities, garbage collection, and forms of maintenance.

The idea is for the developer to have a continuing business long after he has sold the housing units through a mandatory tie-in of services. It goes one step further, however, as the developer not only demands that the consumer pay x dollars a month for these services, but further says. "If you don't pay me, I will foreclose on your home like a mortgage."

"COMPANY STORE CONTRACT"

Senator, when you've got to pay a monthly payment and it is secured with a lien on your house, that is a second mortgage by any definition. A second mortgage could be the very same thing. The developer could have increased the price of the unit and financed it himself with a second mortgage, but if he does that he would be subject to the State usury laws and would have a fixed return on his investment. The use of the tie-in sale of services rather than a standard second mortgage is what I call the company store contract. All he has done is created a new company store and he is going to have an absolute monopoly over the sale of services for that community and he is going to enforce it with a lien on the homestead.

That is the problem that concerns me that I have been watching for the past 4 or 5 years, and is the major abuse in housing, not only in the State but throughout the country. The profits are tremendous, and where there are profits it is going to attract more developers to do the very same thing. I recently gave a talk at the National Association of

[1] For additional material submitted by Mr. Tennyson, see appendix 1, item 2, p. 176.

Realtors in Miami at their national convention and I have never received a worse reception by a group of people because the National Association of Realtors thought there was absolutely nothing wrong with the company store concept. That reception was not just in Florida. It is going beyond that. They want to do it. There is just too much money involved.

Well, what happens if we allow this? Well, of course, first of all you avoid the usury laws, because it doesn't look like a second mortgage. Developers have profit increases every year. Developers have a hedge on inflation because they can tie increases to the Consumer Price Index, so they don't have to worry about inflation any more and the income continues to flow. Well, of course the consumer is in a situation where the cost of that service is increasing and he has to pay for it whether he uses it or not. Consequently, there is an absolute monopoly on the sale of that service within the community and even though the Florida Supreme Court said that did not violate State law, it may violate Federal antitrust laws. So the consumer has to pay whether he uses the services or not. This is especially unconscionable with elderly citizens because many times, because of subsequent illness or accident, they can no longer use the facilities. If he does not pay for them, there is a lien foreclosure.

In this county alone developers have filed more than 300 foreclosures and, in an open court, the president of that company under oath stated they are going to file another 2,900. That is a lot of homes lost because those people for one reason or another could not afford to belong to the "country club" or company store.

That is what I call the company store. I think if we are going to attempt to resolve this problem we have got to look beyond just condominiums. If we pass a condominium act today, we are going to be sitting in this room next year talking about mobile homes and talking about townhouses the year after that and talking about single family homes the year after that. The developers will always be one step ahead of you. When they are one step ahead of you, you will run into all the retroactive application problems and we just can't keep up with it.

Banking Laws Reform Suggested

The Feds are going to get in an area which they should, because they don't have the same constitutional limitations as the State law. We ought to look beyond the condominiums. We ought to look at such things as reforming the banking laws so that any lending institution, for example, that gives a mortgage on a housing unit cannot give the mortgage unless there is no company store contract with the lien collateral on the unit or, second, eliminate the tax advantage on company store contracts.

I would also like to see the Justice Department take actions, which it has just absolutely refused to do—Schenefield is the head of that and he just flatly stated he didn't think this was a monopoly situation. I disagree with that and I think the Federal courts are going to disagree with that, too. I think the Justice Department and the Federal Trade Commission have an obligation to look at the company store contracts and to look at the monopoly. I want to see the law go beyond

the condominium, or we are going to be here next year on another problem.

Senator CHILES. We don't have enough nationwide support and, if we can pass this bill, then we might have a better chance of going back and amending the act and adding some of these other things. So, I think a pragmatic standpoint of trying to determine what is the best way of trying to get some law on the books is the way that you have to approach this. It may be that broadening it would be a way of attracting us. I know we attract a lot more opposition.

Mr. TENNYSON. Senator, my suggestion is to broaden the provision on the company store contracts to maybe a separate bill or write it to this particular bill and it could be tied to the banking or the tax concepts. I see the major problem in community housing is the company store contract.

Senator CHILES. I think that is a valid point that you make.

[The prepared statement of Mr. Tennyson follows:]

PREPARED STATEMENT OF ROD TENNYSON

My name is Rod Tennyson. I am a practicing attorney in West Palm Beach, affiliated with the law offices of Ombres, Powell, Tennyson and St. John, P.A. Prior to private practice, I was the first director of the division of consumer protection in the attorney general's office wherein I directed the attorney general's litigation involving housing problems. While with the attorney general, I directed extensive studies and litigation in reforming housing problems especially those problems relating to the elderly and condominium recreational leases. My private practice currently involves representation of approximately 200 condominium associations throughout south Florida.

It is no surprise to anyone of the soaring costs in housing today, both in construction costs and rising interest rates. Most economists would agree that the single family, detached home is beyond the economic reach of the average American family or couple. This is especially true with fixed income, retired citizens who are moving to Florida. It has been my experience that the only moderate priced housing still available to the average consumer is: condominiums, planned unit developments or townhouses, and mobile homes.

However, these forms of moderate priced housing attracted a new development scheme which has lead to enormous profits by developers at the expense of the housing consumer.

Developers who build moderate priced housing, including condominiums, PUD's, and mobile home parks, are no longer satisfied with building a product, selling it, realizing a reasonable profit, and then removing itself from the development. For tax purposes and other reasons, the trend appears to be that developers would rather keep their profit low on the initial sale of the housing unit and then condition the sale of the housing unit upon the consumer's agreement to also purchase other services offered by the developer. This so-called conditional or tie-in sale allows the developer to realize a continuing income over the sale of his tied service rather than realizing his total income at the sale of the housing unit itself. The obvious tax advantages include deferral of income over a long period of time, which means a lower tax bracket for the developer. In my practice I have seen the following services tied to the sale of housing units as a mandatory condition of sale of the housing unit: recreational services, real estate brokerage services, insurance, cable T.V., management services, vending machines, and laundry facilities.

NET PROFIT PROTECTED BY BUILT-IN CLAUSES

In each of these areas, a consumer is required to buy these services from the developer or his designee as a condition of purchasing and living in the housing unit. These services are almost invariably at a higher price than what the consumer could obtain in a free and open market for the service, and have built-in escalation clauses to assure the developer that he will be protected from inflationary increases in the cost of living. It should be noted, however, that these escala-

tion clauses are not just designed to cover any increased costs of operation incurred by the developer, but are all designed to increase the net income to the developer as inflation continues. In other words, the developer, with his built-in escalation clauses, protects his net profit from inflation at the expense of the consumer. Furthermore, the developer holds a lien on the housing unit to secure the payment for the services which are escalating with inflation. In other words, if the consumer can no longer pay for the incidental services, whether he uses them or not, he is subject to a lien foreclosure and the loss of his home.

By requiring a periodic payment secured with a lien on real property, the developers are in effect simply taking a second mortgage on the housing unit. In fact, a developer could accomplish the very same purposes of deferring income and realizing greater profits by increasing the original purchase price of the housing unit but taking back a second mortgage from the consumer, and thereby lowering the initial downpayment.

However, mortgages are controlled by the State's usury laws and thereby would only allow a fixed, net income to the developer. Furthermore, mortgages are not popular with consumers and have a bad connotation to them. In effect, all the developer did was simply call his second mortgage a recreational lease, management contract, or other kind of service agreement and accomplished the same purpose with a further guarantee against inflation on his net profit. This was possible because the usury laws on mortgages do not apply on contracts for services and leases.

In my opinion, this phenomena has resulted in the rebirth of the so-called company store. The company store developed at the turn of the century whereby employers required their employees to purchase all their consumer goods from the company store. The company would then deduct purchased items on credit from the salary of the employee. In other words, the company wound up with an absolute monopoly in terms of consumer goods sold to their employees. There is not much difference between the old company store and the present trend in moderate priced housing in Florida which will obviously spread to the rest of the Nation. The new company store concept is simply too profitable to stay within the borders of Florida. As an example, the Century Village complex in West Palm Beach includes over 7,800 housing units. The housing units are conditioned and tied to a long-term recreational lease which provides recreational and other services to the residents of the village. The costs of these recreational services is tied to the Consumer Price Index and increases every year. Unit owners must pay on the average over $50 per month for this recreation whether or not they can or wish to use the facilities. If they refuse to pay the recreational fee, then the developer reserves the right to foreclose the home through lien foreclosure proceedings. In fact, the developer has filed some 300 lien foreclosures in the circuit court in Palm Beach County over a dispute in rental payments and has threatened to file another 2,900.

CONCEPT CAUSES MANY PROBLEMS

Although the new company store concept is immensely profitable to developers and has attracted many new developers to produce moderate priced housing, it has created numerous problems with the housing consumer. Most consumers are not assured that their income will increase every year at the same rate as the rise in the Consumer Price Index. Consequently, increases, payable to the developer under the company store concept, are increasing at a greater rate than the consumer's income. Furthermore, many consumers, especially senior citizens, are physically unable to use the services because of illness or accident. However, even though they cannot use the facilities, they are still required to pay for them and that payment is enforced with a lien on the home. Also, because the housing consumer is required to pay for these services, whether he uses them or not, he is effectively precluded from seeking similar services at a lower price in an open and competitive market. The developer literally has a monopoly over the sale of those services within the housing community. Also, because of this monopoly, the housing consumer has very little control over the quality of services being offered by the developer, and has very little say in how these services are to be distributed.

I am sorry to say that the State of Florida has had very little success in curbing the abuses of the new company store. The most active fight has come from the attorney general of Florida which started with several legal actions

in 1974 challenging the legality of the so-called tie-in of services under the State antitrust laws. The Florida Supreme Court rejected the attorney general's contention that the so-called company store or tie-in sale violated the State antitrust laws. The supreme court ruled that the Florida Legislature had specifically allowed such tie-ins, at least in regards to recreational services for condominiums. However, the Florida Supreme Court did state that these leases or other tie-in sale agreements might be challenged based on the theory of unconscionability. Pursuant to that decision, the attorney general has proposed rules defining unconscionability for company store contracts in the sale of all forms of housing. (See attached.)[1] A challenge has been filed to these rules with an initial determination that the rules cannot apply retroactively. The attorney general has also filed actions in Broward and Pinellas Counties, Fla. challenging the long-term recreational lease as being unconscionable. Both of these cases have been settled with the agreement that the association be allowed to purchase the recreational lease from the developer.

The Florida State Legislature, when it finally decided to cure the abuses in the housing market, always seemed to come up with too little, too late. The State and Federal constitutions prohibit a State from impairing the obligations of contract and, therefore, all legislation could only apply to future housing developments but could not cure the abuses of past housing developments. To date, State law only prohibits escalation clauses in recreational leases for condominiums when such leases where entered into after June 5, 1975. State laws still do not prohibit company store type contracts and escalation clauses are still used in noncondominium housing. Perhaps the best explanation of this inability of the legislature to act is the strong developer lobby in the State capitol.

The Federal agencies have had less success than even State government. Although President Carter in his campaign in Florida promised that he would ask the Justice Department to challenge the company store contracts based on violations of the antitrust laws, the Justice Department has issued a formal memorandum rejecting the so-called antitrust or tie-in sale theory as a violation of the antitrust laws. The Federal Trade Commission has initiated one action to challenge the legality of a long-term recreational lease based on unfair trade practice theory or unconscionability, but that case is still pending and is moving at a snail's pace. The Federal Trade Commission's staff seems underfunded and is simply not given the priority needed to successfully attack the leases.

OWNERS TURN TO LITIGATION

Without extensive help from State and Federal Governments, the condominium and other housing unit owners have resorted to private litigation in the State and Federal courts in an attempt to overturn the company store contracts. The various legal theories are more fully explained in the attached chapter from a recent book I have published with D & S Publishing Co. A good portion of the private litigation has resulted in settlements wherein the developer has agreed to sell the recreational lease and facilities to the Homeowners Association. The price for many of these buy-outs has been equal to approximately 10 times the yearly rental under the company store contract. Unfortunately, private litigation is very costly and many of the smaller developments simply cannot afford expensive and lengthy litigation to overturn their company store.

In times of deregulation, proposition 13, and anti-government feelings, it is not popular to propose Federal intervention. However, because of the State's constitutional roadblock that it cannot impare the obligations of contract, we can only turn to Federal legislation to reform the past sins of the company store and to prevent future problems on a nationwide basis. This can be accomplished without creating a vast Federal Government intervention, new bureaucracy, or increased taxes. The present bill pending before the Congress which would set minimum standards for condominium housing in the United States is too narrow and is full of loopholes. First of all, the act only applies to condominium housing when the problems we have previously discussed cover the full range of moderate priced housing beyond just condominiums. However, the bill could be amended to set minimum standards for all forms of housing

[1] See appendix 1, item 2, p. 176.

to prohibit the company store concept. The developers will argue that the company store concept helps keep down the costs of housing and prevents further inflation in the costs of housing. But it does no good to the consumer to control inflation in housing while we increase inflation in the company store services tied to the sale of housing. The Federal Government has long had a national interest in the costs of housing and the regulation of housing. In fact, the Federal Government is really the only government that has the capability of assuring fair, adequate, and affordable housing to the consumer. Whether or not the present bill is the proper approach, is a debatable question. However, the following are some examples of what the Federal Government could do to eliminate the company store in America:

(1) Eliminate the tax advantages of deferral of income when developers use the company store.

(2) Retroactively eliminate or reform company store contracts in all forms of housing with private remedies in the Federal court.

(3) Prohibit the use of federally insured lending institution funds for mortgages on housing units when that housing unit is also encumbered by a lien tied to a company store contract.

(4) Properly fund the Justice Department and/or Federal Trade Commission to take a more active role in eliminating company stores.

These reforms can be accomplished at the Federal level without extensive bureaucracy or costs. Without these Federal reforms, I am afraid all of America will soon see the new company store.

Mr. POLIAKOFF. Senator, may I add a comment? Do you have time for just one comment?

Senator CHILES. Yes.

NEEDS UNCLEAR FOR RECREATIONAL LEASES

Mr. POLIAKOFF. I think there is a gross misconception by the bill itself and the Congress as to what the ultimate needs are for recreational leases. Even if the courts can ultimately declare the lease to be unconstitutional, that does not necessarily resolve the problem. Despite what may be said, condominium owners do not desire in all instances to be rid of the recreational facilities. If the court were to come back and say that this lease is no longer valid or you no longer have the lease, you also no longer have the facilities. What we need is some type of Federal guarantees to loans to allow condominium owners to buy out the existing leases or the subsidy of the payment obligation and in purchasing those leases to enable the low income or fixed income retiree to purchase a lease. If we buy the leases, we eliminate permanently the problem. Declaring a lease to be void is not going to do it.

Senator CHILES. Tom, in your statement you allude to a situation in which a developer with no maintenance obligations collected a third of a million dollars for the recreational facility that cost $50,000. In this case or any other that you are familiar with, have you seen any validity for the claim that the developer sold the units at cost or at a loss in the recreational lease?

Mr. PFLAUM. I have never seen any evidence supporting that claim from developers, though I must add that we have never reached that factual issue in litigation.

Senator CHILES. I think Gary has already commented on it.

Mr. PFLAUM. I have heard this allegation from developers, but it has never been really verified one way or the other.

Senator CHILES. Rod, in your practice you have many disputes growing out of condominiums besides the unit owner versus developer.

Which type do you view as the greatest long-term threat? Is that the problem, or is inadequate education the real problem?

Mr. TENNYSON. Well, obviously I don't think condominiums are destined for abandonment. I live in a condominium myself. I particularly like that concept of living. Obviously I knew what I was getting into and that made it a whole lot easier to adjust to that, but you do have to give up some of your individual rights. I think that the major problem obviously was developer versus owner relationship; it is now shifting to unit owner versus his association. Then the fights start because of children, dogs, assessments, you name it.

I don't think those problems are insolvable and I am not so sure that the Federal Government wants to get involved in those individual disputes. I think that more and more local and State governments are trying to arbitrate the disputes and I think we will solve that problem. I think the problem lies between the developer and the owner, and I think that is where the Federal Government needs to take some action.

Senator CHILES. Gary.

TENANTS MUST ACCEPT RESPONSIBILITY

Mr. POLIAKOFF. Could I respond quickly to that question? Too many condominium owners think of themselves as tenants and they expect the landlord to fix the plumbing or take care of the problem. The condominium living concept will not work until you go through the educational process on four basic things:

First, that they are owners and not tenants.

Second, that they are responsible for the operation and maintenance of their community.

Third, they must share in the common expenses of that community, regardless of how high those expenses may be.

Fourth, that they must abide by the covenants and restrictions of the community.

Senator CHILES. How are you going to educate them?

Mr. POLIAKOFF. It is a serious problem. I think personally I would recommend it to Mr. Andrews, bureau of condominiums. A number of the States are putting out more publications and films on exactly what condominium ownership is all about. Some of the Federal agencies have some publications out but they are apparently not being disseminated down to the grassroot purchasers because there is still a large misunderstanding among individuals as to exactly what they are buying or what their responsibilities are.

Senator CHILES. Jeff, you were talking about the need for some Federal dollars in this regard. My understanding is that your agency does not get the fees right now which the State charges to developers and unit owners.

Mr. ANDREWS. We have to go through the budgetary process just as if we were funded by general revenue funds, although we have a large surplus in the trust fund. We have not been able to break it loose to this point. Underlining what Gary is saying—Gary and I have talked extensively about it.

Senator CHILES. Why should the Federal Government be giving dollars in this regard if we are charging fees on the State level, with

regard to filing fees and unit owners, if that money is not being used?

Mr. ANDREWS. Well, the point is well taken and I am certainly in favor of trying to get that broken loose if you can assist with that. Having the association fees cut in half at the last session will deplete the trust fund money over the next several years. It is only a surplus at this point. I don't know that it will remain a surplus in the next 2 to 3 years. Yes, in answer to your question, we do have a large sum of money that could be used for educational purposes if the legislature will make it available to the agency.

Senator CHILES. Thank you.

I want to thank all of you for your discussion, I think it has been very helpful to our record. We will be looking at the act as we get ready to reintroduce it and try to determine what changes you want to make.

Thank you very much.

I want to take about a 5-minute break now and then we are going to start our town hall meeting portion. We will have about 45 minutes for that portion of our town hall meeting and we will get that started in just a couple of minutes.

[Whereupon, the committee took a short recess.]

Senator CHILES. We are going to start our town hall portion now. We are going to have about 40 minutes to try to finish. I will just ask you to please keep your statements brief, if you can, so that we will give everybody an opportunity to be heard. If our time does run out, we have some slips that I will ask you, if you would, to fill out, and give us your comments on these slips on the table over there. I will also tell you that we will keep our record open for a period of at least 2 weeks, so if you have any statement that you would like to make for our record we would be delighted to receive that.

All right. Pat Cahill was originally invited as a witness, so we will start off with Pat and we will go from there.

STATEMENT OF PATRICK C. CAHILL, PALM SPRINGS, FLA.

Mr. CAHILL. Good afternoon.

My name is Pat Cahill. I am former president of the Village Mutual Association of Century Village. I have been a member of the condominium advisory board of the State of Florida and cofounder of the Nonpartisan Political Action Committee of Palm Beach County. I am also a past president of a condominium association in Century Village.

If I were to read what I have written on here, I would probably speak for 40 minutes or longer.

Senator CHILES. We will take your statement in full and put in the record.[1]

Mr. CAHILL. I will give you the whole thing, but I would like to make some comments if I may. I have a letter which is in here and it is from Century Village, written in 1968 when Century Village was first started and when the original recreational facilities were in existence. Mr. Jack Snyder wrote to Century Village and said that, with all the land room there, he didn't know how many units they were going to

[1] See p. 143.

develop within the community and wondered if there would be enough room in the clubhouse to take care of the people. This letter is signed by Century Village and it says they figure it will be somewhere around 1,500 units.

Today in Century Village there are 7,853 units with the same facilities and, with the added income, he is making a yearly profit of over $3 million. He overdeveloped. This piece of paper, by the way, is the Century Village lease that you did not get when you went to buy. I said, "Can I see the paper so I can get my attorney to check it?"

Their reply was: "We don't give you the papers. If you want to buy, we will give you the papers at the closing; otherwise, move on. There are other customers waiting to buy."

Buying in the Dark

They will give you no papers. You had no chance to find out what you were buying. You were buying a pig in a poke, if you want to call it that, and no chance to do anything about it. Most people bought because they didn't know what a long-term lease was. There was mention of a long-term lease.

Now a long-term lease to somebody who is 65 years old is probably about 10 years. That is the way I figure it would be, but it turned out to be 99 years. Here is the set of figures here which says that. You started in 1968. In that 99 years you will be paying $4,549.50 per month for your recreational lease. Here are the figures projected on a 5-percent cost-of-living increase and at 7.5-percent cost-of-living increase.

Now the first increase that I got at the time was on December 26, 1974, and this is in the folder I am going to give you. The increase at that time was 45 percent on one shot. That was only on the rent. The maintenance in some areas went up as high as 117 percent without any reason, it just went up from nothing to 117 percent overnight.

Now those things are important to the people on fixed income for the simple reason that today in Century Village most of the people are on fixed incomes. Most of them also are either on welfare or on food stamps—not most of them, but quite a few. I would say, at least the last figure I got over a year ago, there were over 600, and those figures can be verified.

The first notice we got regarding the trams and buses was in November 1971, and this was the new wrinkle at the time. The trams and buses were originally promised in a brochure which is right in this pamphlet I am going to give you. There were trams as part of the recreation lease; you are entitled to trams and buses. In November 1971 I got a letter asking for $1 per month per one-bedroom apartment and $1.50 for a two-bedroom apartment for transportation. It said nothing about community services, it was transportation.

I wrote back through our attorney saying that the transportation was promised to us in the brochure and, therefore, we are entitled to that under the 99-year lease. We never heard a thing about it for 5 years; it laid dormant. All of a sudden in 5 years we are hit with a request for $7.50 and $8 per month for community services which we also refused to pay. As of right now, that date was May 1975.

Senator CHILES. Is that in litigation?

Mr. CAHILL. Yes. May 27, 1975, was the first request after 1971, and we refused that also.

We feel that a $3 million profit not only is too much, but on top of that it is putting people in the position where they are going to lose their homes. Now I am going to give you all those papers, but there were a couple of items I would like to bring to your attention.

In the State of Michigan all sales of recreational facilities in condominiums is prohibited. In Virginia the management contract and the recreational lease after the takeover must be ratified by the unit owners—not after 5 years. The unit owners can say: "We don't want the recreational facilities any more. We will buy them from you or whatever you want to do with them, it is up to you." In those States they have some controls that I think we could use in this State. I will also include that in my letter.

There were a couple of things that were said that I would like to bring to your attention. One of them is, "A contract is a contract is a contract," but nobody ever said anything about a contract being fair and reasonable, and that is the law, too. Also, the laws of the United States—the Patman Act, the Sherman Antitrust Act.

TIED TO CONTRACT

There are violations in this piece of paper here where you are tied to buy something like Century Village. You are first tied to buy a recreational lease. You are also tied to buy insurance from a subsidiary of Century Village. You are also tied to buy a management agreement. You are also tied to buy your sewage and garbage disposal or water and sewer, whatever you want to call it. That is also another subsidiary.

In other words, when you sign that contract, you are tied to five different subsidiaries of that company and you have to pay all of them or you don't get an apartment. Now that is a violation of Federal law. In your opening statement you made some statement about the things that are in a contract that should be there if they should cancel the contract. I agree with you because that is part of the discussion I had with Senator Stone, you, Congressman Rogers, and the President of the United States, Jimmy Carter. I have been working with the FTC since 1973 and I have written continuously to them.

I appeared in Washington before the Federal Trade Commission for 5 hours at one session to try to show them what had to be done to eliminate the problems that we have here in the State of Florida. This happened not only in Florida but in other States that don't have adequate controls. I feel that adequate controls must be by the Federal Government where there is violation of the Federal laws. The "little FTC" act here was not retroactive because of this "a contract is a contract is a contract." They didn't think about any contract being fair and reasonable.

Now you also made a statement about the net-net and gross leases. You know the gross leases are more unconscionable than the net-net leases because when an increase of 10 percent is put on, we will say $50, it is then added to that. If it is put on to a net-net lease—the lease is, we will say, $30—the rest of it is for insurance, maintenance, and taxes.

Now if the taxes don't go up and the insurance does not go up, they are not entitled to the 10 percent. They are only entitled to the 10 percent on the $30, the base. So the gross lease is absolutely the most unconscionable lease of the two and should be attached. That is why Kelly Mann said it should include all leases. I have a set of figures which unfortunately I didn't bring with me. I will send them to you. The figures show you the difference between the gross and the net lease. I have them at home because when I was up in Tallahassee before the cabinet, I presented them at that time.

"PRESENT LAWS ARE LEGAL DOCUMENTS"

The other thing is that I have a written statement from Attorney General Griffin Bell saying that the present laws that you have now coming through the U.S. Congress, one going through the House of Representatives and one going through the Senate, are legal documents and he feels—and this is his written opinion—that they cannot be attacked in court.

Senator CHILES. I don't think he says they can't be attacked in court. He says "successfully."

Mr. CAHILL. He says they can be attacked, but when you can't prove a violation of a Federal law you have a very, very poor chance of winning. And that is what you say in this law, that if those violations exist, the contract is null and void.

I would like to say that I have also been instrumental in trying to get the divisional land sales and condominiums to expand their facilities to help the people more. Last year, through the efforts of Senator Phil Lewis, the divisional land sales and condominiums got a substantial increase in their funding. I have been in touch with them this year. We are going to work again to see if we can get more money.

There is over $1 million in the fund and we want that money used to benefit the condominiums and, if necessary, go around to the different condominiums and advise them of meetings through different areas in the State of Florida. If we can do that, then I think we will accomplish something with the people who are running the condominiums. A lot of people are afraid to take an office in a condominium association because they could be sued, or something else could happen to them, so this kind of puts a damper on the whole thing.

We need help and we need help badly from Washington. Very seldom, as a stubborn Irishman, do I ever beg for anything, but I am begging you right now; please help us. We need your help.

Thank you very much.

Senator CHILES. Thank you.

[The prepared statement of Mr. Cahill follows:]

PREPARED STATEMENT OF PATRICK C. CAHILL

My name is Pat Cahill, past president of the Village Mutual Association, Inc., a member of the Condominium Advisory Board of the State of Florida, and co-founder of the Non-Partisan Political Action Committee of Palm Beach County.

The long-term recreation lease was signed between the developer and the association board of directors who were one in the same (Century Village, Inc.). Each unit owner was required at purchase closing time, not only to sign the long-term recreation lease, but also had to sign a maintenance agreement with Village management, a wholly owned subsidiary of the developer which included

insurance, which was purchased without other bids, from Bencart Insurance Agency, another wholly owned subsidiary, and were required to contract with Century Utilities, another wholly owned subsidiary for water and sewerage, plus a 3 percent management fee to Village management. This self-dealing by the developer by which the profit from each of the subsidiaries was paid by the unit owners violated the fiduciary duty to the unit owner as the higher the costs were the higher the management fee would be in dollars. The unit owners were not told of these entwining contracts and was not allowed to read the agreements prior to closing and had no knowledge that in signing these papers they not only obligated themselves but also made the association liable for the payment of rent on the long-term recreation lease. Prospective purchasers when they asked to read the papers prior to signing were told they would get the papers after they signed and if they did not want to buy under these conditions, move on as there are others that want to buy. The long-term recreation lease and the maintenance contract were tie-in sales which is a violation of Federal law forbidding tie-in sales. Senior citizens signing the long-term lease at closing did not know they were signing a 99-year lease, as a long-term lease to most of these people is 10 years or less and most of them had no knowledge of the inclusion of the escalation clause in the contract.

The developer set up rules and regulations which were not given to the owners until 1972, or 2 years after over 3,500 sales were consummated, giving him full control of the facilities without the owner's consent. Prior to 1972 we were allowed to use the club house for association meetings for which the unit owner pays $4,334,000 per year in lease payments and we have no say in any of the operations or use of our rented facilities. This is a violation of our civil rights as our lives are controlled by the "benevolent dictator," as he calls himself. The lessee pays for all the operating costs, all maintenance, taxes, insurance, security, replacement of facilities, but the developer who invested less than $1,500,000 now makes a profit of over $3 million per year on this investment.

This unconscionable profit keeps increasing yearly due to the escalation clause based on the Consumer Price Index—the U.S. city average all items and commodity groups issued by the Bureau of Labor Statistics of the U.S. Department of Labor, and the denominator of which shall be the basic standard index figure of such price index for the month of October 1969. The assessed value on the Palm Beach County appraisers' records is less than $1 million for all of the recreation facilities which again shows the unconscionable profits made from the long-term recreation lease.

RECREATION LEASES PROHIBITED IN SOME STATES

The cost-of-living index outlined above includes food, clothing, gasoline, oil, and many other items which has no connection to a recreation lease. Some States, such as Michigan, prohibit sales of condominiums with recreation leases, and in Virginia, any management contract, recreation lease, or other contract is binding only if renewed or ratified by the majority of the unit owners after they take over control of the association. Florida has no law to protect innocent purchasers of condominiums from being defrauded by false promises, misrepresentation, or violations of the Patman Act or the Sherman antitrust laws. In 1974 none of the people of Century Village, West Palm Beach, were on welfare or food stamps, now due to the escalation clause in the recreation leases, there are over 70 unit owners on welfare and over 600 unit owners on food stamps, and this will increase yearly as the recreation rent increases. For example; since January 1973, the recreation rent on a one-bedroom apartment increased from $25.50 per month to $41.81 per month on January 1, 1977, and the recreation rent on a two-bedroom apartment increased from $31.75 to $52.05 per month on January 1, 1977, or an increase of 64 percent in both cases for only a 4-year period. From these figures it is easy to see that most of the unit owners will not be able to meet the rental payments by January 1983, or 10 years from the first increase under the long-term lease.

In the Cenvill Communities, Inc., prospectus dated November 15, 1972, it stated the company furnishes free transportation to and from West Palm Beach on four buses and within the community on six trams. Despite this, letters were sent out to some associations on November 17, 1971, demanding $1 per month for one-bedroom apartments and $1.50 per month for two-bedroom apartments for transportation. The associations not under a management agreement refused to pay

as this service was free under the long-term lease. Again on May 27, 1975, the associations who refused to pay were again sent a demand letter asking for $7.50 for one-bedroom apartments and $8 for two-bedroom apartments for so-called community services. Again the associations refused to pay for the reasons stated in the 1971 letter. For example, Golf's Edge Condominium Association, Inc., pays Century Village, Inc., and Century Utilities 60.7 percent of their entire budget for rent, water, and sewerage only.

[Attachment]

INCREDIBLE RECREATION LEASE PAYMENTS

	Cost-of-living increase per year	
	At 5 percent	At 7½ percent
Original base rent as of 1968, 1-bedroom, $25.50 per month:		
After 20 yr (per month)	$64.413	$83.869
After 30 yr (per month)	104.958	144.687
After 50 yr (per month)	278.485	404.695
After 99 yr (per month)	3,141.512	4,549.506
Original base rent as of 1968, 2-bedroom, $37.75 per month:		
After 20 yr (per month)	80.100	104.425
After 30 yr (per month)	130.683	180.149
After 50 yr (per month)	346.742	504.221
After 99 yr (per month)	3,786.981	5,664.581

You think you own your condominium now, but can you, your children, or your grandchildren afford to live under these rent costs or will Century Village own all apartments when 1988 or 1998 costs are applied.

Village Management, Inc., and Century Village, Inc., sued Waltham, et al., to cancel maintenance and management contracts of 283 associations because they were losing $600,000 annually. Why is Village Management now fighting to keep the contracts they have and asking the associations who are with Personalized to drop their contracts? Could it be that the $600,000 loss is not factual or is it because trams, buses and security, which is now paid under Community Services could be in jeopardy? Is it good business to keep a losing contract?

Century Village, Inc., who is the landlord, should agree in writing to the verbal promises now being made by Village Management, Inc. regarding no increase in rent if you sign with Village Management, Inc. and withdraw from all legal actions. The 99 year lease specifies that increases in rent can be made on January 1 of each year and that all associations must be increased if one is increased. If you sign this agreement will you forfeit all money in the escrow account and forfeit the right to sue again and what will the new rental cost be per month? Will it be at the original base or do you have to agree to accept the illegal cost-of-living increases?

Why is Century Village so anxious to have all suits dropped. Do they know something we only suspect regarding the Supreme Court decisions?

Judge Mehrtens, Senior U.S. District Judge, ruled in the case on Chatham Condominium Association et al. vs. Century Village, Inc. that both sides pay their own legal costs. The action by Century Village to ask for $40,000 in legal fees from the associations is another method of upsetting the people of Century Village who by now should be aware of these scare tactics to keep the people divided. They make lots of claims about winning decisions but what decisions have they won—none, as no final decisions have been handed down to date and the people of Century Village have not paid any legal fees during 1974, 1975 and 1976.

The above figures do not include cost of maintenance payments to Village Management or Personalized Management.

STATEMENT OF WILLIAM L. SCHOLZ, BOYNTON BEACH, FLA.

Mr. SCHOLZ. Senator, I am Bill Scholz, president of the Leisureville Condominium Apartment Association. We have a 99-year lease which I believe meets all the qualifications of making it unconscionable. However, we have developers forming a ploy now by offering the

unit owners throughout Leisureville the opportunity, as they so state, of purchasing this lease—not selling them the land, mind you, just purchasing the lease. He is contacting every owner individually and offering them roughly what I think is the equivalent to 12 times the rent of the annual rental that they can purchase the lease.

Now he does not tell them, to the best of my knowledge, that there are encumbrances against all the recreational facilities. We have three recreational facilities and a golf course. I understand there is quite an amount of encumbrances of mortgages against these properties. They are not being amortized, to the best of my knowledge, and remain set. What is to prevent this developer, after selling these leases—he sells enough leases where there is not enough income coming in to pay the interest on these mortgages—of discontinuing interest payments? What is to prevent him from going into bankruptcy?

Senator CHILES. Is he talking about selling individually to the people? If the whole group gets together to buy, he is going to sell each person the right to buy up their share of the lease?

Mr. SCHOLZ. He is approaching each individual on an individual basis, and unfortunately the community association has not taken any action to direct or to look into the possible pitfalls, and I am questioning this. If foreclosures start on these mortgages——

Senator CHILES. Do you know whether he is selling those subject to encumbrances, or is he assuming encumbrances? Do you know?

Mr. SCHOLZ. Senator, I have a background in real estate and I know if I sell you a lease, I am selling you a lease. If I guarantee it, it is only as good as my corporation is at that time; I might go bankrupt.

Senator CHILES. Yes, but I just wonder about the terms.

Mr. SCHOLZ. It would not make much difference because it is a corporation you are dealing with, not individuals. I think it is a ploy to actually detract money without the people getting their value. If they were buying the land, I would be all for it, but they are buying nothing but a piece of paper. This is in Leisureville.

Senator CHILES. We thank you for giving us that information. I would agree with you that is something that the association ought to take up and ought to look into so they could make information available to the respective members.

Mr. SCHOLZ. Unfortunately, Senator, I read some of the comments in some of this literature you have here and it amply puts it that the board of directors, in most of these condominiums, are taken from different walks of life. Some have not had the experience and maybe don't seek the experience. I believe it has been said that most of the board has purchased their leases.

Thank you.

Senator CHILES. Yes, ma'am.

STATEMENT OF DORA PORTE, WEST PALM BEACH, FLA.

Mrs. PORTE. Senator Chiles, I am Dora Porte. I am a unit owner at Golden Lakes Village a planned unit development, the first phase of which is just being completed now. We, too, have a 99-year recreation lease, a net-net lease; it was a tie-in with the sale. At the present

moment, with the preparation of the budget for January 1979, we find ourselves with a 56-percent increase in the recreation rental. The lease calls for 5-year increases, or increases every 5 years, based upon the cost-of-living index.

The cost of maintaining the recreation area will be in excess of the cost of maintaining our own apartments because the rental has been increased by that much. We have had many problems in our place with reference to construction, with reference to violations of the building codes, et cetera, and we are suing the developer. In many ways our problems parallel those problems of Century Village.

We had been promised, through the brochures that were submitted to prospective purchasers, bus service, TV, master antenna service, and many other items at no extra cost. What we have found, however, is that we are paying for each and every one of these services.

At the present time we are negotiating for the purchase of the rec area. We understand that it cost the developer somewhere in the vicinity of $750,000 to construct this recreation area. He is now requesting 10 times the increased rental of the recreation area, which price would total approximately $5,350,000. Mind you, this recreation area was built in 1974, at a cost of about $750,000.

My own apartment maintenance cost was $68 when I purchased it in 1974. Under the budget that is being proposed for 1979, that apartment will be costing me $115 per month.

As far as our laundries are concerned, our developer entered into an agreement with the laundry company, of which he is owner, at the time he and his fellow cohorts were members of the board of directors of the association. We maintain the laundry buildings. We clean those laundry buildings. Nevertheless, we do not receive one dime from the developer. In the interim, he has increased the cost of the washing machines and the dryers by doubling the amount that they were set for originally.

Now this puts us in a position where the apartments become prohibitive. We have heard this said time and again by many of the speakers, that before you know it, we will all be out of our apartments. Some relief must be forthcoming so that it will be possible for us to remain in our apartments. We don't wish to have to go into public housing. That would be a far more costly project for the Committee on Aging than what we have at the moment. We find that every phase of our contract falls completely within the items set forth by Attorney General Robert Shevin as rendering them unconscionable. I think that the legislature should give us some consideration at this point.

While I do not advocate abrogating contracts because of hardship, I do believe that the rules of law setting forth unconscionability of contracts should be clearly defined by the legislators. Senator Stone's bill, S. 2919, does define unconscionability. The passage of S. 2919 would give condominium owners the relief needed to void the 99-year recreation leases containing escalation clauses and which were tied into the sale of condominiums.

Thank you.

Senator CHILES. Thank you. Yes, sir.

STATEMENT OF IRVING GOLDBERG, DELRAY BEACH, FLA.

Mr. GOLDBERG. Thank you, Senator Chiles.

My name is Irving Goldberg. I am here representing the 3,000 members of the Atlantic Democratic Club of Delray Beach, and numerous condominium unit owners of King's Point, in particular.

We are in the position, as indicated more or less by my good Irish brother, Pat Cahill, as those in Century Village. We also are subject to the 99-year recreation lease. We hope the legislation which you are proposing and hoping to get through, that the Congress will take into consideration the problems of people under the 99-year lease, retroactively. The Florida judiciary said they are not concerned with us, retroactively, especially since the Florida "little antitrust act" has not been put into effect, although Attorney General Robert L. Shevin did try to have it apply to the leases. The Federal antitrust law must come into play because of the fact that there were tie-in sales, et cetera. We were not told that we could take the recreation lease or not take the recreation lease. We were compelled to take it. The lease is definitely in violation of the Federal Antitrust Act, and I feel that in the bill that you the proposing, Senator, this will be taken care of through the Justice Department.

I might say in passing that when President Carter was here during the election campaign, he more or less told us that he would see what he could do about it at that time and we expect that something will be done. We are dealing here, especially in King's Point, with 98 percent of the people who are on fixed incomes. I am a retired civil service worker on a fixed income. Our unit owners cannot afford to keep on paying escalating rates on this recreation lease and something must be done about it.

As I said before, there were tie-in sales in violation of the FTC. Further, the Florida Condominium Act has a clause where the developer and/or the board of directors can take liens against the unit owners on many things which are not legal. As a matter of fact, in our own King's Point, liens have been taken already. They don't have to go to trial to take these liens; they just get them automatically on the basis of an illegal lease, and they are in the courts today attempting to foreclose on the unit owners for not paying these liens, the same as reported by Pat Cahill of Century Village.

I say to you that all the other things that the people spoke about in the earlier session definitely are things that our people in the condominiums need. The elderly ill need transportation to doctors, hospitals, shopping, and meals. They can't go out on their own. We ask that you do what you can to have Congress enact legislation in the interests and needs of the condominium unit owners.

Thank you.

[A supplemental statement by Mr. Goldberg follows:]

SUPPLEMENTAL STATEMENT OF IRVING GOLDBERG

In the name of the over 3,000 members of our Atlantic Democratic Club, residing mainly in condominiums in the Delray Beach area of West Palm Beach, I make a further statement.

Our area consists of approximately 50,000 condominium unit owners. We are all subject to the 99-year recreation lease with no retroactivity for those who pur-

chased prior to July 1974. The Florida costs have not been decided up to this writing, even though our Attorney General Shevin has stated the lease is subject to the Florida FTC act and is unconscionable. It therefore must have Federal action under the Federal rate antitrust law and tieing of sales.

Further section 718 of the Florida condo statute allows the developer or board of directors to obtain a lien on our homes withut any due process court action, in violation of the sixth amendment to our U.S. Constitution, and the Justice Department and/or the U.S. Attorney General should prosecute this violation.

Senator CHILES. Thank you very much.

Yes, sir.

STATEMENT OF ABE BENZMAN,[1] WEST PALM BEACH, FLA.

Mr. BENZMAN. My name is Abe Benzman. I was raised in the United States and I never thought I would be the object of charity in my twilight years, but at 68 I find all this consideration—this very charitable effort made by the Government, which really hurts me.

I am one of the people who did my business with Century Developers completely through the mail, interstate law. I left a deposit in June 1971 and was notified to come down and take possession in February 1972. They threw a contract in front of me, and in this 99-year lease, the smartest Philadelphia lawyer could not understand if he read it for 60 days. I demanded my money back. These swindlers refused to give me my money back. They called out a Mrs. McLean and she told me they had my money, and they were going to keep it, and I had to pay the rest. If this tie-in sale does not come under the Sherman Antitrust Act, I don't know what does.

Recently, you have been informed that liens have been projected for 3,300 apartments in Century Village. As an answer to this harassment through the courts—now these courts operate on the taxes we are paying, including the judges' salaries. We are paying your salaries; you are our representatives. Mr. Levy is now using the courts to make us pay excessive legal charges by bringing in harassing cases. He has continued to do this. The circuit court here in Palm Beach is absolutely flooded with cases. If the rest of the country is 3 years behind, we are 5 years behind. Under the sixth amendment we are entitled to due process for speedy and fair trial.

The most reprehensive situation takes place in this State right now and you will now have to come forward with the Federal Government to try to help us. Well, like West Point says, the best defense is a good attack—a good offense. We have, before Judge Poulton in the circuit court here in West Palm Beach, the *Waltham* case. In this case the fiduciary relationship was brought up involving the building management, one of the store companies that Mr. Tennyson spoke about.

TESTIMONY PRODUCED

The three board members—Landino, Jacobson, and Mills—were put under oath. Testimony was produced by Mr. Bailey, the attorney for Levy, to the effect that he had given us notice of payments due for years prior for community services. Fourteen witnesses repudiated it.

[1] For newspaper articles submitted by Mr. Benzman, see appendix 1, item 3, p. 204.

A deposition of the stipulation was demanded by Judge Poulton that all the other 153 associations were to attest to the same thing. Mr. Bailey refused to sign the stipulation, but on the record adverse testimony exists which shows probable cause for an investigation of perjury.

Miss Mills said that she personally typed and sent out all these budgets and informed the people on a regular basis. Mrs. Landino denied it; Mr. Jacobson denied it. The fiduciary relationship existing in this act was absolutely now a fraudulent act—it is under oath, it is on the record in Judge Poulton's court.

Is an individual who has purchased this property through the mail governed by Federal law and not State law? I say that your committee now has on record an indelible regular fraud and we should proceed to break this contract right from its inception. Judge Poulton's own words to the two opposing attorneys were on Thursday approximately 6 weeks ago:

> Gentlemen, you leave me only two alternatives: to invalidate this contract from its inception because there was no meeting of the minds, or to seek an equitable settlement.

I cannot see making an equitable settlement with fraudulent people, with fraudulent contracts, and I say that you owe to us an invalidation of every one of these contracts in existence on this basis. I say the investigation should pursue in charging these people with criminal fraud and put them in jail, and maybe we will get rid of all these contracts at the right time.

In a newspaper article, Mr. Levy makes a statement to the effect that in 1978 he expects to make $90 million. Those are Mr. Levy's words.

May I also bring to your attention the fact that on September 8 in Tallahassee, the Florida Supreme Court invalidated——

Senator CHILES. Yes, sir, I know about that case.

Mr. BENZMAN. All right. Then I will refrain from saying anything further. You have now created a caveat emptor to the greatest degree—go after the old folks, kill them, get what you can. That is the way the Florida court is trying to protect the consumer.

Senator CHILES. Try to keep your statements to several minutes because we would like to give everybody a chance and we are getting close to 1 o'clock.

STATEMENT OF JEANNE SKLAR, DELRAY BEACH, FLA.

Mrs. SKLAR. I am Jeanne Sklar, Kings Point.

Our first relationship with the developer was a completely negative situation. All of us have bought our homes in good faith, and we anticipated that our good faith would be reciprocated. We found many things which were contrary to our rightful expectations. We found slipshod work, many changes in the construction plans submitted to us. We have found them to withhold information from us which should have been told to us. As a result, many condominium associations have taxed their means to institute costly litigation, some of which in many quarters has been declared suspect. We feel that this kind of relief is costly, time consuming, and leaves the results up in the air.

It has also been very frustrating to be given a management company which is just another hat worn by the developer whose purpose ostensibly is to handle our complaints and resolve them. We find that complaints are presented repeatedly to the management company and either the work is never done, or if it is done, in many instances it is slipshod and not corrected.

We have heard much about recreation leases and sales. We have been told that "the fortunate ones" who are purchasing the recreation areas, actually it is an agreement for a deed. It is our understanding that we pay for 30 years and then acquire minority title contrary to what we believed at the time of purchase. We have absolutely no voice in the running of the recreation facilities. We get no certified accounting for our monthly maintenance costs for other than recreation. We have been told that whatever the costs are, we have no input.

In view of all this we feel that certain remedies are mandatory. Management companies, particularly those controlled by the developer, should be required to submit a certified audit turning over the corporation to each condominium association followed by an annual certified audit report. In the experience of many of us who have owned our home prior to the purchase of condominiums, our experience is that there are many unfinished items when buying a new home.

At the closing, arrangements are made with the developer to hold funds in escrow guaranteeing the delivery of service and repairs within an agreed period of time. We feel that it would be appropriate for every developer to be required to place 10 percent of the purchase price in escrow to complete the repairs in the stipulated period of time. Should the developer fail to make the necessary repairs or deliver them at the end of the stipulated period of time, the purchaser should then have the authority to have the work done. Should the repairs require more than the money held in escrow, then all costs above that should be a lien against the developer.

In the interest of brevity and realizing that many of us have something to offer, we did not substantiate our statements by documentation. We have them available any time you wish to avail yourselves of them.

Thank you.

Senator CHILES. Thank you very much.

Yes, ma'am.

STATEMENT OF MRS. IRWIN DAVIS, BOCA RATON, FLA.

Mrs. DAVIS. Thank you, Senator Chiles. I do not wish to take up much of your time.

I am Mrs. Irwin Davis. I have prepared a brief outline of what is happening and I have copies which I have given to your staff.

Senator CHILES. Thank you, ma'am.

Mrs. DAVIS. We bought a condominium apartment in December 1976. When my husband and I purchased this apartment there was nothing mentioned about the owners having to take cable TV and exterminating service; neither was it mentioned in the condominium declaration of bylaws.

On June 14, 1977, we received a letter telling us about cable TV on a voluntary subscription basis. We did not wish to subscribe to this service so did not sign the attached form.

On September 22, 1977, we received a letter telling us cable TV and exterminators service would be completed in all apartments and it would be $9.50 a month starting the first of the year 1978. Our apartment is not common area and we do not want this service, but we are being forced to pay for these services whether we want them or not.

There has been much communication from the developers about not accepting these services and after paying for a few quarters to give us time to investigate. We decided in May 1978 to stop the exterminator service, and in October 1978 stopped paying for the cable TV. My husband and I received three notices of being in arrears for the exterminator services and on October 10, 1978, we received a letter from their attorney threatening us with a lien on our apartment.

Some people, upon receiving notices from the office, paid up. We did not panic when we got the attorney's threat. We gave it to our lawyer and he checked our documents. There was nothing which stated we had to take cable TV or exterminator service. Our apartment is not common area.

Our attorneys sent a letter to the developer's attorney on October 16, 1978, and up to the present time they have not answered him. It is a shame that senior citizens have to go to the expense of hiring an attorney to fight these conditions in condominiums.

Thank you for listening.

Senator CHILES. Thank you.

Yes, sir.

STATEMENT OF HAROLD R. BLACK, WEST PALM BEACH, FLA.

Mr. BLACK. Senator Chiles, you have heard from all the big complexes. I happen to be from one of the smaller ones; we have only 518 units in our place.

My name is Harold R. Black and I live in Linksworth.

I heard you ask the lawyers if they knew of anyone who had sold below cost. Apparently the developer at our place did sell below cost because he went broke. The savings and loan took over leaving 140 people without deeds. The savings and loan asked them to contribute $700 additional, and the ones who had not moved in their apartments had to pay $2,000 additional and were assured that the apartments were completed.

I found that the savings and loan in question also received half of the income from another development, the same builder that built previously, and all of the income from a third development that he put up. We have been through about 3 years of court litigation. After the 3 years of litigation and somewhere between $10,000 and $20,000 of legal costs, we had the courts decide that the management agreement was null and void. The judge referred to the Boston Tea Party where it had taken away all of our rights under any law that had been promulgated.

The end result is that we now are trying to get a special taxing district, which is apparently a new thing that has come up in the State. They are talking about the possibility, over a 30-year period,

of our buying out our land lease. The first year the land lease income was about $90,000. At the end of 5 years, the escalation clause had jumped to $125,000. The second 5 years—it comes up next year, and with the cost-of-living tie-in I can see very plainly that it will be anywhere from $160,000 to $190,000.

I have certainly wondered right along why there are not some laws. Some of the attorneys who brought this up said that there is not some law in the past that has been violated, and I am sure that several people have mentioned it. I would like to think that the legal department—the Federal Government—would look into the laws already on the books and see if it isn't possible to break these things high, wide, and handsome.

Getting back to the possible purchase, the savings and loan discussed with the owners—I tried to start it on my own and started to buy my own. I made an offer and they said, no; they didn't want to do it individually. To buy out is going to cost me some $3,600, and when I first started there it was $20 a month. I offered them $500 and told them I thought I was being very magnanimous in offering the $500.

I don't know what the answer is. I know we all need help. It frightens me to think that even with 30 years to pay off, with the escalation clauses in there, what it can amount to. I am on a fixed income, very fixed, and I would hate to be in the position of having to go on welfare or food stamps or anything else. I have always wanted to pay my way and I hope I can continue to, and I am sure that most of the people in my complex do. I am not speaking for others in the complex; I am speaking just as an individual. Certainly 99-year leases—every phase of unconscionability is covered with our lease.

We pay all the expenses and maintenance. We pay all the taxes. The money income was greater than the place was assessed for. I have not bothered to get into the actual figures as to what kind of money the savings and loans are going to get out of it, but I also wonder as to the savings and loans being within the bounds of propriety and legality in being in a unit like this. After the money is returned, why should they have an escalation clause in there, any more than they have in any mortgage contract? I don't understand. When they moved in on this—sure; it is a sweetheart deal for them, but to me, where they are federally regulated, it seems as though something could be done on that score to stop the escalation.

Thank you very much.

Senator CHILES. Thank you, sir.

Yes, ma'am.

STATEMENT OF ANNE RUDOLF, WEST PALM BEACH, FLA.

Mrs. RUDOLF. My name is Anne Rudolf. I am chairman of the legal study committee for a small condominium, probably smaller than any mentioned. However, we, too, have our problems.

Senator CHILES. How many units are in the condominium?

Mrs. RUDOLF. 145.

We have been studying our documents very quickly after it became apparent that they were written in favor of the developer. We have acute structural problems and no warranties. If we go to litigation, it will be costly, long, and drawn out, and no guarantee of any results.

I feel that there should be some form of insurance the way they have for single-family homes whereby if there is any faulty construction, you could relate it right to an insurance company rather than engage in very expensive litigation.

I also believe that our land sales division might be more helpful if they could give small condominiums guidance rather than just shuffle off to the courts. The courts are overloaded now and we do need some sort of help. Every question does not necessarily have to be brought before the court; however, the land sales division states that they will not come to a condominium unless there is a violation of a law.

Sometimes you just want interpretation of a law rather than costly litigation, especially when you can't decide whether the law has been violated. You would like to say, "Well, now, how does this affect us?"

The other thing I would like to say is that in any law that is passed in condominiums, I think that some attention should be given to owners' rights. This is a very vague subject in all condominium documents, and I think it is the cause of a lot of controversy. If a law could be spelled out where the owners have certain rights and they are clear. This would be very helpful. Thank you.

Senator CHILES. Thank you.

I said that we were going to have to close this at 1 o'clock and it is now 5 minutes after. I will go until 1:15 and then that is my maximum deadline when, I am afraid, I have to leave. I want to hear from everybody that we possibly can.

STATEMENT OF JAMES H. NIMMO, WEST PALM BEACH, FLA.

Mr. NIMMO. I will be very brief.

My name is James Nimmo and I represent Crest Haven in West Palm Beach.

I hear so much talk about recreation leases these days. Unfortunately, we have a real Mickey Mouse contract with the developer, and it does not include the recreation lease. Of course, the developer is also management and he controls everything; we have no input there whatsoever.

One of the things that alarms most of us as members of this homeowners association is the possibility of assessments. Last year we were assessed $25, very arbitrarily. The books were never shown to us; these increases were not justified. You have to take this man's word for it, which on its face seems a little absurd.

The reason I speak now is since the recreation lease does not apply to us, we are there as his guests. Even though we represent a large group of homeowners, we are barred from using the clubhouse for meetings. We have to rent assembly rooms in the public schools whenever we want to have our meetings. It is quite unbelievable.

Over and above that, it would seem to me our only hope is to get a freeze put on this cost-of-living index that is really getting into everybody's hair. Most of us are paying more for maintenance than we are for mortgages.

Thank you for your consideration.

Senator CHILES. Thank you.

Yes, sir.

STATEMENT OF WILLIAM LAMINSKY, WEST PALM BEACH, FLA.

Mr. LAMINSKY. My name is William Laminsky. I live at Century Village. I am one of the 320 people who received notices—summonses—that my apartment has a lien against it.

Senator CHILES. What is that lien for?

Mr. LAMINSKY. I will explain it, sir.

Senator CHILES. Yes, sir.

Mr. LAMINSKY. In 1975, we had a court action. I was one of the presidents who was supposed to go to jail. At that time I would have gone to jail, if necessary. At that time certain moneys were due to Century Village, but the court said inasmuch as Century Village did not have too much money in its treasury, that the increases we were assessed should be put into a savings account. In other words, this money by court order was put into the Century Village lease and trust account, this money having been deposited there from 1975 up until 2 months ago.

Now in the meantime CV felt inasmuch as the court ruled against us in reference to CV lease money, he was supposed to get this money directly from the associations, and according to the lease we signed, he also was entitled to a full year's rent in advance. In other words, for my apartment he charged me for a total of approximately $1,700.

However, we were in no way in default because we went according to the court ruling. The court ruling said that we should put this money into escrow, which we did. He claimed that we were in default and he put a lien against my apartment and 300 other apartments at the same time. He said approximately 3,000 more will get the liens.

Now I think it is absolutely imperative that the Federal Government has to step in: that means the Congress—the House and the Senate. They must enact a law which will force developers to stop harassing the senior citizens. I think it is abominable. I don't think, Senator, that when you say we've got to try—it is more than trying, you must do something. After all, our lives are at stake. There are people I know who are on food stamps and they cannot take these to be harassments. Unless some action is taken, we will be priced out of our apartments and I don't think it is very fair for us after working all our lives and paying taxes, that we have to end up with things like this.

Senator CHILES. I thank you for your statement.

HELP PROMISED

I just want to say that when I say that I am going to try, I am going to give that every effort that I possibly can. The only thing worse than not being able to help is to promise you something that can't be delivered. I think that I want to be credible as much as anybody. We are dealing with this matter which is a very, very serious question. If you had the Florida delegation to pass the law, we could pass it today. But we are dealing with 50 States, many of which don't have the kinds of situations we have. Yet we think they are going to have them, and we would like to prevent them from happening in those States, but it is very hard to try to get that understanding out.

For example, the bill does not reside in my committee. I am not on the committee that has the bill; it is in the Banking and Housing Com-

mittee. We are meeting here under the Special Committee on Aging which does not have the authority to act on legislation. We cannot offer legislation in that committee. What we can do is hold hearings like we are doing now to build a record, and use that record as a means of getting some leverage on other people to show what kind of a plight we have, and we intend to do that.

I do want to tell you that we are going to see that we get hearings in the Congress this year and I think on the basis of those hearings we can achieve more understanding of the problem, if only I could get all the other Members of the Congress to hear what I am hearing today. Of course, I didn't even need to hear it to start with. I walked through here in 1970 when it was just beginning to start. I came back in 1976 and of course many weekends in between, and I have been listening to your plights on this for the 8 years. If I could get everybody else to hear them, it would not be any problem to pass the law.

So I don't want you to think that you don't have my support, and my enthusiastic support, to try to do something about it. But at the same time I want to be very careful and not walk out of here having you say, "Well, he said he was going to take care of that and he didn't do it." It is still a heck of a problem to try to get the other Members, and the other States that don't face this condominium problem right now, to see the importance of the legislation so that we can get it passed.

I want to thank you all for your appearance here today. It has been very helpful; I think it will help us in building the kind of record we want and we are going to try to take that record and do exactly what we can.

Pat, do you have anything further?

Mr. CAHILL. I would like to thank you very much. If I can help you in any way in Washington, all you have to do is make a telephone call and I will be there.

Senator CHILES. I thank you. I appreciate that.

We will recess our hearings. The record will remain open for several weeks. If you have additional material that you would like to send us, we would be delighted to have that material.

Thank you very much for your attendance.

[Whereupon, at 1:13 p.m., the committee adjourned.]

APPENDIXES

Appendix 1

MATERIAL SUBMITTED BY WITNESSES

ITEM 1. NEWSPAPER ARTICLES AND LEGAL DOCUMENTS SUBMITTED BY GARY A. POLIAKOFF,[1] OF BECKER, POLIAKOFF & SACHS, P.A., MIAMI BEACH, FLA.

EXHIBIT C

[From the Miami Herald, Jan. 11, 1976]

FORECLOSURES MOUNT; LATEST FILINGS HIT NEAR RECORD LEVEL

(By Charles Kimball)

Another onrush of foreclosure suits and conveyances of properties in lieu of litigation resulted in 74 more major real estate failures in South Florida in November. The month's accumulation of new distressed properties of record was one of the heaviest seen since the shakeout began in September, 1974. There are now a combined total of 775 financially pressed real estate holdings each worth $250,000 or more in Dade and Broward counties. The dollar valuation of these properties now totals $1.981 billion. The largest single category of projects in trouble continues to be apartments.

In Broward 17 more developments went under worth $59.3 million. The parallel November total for Dade County was 16 failures worth $69.2 million. In Broward two major developments were conveyed to lenders. They were Point View Towers and Plantation Villas. Foreclosure proceedings were started against a high-rise rental project, the Seasons of Fort Lauderdale.

In Dade two builders deeded seven projects to two trusts in lieu of foreclosure. Bankruptcy proceedings revealed over $16 million in defaulted mortgages alone at a large condominium promotion in northwest Dade County. Foreclosure proceedings hit a major conversion, the Island Terrace in Miami Beach. Trusts with loans of over $7 million on land alone in southwest Dade also found themselves in bankruptcy proceedings because of an insolvent builder.

There are now 364 apartment buildings in distress in the two counties combined. A total of 210 holdings of land are the next largest category of financially distressed properties.

[From the Wall Street Journal]

CONDO FAILURE CAUSES WIDESPREAD PROBLEMS

(By Jim Montgomery)

SANDESTIN, FLA.—When a big real-estate project goes under, it spreads ruinous ripples.

Bill and Tina Davis are strolling past their $51,900 condominium villa. Though it's "about 96 per cent completed," it has been that way for 15 months. The Davises, from Atlanta, spend their Florida vacations in another villa that costs them $40 a day. "It's kind of galling," says Mr. Davis, a Ford Motor Credit Co. manager.

The Davises' unfinished villa is in Sandestin, a posh resort in the making that folded last year. Its plumbing was being installed by Fred Morris, who was earning more than $25,000 a year on the job. When Sandestin ran out of money,

[1] See statement, p. 113.

Mr. Morris was out of work for 10 months. Now he is making $6.50 an hour as a construction worker in nearby Panama City. He says he has lost his boat, an airplane, a car and "everything I'd worked for." Because he can't collect $112,000 due him for plumbing work at Sandestin, he can't pay $65,000 in business debts he owes.

And then there is Chase Manhattan Mortgage & Realty Trust, named after the bank, because the bank was its real-estate advisor. Chase Trust has $14.2 million in unpaid loans and interest at stake in the Sandestin resort. To salvage its investment, real-estate professionals say, Chase Trust will have to risk at least another $4 million. Ironically, the project went under in the first place when Chase Trust abruptly cut off its financing, precipitating the bankruptcy of Sandestin's developer, Evans & Mitchell Industries of Atlanta.

(Recently, Chase Trust sold 16 loans totaling nearly $160 million to Chase Manhattan Bank; that left the trust with $589.5 million in loans, including the Sandestin loan, that weren't accruing interest—70 per cent of its loan portfolio.)

Sandestin, like many another ambitious REIT project, was conceived more than four years ago. At the time, REITs like Chase Trust were financing extravagant development plans, and that was when Evans & Mitchell acquired this 1,700-acre piney woods site straddling U.S. Highway 98 midway between Pensacola and Panama City on a peninsula lapped by the Gulf of Mexico on one side and Choctawhatchee Bay on the other.

Evans & Mitchell, not too hyperbolically, touted Sandestin as "a residential and vacation resort where man can live in harmony with nature while savoring the choicest fruits of civilization."

By August of 1974, the developers had completed an 18-hole golf course, tennis courts, a clubhouse and 43 of 215 planned condominium villas. Then Chase Trust cut off the money. Today, another 73 villas, a 96-room motel, a restaurant and related facilities remain just over 90 per cent completed and 100 per cent unusable. Of 99 other villas on which work was started, experts figure only 36 are "finishable." Weather, including Hurricane Eloise, ruined the rest.

Halting the project wiped out the jobs of some 500 construction workers and left more than 250 contractors, suppliers and other creditors holding the bag for at least $24 million.

Theodore P. Booras, vice president of First National Bank of Fort Walton Beach, says some construction workers "just disappeared into the woods," abandoning cars and mobile homes they were buying on the installment plan. He says the bank repossessed and took losses on "two big dump trucks, a boat and a half-dozen automobiles" and still holds four foreclosed homes.

Ordinary construction workers, says Fred Morris, the plumbing contractor, "were really hurt" because they needed all their pay to live on, and they couldn't find new jobs. To keep afloat himself, Mr. Morris used his life savings of $15,000 and sold possessions at a $16,400 loss. He kept a pickup truck. His wife has just taken a $100-a-week clerical job to help avert the foreclosure threatening the Morrises' $55,000 home in Panama City.

Another Sandestin contractor, Jack Adair, is "hanging on by the skin of his teeth," according to his lawyer, thanks mainly to his wife's income as a school teacher in DeFuniak Springs. Mr. Adair did pick up $4,000 for clean-up work around Sandestin after Hurricane Eloise. But Sandestin owes Mr. Adair $51,515 for earth-moving work. Bulldozers and other equipment on which he had paid $70,000 have been repossessed.

"That place cost me about $110,000." Aubrey Johnson, an electrical contractor in Milton, near Pensacola, says of Sandestin. "My backlog's down to $150,000 from over $1 million and I've had to lay off five people . . . and I'm stuck with $30,000 worth of light fixtures. You wanna buy 2,200 fixtures?"

Gale Smith's farm in Indiana recently went on the market, a casualty of the Sandestin collapse. Mr. Smith had installed water and sewer lines for the project and never got $138,256 due him. Another failed project in the Sandestin area cost him $117,000. To pay his debts and replenish his capital, Mr. Smith sold his farm for $120,000. He hopes that the sale of a home he owns in Warsaw, Ind., will bring him another $63,500. He was forced to sell some machinery, at distress prices, at a $300,000 loss. He says he may recover financially in "10 to 15 years, if I live that long."

Many people hereabouts blame the Chase Trust for their trouble. A big sign at the project still proclaims "Financing by Chase Manhattan Mortgage & Realty Trust," but one victim says, "Now we call it the Chase Distrust!"

They complain that the Chase Trust stopped financing the project after repeatedly assuring everyone concerned that all was well. Charlie A. Evans, II, former chairman of Evans & Mitchell, the developer, asserts that "Chase made a basically open-ended commitment to continue financing to completion, but he ran out of money and refused." The Sandestin Motel, he says, needed only 45 days of work to complete, and it would then have produced cash revenue to support the project.

"Stupidity of the Chase Trust wasted a cash flow (from the motel) of a half-million dollars," says C. M. (Push) La Grone, an Atlanta building-materials supplier and member of a Sandestin creditors' committee. But he also says there was a "a lot of stupidity, including mine, on the whole thing!" He says he permitted Sandestin to run up a $112,626 bill at his firm; by way of atonement, he has reduced his salary, he says, "about 30 percent."

Other businessmen also suggest that a lack of fiscal restraint hastened Sandestin's collapse. "They spent grandiosely," says banker Booras of Fort Walton Beach. "Funds poured out like there was an endless supply."

"It was the loosiest-goosiest operation I ever saw," a veteran real estate broker says. And another businessman says that, when the Chase Trust finally realized it was riding "a runaway horse, it jerked the rein too quickly and everyone took a spill."

Evans & Mitchell, the developer, tried to recoup by filing a bankruptcy petition on Aug. 15, 1974, under Chapter 11 of the Bankruptcy Act. This would have allowed the developer to continue work on Sandestin under court supervision without being sued by creditors. But last March, Sandestin simply ran out of cash, and the court appointed a trustee to liquidate the project to raise cash for creditors.

Now awaiting court approval is a settlement agreement just executed by Chase Trust under which Chase would pay $1.9 million and take title to the 350-acre developed part of the project. Most of the undeveloped part would go to Cabot, Cabot & Forbes Land Trust to satisfy a $7 million claim it has on the project.

The Chase settlement would yield suppliers and other unsecured creditors about "63 cents on the dollar" of an estimated $3 million in claims, says Edward L. Greenblatt, attorney for the bankruptcy trustee. "In the context of a bankruptcy," Mr. Greenblatt says, "that's close to a bonanza."

Some creditors are less enthusiastic. "I didn't work on a 37 percent profit margin," says Fred Morris, the plumbing contractor. "Do you really think the Internal Revenue Service and my other creditors will let me settle for 63 cents on the dollar?"

Chase Trust chairman Joshua Muss won't disclose how much Chase has set aside as a loss reserve on Sandestin. He does say the trust plans "to revitalize the project" at an additional cost of no more than $2.5 million.

If Chase Trust takes over Sandestin and completes construction, it can count on closing one sale right away. Bill and Tina Davis, the Atlanta couple, paid $5,190 down on their villa two years ago. "We'll complete our purchase, definitely," Mrs. Davis says.

Some others want their money back. Jack Adair, the earth-moving contractor, had put up an earnest-money deposit of $500 toward the purchase of a villa in the project he helped build. "Now I can't afford it," he says. L. Andrew Hollis Jr., a lawyer from Enterprise, Ala., demanded and got back his $5,000 down payment about a year ago.

Owners of finished villas, who come from as far away as Calgary, Alberta, seem happy with their purchases, though the project's financial troubles have cast a cloud over at least one title. Mrs. Ann J. Jones, a Memphis real-estate woman, bought her $56,626 villa for cash on June 25, 1974. But her deed to the property wasn't recorded until July 1, three days after a mechanic's lien of an unpaid Sandestin contractor was filed against it.

At least one man thinks Sandestin's failure has helped improve his life. Burton Ward, a 54-year-old construction supervisor, left a job in Fort Wayne, Ind., to work at Sandestin. The work ran out in less than six months, and Mr. Ward lost about $10,000 in pay and bonuses. But now he's happily running a marina that he leases in nearby Destin. Finding a marina to run, he says, "was really why I came down here. The job at Sandestin was only an excuse."

EXHIBIT D

[From the Miami Herald, May 28, 1978]

DREAM CONDOS AT EMERALD ISLES ARE NIGHTMARE

(By Darrell Eiland)

"There are several good reasons why Emerald Isles West is located in Davie. First of all, there are many people who prefer a different lifestyle from the overcrowded 'beach' environment. People who yearn for the wholesome atmosphere many of us remember from childhood, but with comforts and modern conveniences that were lacking in 'the good old days.' Davie, Florida, offers such a setting."

In the summer of 1974, there were condominiums rising all over Dade and Broward Counties. Aunt Jemima could have wished her pancakes were selling that well.

". . . Yet, Emerald Isle West is within minutes of the other Gold Coast communities and their attractions. Ideal commuting distance for business or pleasure."

Some people bought condominium units for a retirement home, for a place to live their last years in sunshine and quiet. Some bought them as an investment, a place to put their money to work.

"There is financial advantage of buying here. Building moratoriums have curtailed condominium and high-rise construction in many parts of Broward and Dade counties, which has forced prices higher than they should be for existing condominiums in those areas. Just compare their prices and ours and you'll see. You get so much more for your money at Emerald Isles West."

Ed Begbie: "I figured it was a good price, both from a buyers' standpoint and a sellers' standpoint. I wasn't stealing it and I wasn't being robbed. I paid $28,500 before construction started for a two-bedroom, two-bath unit."

Begbie is one of the "lucky" ones. He and his wife got an apartment out of the deal. They also got some problems.

"Condominium prices will continue to rise. Some will eventually price themselves out of the market, but our low pricing structure will allow for substantial appreciation and marketability. Your Emerald Isles West condominium offers you a pleasant way of life now and security as well for the future."

But Begbie and the 44 families who did receive apartments can't sell them, however much the price of condominiums have risen. And, they say, their life at Emerald Isles West has been anything but pleasant.

"Now, read on. You'll be pleased with the features of Emerald Isles West. 'A Bit of the Irish Woods in Davie'."

There's what the lawyers call "a cloud on the title." Since 1974, construction has halted at the project with only the first phase semi-finished.

The 44 families have had to improve, maintain and take care of property they don't really own.

Sol Diamond is one of the "fortunate" 44. It's the waiting that has gotten to him.

"I know of at least a half dozen people who have died while they were waiting for the courts to reach some sort of a decision on this. The courts should take into consideration that some of us in here don't have that many years left to us to wait around for our Garden of Eden in the Promised Land."

"Yeah," said Begbie. "If criminals are entitled to speedy justice, why aren't we?"

"Enjoy a carefree adult lifestyle on your own little 'isle' of fun and relaxation. You won't have to go anywhere to have a good time. In the middle of our well-guarded, tree-studded estate is a tremendous swimming pool surrounded by plenty of sundecking. The ideal spot to spend a lazy afternoon, getting into the swim of things or lounging in the shade chatting with friends."

Ed Begbie has never so much as wet a toe in the swimming pool. The reason: weeds still grow high on the vacant space where the swimming pool was supposed to be.

"If you care for more activity, there's plenty available in our handsome recreation building. Get in shape with a workout in the gymnasium, followed by a soothing sauna bath (separate saunas for men and women.) There's a party room with kitchen for friendly get-togethers. The building also contains a billiard room and shower-rest room facilities.

The ugly grey skeleton of what was to be the recreation room stands gauntly beside the spot where the swimming pool was to be. Residents of Emerald Isles

West can't even roam inside the structure. A hurricane fence blocks off all access to the area.

Howard Duncan, who heads Davie's Building Department, said he has frequently examined the project's uncompleted portion.

"I would be greatly surprised if the basic framework of the building has not suffered terrific damage," Duncan said.

"When you leave ends of steel reinforcing projecting out into the weather, as they have been on that project, the erosion follows the steel down inside the concrete," he said.

"If tennis is your game, grab your racket and head for one of our tennis courts located just outside the recreation center. The courts are lighted so you can play them day or night. As you can see, there is ample opportunity to enjoy yourself at Emerald Isles West."

The land has not yet been leveled for the tennis courts. Some of the residents, seeking recreation, joined a nearby country club. The country club closed.

What happened at Emerald Isles West?

At the same time Begbie and other residents were moving into the completed first phase of the structure, dozens of other people were waiting for their units to be built.

Waiting. And waiting. And waiting.

"My place couldn't have been more than a couple of months from completion," said Theodore Kanov.

"And yet, they kept putting me off and putting me off on the completion date. First, there was this that still had to be done, and then there was something else and then something else," Kanov said.

"I began to really smell a rat when several of the other potential tenants said they had received letters from the developer, the Barth company, asking that husbands and wives come in for a talk. The letter said there wasn't any need for the tenants to bring a lawyer as the meeting would be time consuming and a lawyer would be an unnecessary expense," Kanov said.

"They didn't send me one, probably because they were aware that I have had some experience in real estate," he said.

But. Kanov told a friend, "George, I'm going in with you," and at the day and hour when George was scheduled to go in, Kanov went in too, over the objections of the receptionist.

"They said the company needed some construction money. They were offering a deal: If you increased your downpayment to 25 per cent or more of the total cost of the unit, they would give you a 10 per cent discount on the total cost at closing.

"It sounded like a reasonable deal. They said it would cost them 13 per cent interest and a lot of paperwork to borrow the money from a lending institution and they would rather give the purchasers 10 per cent deduction in the price."

But Kanov, who owns the Beach Motel in North Dade and has sold real estate for a number of years in South Florida, sensed the company might be in deep financial trouble.

He placed an ad in the Herald for all potential Emerald Isles West purchasers to contact him.

More than 100 did, and they formed a corporation and hired the law firm of Poliakoff, Becker and Sachs to represent them.

Attorney Peter Sachs, who has been representing the group in court, said as much as $1.5 million in deposits had been received by Barth Construction.

In late 1974, Clevetrust, an Ohio real-estate investment trust, filed a foreclosure suit against Barth, alleging that a $3.5 million loan had not been repaid in a timely fashion.

Sachs attempted to intervene in the suit, asking the court to halt the foreclosure proceedings to protect the rights of the people who had put down deposits on the uncompleted property.

A Broward court ruled against Sach's motions on every issue except one and Sachs took an appeal.

The appeal has not been acted on by the court since 1975.

"What Barth was doing was perfectly legal at the time," Sachs said. "He was using the deposit money to construct new units with. The Florida Legislature recently passed a law which partially protects the buyer. It limits the amount of the deposit which may be used for construction, but it's not enough.

"The sad part about it is that this tragedy could be repeated unless the state Legislature does something about it," he said. In every other state, he said, the use of deposit funds for construction is illegal.

Clevetrust has demonstrated no great enthusiasm for an out-of-court settlement with the unit purchasers, Sachs said.

"They're afraid of setting a precedent."

What happened to the people who put the money down?

"I know at least one man who worried about getting his money back night and day. His family said it bothered him constantly. He finally developed a heart condition and died. You can't say this situation was the cause, but it certainly didn't help," Kanov said.

The failure of the condo also split up one couple, Kanov said.

"They argued so much and so long about who had talked the other into investing in the place that they finally got a divorce," Kanov said.

Vincenzo Armetta was one of those whose apartments hadn't even begun.

He now lives in Margate.

"What bothers me about it is that they took a $10,000 check from me just two weeks before the whole thing folded," Armetta said.

In all, he had invested some $18,775, he said, counting his down payment on the apartment he never received, plus the additional "investment money" he had put down in an effort to get his apartment at a cheaper price.

"I wasn't hurt as badly as some, but I felt it," Armetta said.

There were others, not just Floridians, who were drawn into the deal.

Frank Di Giovanni of 1357 83rd St., Brooklyn, had paid $11,550.

Milton Fishman of 671 NE 195th St., North Miami, paid the developer $10,128.56.

Carol Weiss of 17120 NW 45th Ct., Opa-locka, a legal secretary, had paid $9,950.

Eugene Zalewski of 3253 Foxcroft Rd., Miramar, had paid $9,447.16.

For some, these sums represented their life savings. For others, it was borrowed money, which meant it had to be paid back, with interest.

And what of the developer?

"Out of the blue, Jerry Barth called me one day," Sachs said. "He said he is living in California now and that he has 'got religion.' He said he sincerely hopes all the people involved get their money back."

Barth's religious inclinations did not blossom with his financial difficulties, unit owners said. During the heyday of condo sales, Barth halted work in his office every Wednesday while an itinerant preacher whom Barth kept on the payroll preached a church service from 1 to 4 p.m.

Some people just put the minimum amount of money on one apartment. Some of them could afford it. For others, it was their life savings and the loss of the apartments meant they had to move in with children or with relatives.

For others, it was an investment loss.

One doctor bought three of the apartments for cash, Kanov said. He still has $91,000 tied up in the transaction.

Begbie and his fellow tenants of the still-uncompleted livable section of the development have had to provide their own funds for maintenance of the property and to settle utility bills and such.

EXHIBIT E

FINAL REPORT OF THE GRAND JURY

In the circuit court of the eleventh judicial circuit of Florida in and for the county of Dade, fall term 1975, circuit judge Harold R. Vann, presiding.

MARTIN LUTHER KING JR. BOULEVARD DEVELOPMENT CORP.

We received reports of misuse of federal funds channeled to the Martin Luther King Jr. Boulevard Development Corporation. We refer this matter to the Federal Grand Jury and urge them to investigate.

CONTROL OF BUILDING INSPECTIONS

The Grand Jury heard testimony concerning building inspection practices in Dade County and the City of Miami. One former inspector told us that inspection practices of the last several years have resulted in the construction of buildings

which could be blown away in another "1926 Hurricane." The evidence we heard supports this statement.

County officials themselves condemned inspection practices during the period of increased construction in Dade County. A Building Department official said that to keep construction going an inspector had to inspect 30–36 sites a day. No inspector could properly and adequately inspect that many sites in one day. In other areas we heard that Dade County Building Inspectors failed even to perform inspections. No excuse, whatsoever, can exist for the County to permit such inaction.

Instead of requiring thorough, proper inspections, the County gave into the pressure of the building industry. The County should have been prepared to adequately staff the Department during peak periods of construction with trained personnel. It was not prepared.

As a result, boondoggles such as the El Conquistador Condominiums were built. Last year a Dade Circuit Judge awarded unit owners in this complex a $1,174,869 judgment for defects including code violations in the construction of the buildings.

Proper inspections would have revealed these defects and proper enforcement would have resulted in these defects being corrected before the Final Certificate of Occupancy was issued. Lack of manpower is no excuse. The County should have provided manpower for the Building Department.

Building Department officials told us that often inspectors rely simply on contractors whom they feel they could trust. The sad fact is, however, that the Building Department cannot be sure that the contractor who secures the building permit will actually supervise the construction. Neither the City of Miami nor Dade County Building Departments have been able to insure that licensed contractors are supervising a particular job. This is a sad commentary on inspection practices.

Building officials told us that many of the problems that have arisen involve only workmanship and not human safety. Officials claim that the South Florida Building Code does not address itself to workmanship standards. Shabby workmanship should not be tolerated. Proper standards for workmanship should be included in the Building Code.

In the meantime, officials of both the City of Miami and Dade County Building Department should do everything within their power to make sure all structural defects in a building are corrected before issuing a Certificate of Occupancy.

We were disturbed at statements from a City of Miami Building Official that the City accepts less than the South Florida Building Code requires. For example, stair heights of 6'10" are accepted when the Code requires 7 feet; block wall widths of 7⅝ inches are accepted when the Code requires 8 inches. If the Code specifies a standard that standard should be met. Statements that individual inspectors must make judgments in these situations are absurd.

We were concerned at the lack of training on the part of building inspectors in either the City of Miami or Dade County Departments. Inspectors come from the trades and are oriented toward the private contractors. The job of inspector must be professionalized, formal training must be provided and salary scales should be set in a flexible fashion capable of attracting competent persons even in boom times.

Dade County Building officials themselves described their bookkeeping and record keeping as sloppy. They described files, too often as lost. We are concerned about such a situation.

We believe any Building Department should serve the public and the construction industry in a fair, impartial and efficient manner. We heard some complaints that inspections are not promptly made even in less hectic times of construction. We heard Building Officials themselves express concern at the length of time required to process plans.

To remedy the problems we have described, we recommend the following:

1. Building inspectors should receive formal training as inspectors before assuming their duties. They should be examined and certified as competent to perform the work of inspectors before undertaking their duties.

2. Salary scales should be established which make the position of inspector competitive with that of jobs in the trades no matter what the economic conditions are at the time.

3. All Building Departments should be able to expand to meet rising construction demands for inspection promptly, efficiently and thoroughly. Quality should never be sacrificed for quantity.

4. Sufficient staff in decision making positions should be available to efficiently expedite the processing of plans.

5. Uniform standards for workmanship should be immediately incorporated into the South Florida Building Code.

6. Fire inspectors should be required to regularly inspect all new construction from the moment construction commences.

7. All Building Departments should institute procedures to insure that the contractor who obtains the permit actually supervises the job. Failure to do so should result in the imposition of severe penalties.

8. Immediate steps should be taken by the Dade County Building and Zoning Department to develop proper bookkeeping and record-keeping procedures.

9. No temporary Certificate of Occupancy should be issued so long as there is any violation of the South Florida Building Code in existence.

EXHIBIT F

[From the Miami Herald, Nov. 26, 1975]

BUILDING CODE NOT ENFORCED

(By Steve Parker)

Many municipal building departments in Broward County are not properly enforcing provisions of the South Florida Building Code, A. J. Collins, chairman of the Broward County Board of Rules and Appeals said Thursday.

Collins made that statement after a two-hour board of rules and appeals sponsored seminar held to explain the duties of inspection personnel as outlined in the building code.

"I'd say many weren't enforcing it," Collins said. "It's been bad enough that it requires what we've had today."

Collins would not name the delinquent departments.

He stressed to a crowd of more than 160 persons, comprised mostly of county and municipal inspection officials, the importance of obeying the code.

"It is the primary duty of every man who owns an inspection position in a municipality to enforce the provisions of the South Florida Building Code. In no way are you to violate the law no matter what city official tells you to do so, whether it be the mayor or whoever," Collins said.

"If you've committed a code violation, somewhere along the line the fur is going to fly," he added. "We don't want problems such as we've had recently."

Collins later said he was referring to problems in Lauderdale Lakes, where three inspection officials were suspended for not doing required inspections and not properly issuing building permits. While Lauderdale Lakes' former chief building official's license was revoked, the board of rules and appeals later lifted the other two officials suspensions.

TAMARAC OFFICIAL FAILED COUNTY BUILDING TEST

(By Ted Stanger)

Tamarac's suspended chief building official failed a countywide building examination last year, just one month before he took over the city position, county records show.

Daniel Salvucci, who was temporarily suspended this week because he hadn't lived within Tamarac city limits as required by the city charter, scored 30.5 points of a possible 100 on the county building exam required of all general contractors who build in county areas. Passing is 75.

Salvucci failed the exam June 8, 1974, three weeks before a new county law required all new chief building officials to pass the county exam.

City manager Gross said he was not aware of Salvucci's test result and would bring it to the attention of the city council.

Gross recently disqualified Tamarac's chief electrical inspector, John Smith, after learning that Smith had twice failed the county-sanctioned electricity test.

Salvucci obtained county certification for his position by passing an exam given at Deerfield Beach in May, 1974, with a 77. Many municipal exams were criticized that year by a grand jury report that said certification was being issued by cities "in a careless, reckless and completely unprofessional manner."

Salvucci said he took the county exam because he had not yet received the results of his Deerfield Beach testing.

Salvucci attributed his falling score on the county test to his lack of experience as an inspector at that time. He started working for Tamarac in March, 1974, and was made chief inspector in July, 1974.

"I was new to the business then," he said, "but just try me now." He said he planned to take another exam, administered by the state.

EDITORIAL: THOSE INSPECTIONS ARE SIGNIFICANT

You wouldn't think an inch of pipe would make much difference, but just ask the residents of Hollywood's Townhouse Villas what it has cost them.

Because the plumbing subcontractor installed a four-inch rather than the specified five-inch sewer pipe, residents in the last two years have spent $4,000 for unclogging with another $8,000 in repair expenses possibly to follow.

Why did it happen? The builder, who got the city building department's approval to depart from the blueprints, says he isn't liable. The plumber who installed the pipe, says he isn't responsible either.

The building department chief, Dave Murchison, said the inspector on the job in 1973 determined that the four-inch pipe would be adequate and that the South Florida building code, allows "alternate methods."

Yet once the residents moved in, their sewer pipes began to clog up. Engineers point out that the extra one inch of pipe is significant because a five-inch pipe has 56 per cent more capacity than a four-inch pipe.

And last year Murchison referred to the four-inch pipe as a violation when he ordered the Townhouse Villas owners to correct the situation by installing a five-inch sewer pipe.

You can guess who finally pays for all this confusion—the unsuspecting residents. As resident Morris Goldenberg put it, "You expect when you buy a new home that the city has done its job and inspected it properly."

His comment underscores the importance of thorough building inspections which insure that all requirements of the building code are met.

It is why The Herald's Broward News Section has continued to look into building inspection practices that ultimately end up victimizing unsuspecting buyers.

[From the Fort Lauderdale News, Dec. 9, 1975]

EDITORIAL: BUILDING VIOLATIONS POINT UP THE NEED FOR COUNTY ACTION

Let the buyer beware is an admonition that applies all too well to the purchasers of homes in Broward County. And it appears that the buyer of a home had best beware mostly of his own safety because of shoddy construction that has been allowed.

Evidence is mounting that a great number of persons have bought a lot of trouble along with their new homes . . . trouble in the form of dangerous electrical and structural defects.

The South Florida Building Code, the law designed to insure the protection of safe and sturdy buildings, has not been followed. And the guardians of that law, the building inspectors in the cities where these homes have been built, have failed to see that the code is enforced.

The widespread reports of such violations has prompted Broward County State Atty. Philip Shailer to begin an investigation that will undoubtedly end up before the grand jury. The announcement of the investigation by Shailer comes about a week after The News ran a comprehensive story indicating numerous cases of possible code violations in West Broward cities.

In some cases the failure to enforce the code may have been caused by incompetence. In some it seems just plain negligence. It is suspected in other cases that it may be inspectors looking the other way for a price.

Asst. State Atty. Harry Gulkin, who will head up the investigation, points out that violations of the code are crimes and that elected officials who knowingly allow the violations to exist or do not correct them can be removed from office.

Meanwhile, it is the homeowner who is holding the bag. It is not fair to penalize him for something he didn't do.

It may just be that some cities may find themselves legally responsible to make the corrections or see that they are corrected.

This is not the first time that the grand jury has taken note of the handling of building inspections by the cities in Broward County. But it is evident that the warning that corrective steps needed to be taken was not enough. It is important now that the conditions which allowed the violations to happen are not permitted to continue.

It is bad enough to consider the tremendous investment of money these homeowners have in the property involved, but even more concern is the danger to life and property that exists.

In addition to any criminal action, it is mandatory that qualified inspectors are hired by the cities and that rigid requirements are met for such jobs.

It may be best to take inspectors out from under control of the cities and put them under a countywide board.

The county board of Rules and Appeals has the power to file suits to stop shoddy construction of which it is aware and should exercise that power where appropriate.

The building code itself should be better defined to insure greater compliance.

The time is past for officials to ignore warnings. County officials must act to insure the proper protection of lives and property.

EXHIBIT G

FINAL JUDGMENT

In the circuit court of the eleventh judicial circuit of Florida, in and for Dade County, general jurisdiction division, case No. 74–2938.

El Conquistador Condominium, Inc., plaintiff/counter-defendant, v. Mr. and Mrs. William Day, et al., defendants/counter-plaintiffs, and El Conquistador Condominium, Inc., third party plaintiff, v. Planas and Franyie Engineers, Inc., a Florida corporation, and Juan E. Planas, individually, third party defendants.

This cause having come on for final hearing, and the Court having heard testimony, received memoranda of law and final argument of counsel, the Court finds as follows:

1. The builder-developer of El Conquistador Condominium South was and is El Conquistador Condominium, Inc., the Plaintiff/Counter-defendant.

2. The builder-developer of El Conquistador South (i.e. Phase I) erected and constructed the several buildings in said phase below the accepted construction standards prevailing in the community and, in numerous respects, contrary to both plans and specifications for the building and the South Florida Building Code.

3. The evidence and testimony clearly demonstrates that the defective construction has resulted and will continue to result in ongoing maintenance problems and structural defects. The Counterdefendant's witness, Paul Gioia, confirmed the substandard construction and workmanship of these buildings, as initially proven by the Counterplaintiffs by substantial competent evidence.

4. The Court finds the circumstances of the construction of the El Conquistador project to be both inexplicable and incredible and the Court observes that it is perplexing that this matter has not been thoroughly considered by the Grand Jury.

5. The engineer on the project, Planas and Franyie Engineers, Inc. and Juan Planas individually had a moral obligation and professional responsibility to report the flagrant violations of the building code (which the Court finds to exist) to the appropriate county authorities, at the earliest reasonable opportunity. However, the Court finds that said engineers technically complied with the legal obligations imposed upon them as special inspector by the South Florida Building Code.

6. The Court specifically finds the following defects to exist as a result of the breaches by the Counterdefendant and assigns as monetary damage, the sum indicated alongside each item:

Fill and foundation including unclean and poor quality fill, failure to adequately compact, failure to provide a vapor barrier and other problems relating to the first floor slab and its thickened edge	$61,924
Plus, preventative termite treatment	9,639
Variations in stair treads and risers	7,715
Gates to prevent access to the roof	315
Fire rated partitions not provided between all apartment units	60,636
Electrical not in accordance with code	9,945
Masonry walls improperly constructed	196,650
Stucco	13,500
Roofing, including failure to insulate, improper slope, drainage and flashing, and raised electrical conduits	177,585
Walkways and balconies discontinuous	74,853
Interior floors at same elevation as exterior walkways and balconies	258,696
First floor elevation not sufficiently above grade (building E)	17,100
Intercom system (close exposed pipe)	1,800
Drywall system unstable	11,484
Architectural columns deleted	18,909
Air conditioning defects	180,270
Awning windows omitted	54,588
Asphalt parking defects	19,260

In addition to the items above enumerated there are several items of defective construction for which the actual damage figure is not at present readily determinable or where the cost of correction or repair is prohibitive. These items include the placement of rigid metalic conduit less than 18" below the surface of the ground, expansion joint defects, flat plate (slab) design not in accordance with code requirements, improper construction practices with respect to reinforcing steel and concrete, and diminished value of the condominium property and units.

7. The Court makes no finding herein with respect to the liability of other parties, such issues having been reserved to be tried separately.

In accordance with the foregoing findings of fact, it is

Ordered and adjudged that

1. Third party defendants Planas and Franyie Engineers, Inc. and Juan E. Planas' motion for directed verdict is granted and the third party complaint be and it hereby is dismissed.

2. Counterplaintiffs, William Day, et al., shall have and recover from the Counterdefendant, El Conquistador Condominium, Inc. the sum of $1,174,869 for which let execution issue forthwith.

3. Sums received by execution or other satisfaction of this judgment, by Counterplaintiffs or their attorneys in their behalf shall be paid into a Trust Account for the benefit of the class of Phase I unit owner represented by the named Counterplaintiffs to be administered by Steven Hessen, Esq. as Receiver, who shall collect said judgment by execution or otherwise and utilize said funds, after appropriate allowance for attorney's fees agreed to by Counterplaintiffs, to maintain and/or repair and/or rehabilitate the condominium property with respect to the items enumerated in paragraph 6 hereof. The Receiver is further authorized and directed to file a report of his survey and recommendations to the Court within 45 days of this Order.

4. The Court reserves jurisdiction to enter an Order respecting costs upon motion at some future date.

Done and Ordered at Miami, Dade County, Florida, this 31st day of July, 1975.

THOMAS A. TESTA,
Circuit Judge.

EXHIBIT K

INCREDIBLE RECREATION LEASE PAYMENTS "UNCONSCIONABLE"?

A table to give the real facts about recreation leases that have a cost-of-living escalation clause—this table assumes the cost of living will increase 5 percent in each and every year, and future year. This table provides multipliers to (1) determine the approximate lease payment for a period in any future year, and (2) determine the total of all lease payments through any future year.

Examples: If the initial lease payment of a condo is or was $100,000 per year, in the 99th year the lease payment will be about $11,927,500, or 119.275 times $100,000 (see table, column A). The total of all lease payments through the 99th will be about 2484.785 times $100,000, or $248,478,500 (see column B). If the initial lease payment of a condo is or was $100,000 per year, in the 20th year the lease payment will be about $252,600, or 2.526 times $100,000 (see column A). The total lease payments through the 20th year will be about $3,306,500, or 33.065 times $100,000 (see column B).

Year	A	B	Year	A	B	Year	A	B	Year	A	B
1	1.000	1.000	26	3.386	51.113	51	11.467	220.815	76	38.832	795.486
2	1.050	2.050	27	3.555	54.669	52	12.040	232.856	77	40.774	836.260
3	1.102	3.152	28	3.733	58.402	53	12.642	245.498	78	42.813	879.073
4	1.157	4.310	29	3.920	62.322	54	13.274	258.773	79	44.953	924.027
5	1.215	5.525	30	4.116	66.438	55	13.938	272.712	80	47.201	971.228
6	1.276	6.801	31	4.321	70.760	56	14.635	287.348	81	49.561	1,020.790
7	1.340	8.142	32	4.538	75.298	57	15.367	302.715	82	52.039	1,072.829
8	1.407	9.549	33	4.764	80.063	58	16.135	318.851	83	54.641	1,127.471
9	1.477	11.026	34	5.003	85.066	59	16.942	335.794	84	57.373	1,184.844
10	1.551	12.577	35	5.253	90.329	60	17.789	353.583	85	60.242	1,245.087
11	1.628	14.206	36	5.516	95.836	61	18.679	372.262	86	63.254	1,308.341
12	1.710	15.917	37	5.791	101.628	62	19.613	391.876	87	66.417	1,374.758
13	1.795	17.712	38	6.081	107.709	63	20.593	412.469	88	69.737	1,444.496
14	1.885	19.598	39	6.385	114.095	64	21.623	434.093	89	73.224	1,517.721
15	1.979	21.578	40	6.704	120.799	65	22.704	456.798	90	76.886	1,594.607
16	2.078	23.657	41	7.039	127.839	66	23.839	480.637	91	80.730	1,675.337
17	2.182	25.840	42	7.391	135.231	67	25.031	505.669	92	84.766	1,760.104
18	2.292	28.132	43	7.761	142.993	68	26.283	531.953	93	89.005	1,849.109
19	2.406	30.539	44	8.149	151.143	69	27.597	559.550	94	93.455	1,942.565
20	2.526	33.065	45	8.557	159.700	70	28.977	588.528	95	98.128	2,040.693
21	2.653	35.719	46	8.985	168.685	71	30.426	618.954	96	103.034	2,143.728
22	2.785	38.505	47	9.434	178.119	72	31.947	650.902	97	108.186	2,251.914
23	2.925	41.430	48	9.905	188.025	73	33.545	684.447	98	113.595	2,365.510
24	3.071	44.501	49	10.401	198.426	74	35.222	719.670	99	119.275	2,484.785
25	3.225	47.727	50	10.921	209.347	75	36.983	756.653	100	125.239	2,610.025

Source: Prepared by R. E. Wagenhals for the Condominium Executive Council of Florida, Apr. 3, 1974.

EXHIBIT M

EXCERPT FROM THE SOUTHERN REPORTER (FLORIDA)

Marvin Franklin and Norman Franklin, Appellants,

v.

White Egret Condominium, Inc., a non-profit Florida corporation, Appellee.

No. 76–1535. District Court of Appeal of Florida, Fourth District, Aug. 9, 1977. Rehearing Denied May 31, 1978.

Sale of a condominium apartment was made to one purchaser whose application had been approved by condominium association, and he conveyed half of his interest in apartment to his brother. Condominium association brought suit seeking declaratory judgment that transfer was void. Brothers' request for jury trial was denied, and the Circuit Court for Broward County, Gene Fischer, J., entered final judgment setting aside transfer by deed. Brothers appealed. The District Court of Appeal, Kovachevich, Elizabeth A., Associate Judge, held that: (1) ownership of an apartment by two blood brothers was permissible under condominium articles; (2) purchaser and brother met restriction that apartment was to be used only as a "single family residence"; (3) transfer by purchaser of one-half interest in apartment to brother did not require approval of

association; (4) condominium article prohibiting children under age 12 from residing on premises was unconstitutional, and (5) trial court did not err in refusing jury trial.

On petition for rehearing, the court, Cross, J., held that action of condominium association in seeking to invoke powers of trial court to compel reconveyance of interest in condominium apartment enabled the court to pass on question whether restrictive covenant violated Fourteenth Amendment.

Letts, J., dissented and filed opinion.

Affirmed in part, reversed in part, and remanded with directions.

1. Estates 11

Where condominium articles specifically allowed joint ownership of apartments and made no limitation upon amount of owners or character of ownership group, ownership of an apartment by two blood brothers was permissible.

2. Covenants 49

Provision of condominium articles which prohibited use of condominium apartment for any purpose other than as a "single family residence," being a restriction or free use of property, was to be strictly construed in favor of free and unrestricted use of real property.

See publication Words and Phrases for other judicial constructions and definitions.

3. Covenants 49

A restrictive convenant must be read in context of entire document in which it is contained.

4. Covenants 103(1)

Restriction in condominium articles that apartments were to be used for no purpose other than as a "single family residence", taken in context of joint ownership provision, was met by two brothers who jointly owned apartment, even if they constituted two separate families, in that each of brothers alternated their stays on premises and use to which they put apartment was that of a single-family dwelling.

See publication Words and Phrases for other judicial constructions and definitions.

5. Covenants 92

Where condominium articles specifically allowed transfer of apartment to member of "immediate family," without approval of association, conveyance by purchaser of apartment of an undivided one-half interest in apartment to his brother was valid despite failure to seek approval of condominium association.

6. Constitutional Law 82(9), 242.1; Estates 11

Condominium article prohibiting children under age of 12 from residing on condominium premises was an unconstitutional violation of apartment purchaser's rights to marry and procreate; furthermore, no compelling reason was shown for the prohibition, and fact that condominium association provided for designation of children guests and had certain families with children under 12 residing on premises made enforcement of restrictions unreasonably selective and arbitrary and thus a violation of equal protection. U.S.C.A. Const. Amend. 14.

7. Jury 18

In action by condominium association seeking declaratory judgment that transfer by apartment purchaser of one-half interest in apartment to his brother was void, trial court did not err in refusing to grant brothers' motions for jury trial, in that question for determination involved title to real property, no claim or counterclaim was made for damages or any other commonlaw issue, and jury trial, if affordable at all, was subject to discretion of trial court.

ON PETITION FOR REHEARING

8. Constitutional Law 213(4)

So long as objectives of restrictive covenants contained in condominium documents are effected by voluntary adherence to their terms, no state action would be involved, and no rights protected by Fourteenth Amendment to the

United States Constitution could be said to have been violated. U.S.C.A. Const. Amend. 14.

9. Constitutional Law 213(4)

By seeking to invoke powers of trial court to compel reconveyance by apartment owner of one-half interest in condominium apartment to owner's brother on basis that conveyance was contrary to rules of declaration of condominium, condominium association invoked sovereign power of state to legitimize restrictive covenants in question, thus enabling District Court of Appeal to pass upon question whether covenant was violative of Fourteenth Amendment to the United States Constitution. U.S.C.A. Const. Amend. 14.

10. Constitutional Law 82(9), 83(1); Covenants 1

Restrictive covenant forbidding occupancy of condominium premises by families with young children amounts to substantial interference with choice to beget and bear children; other constitutionally protected interests which may also be infringed to varying degrees by such restrictive covenant include interest which supports free and open travel among the states, interest which parents have in being able to supervise their children's education and enjoy their companionship, and interest concerning family living arrangements. U.S.C.A. Const. Amend. 14.

11. Constitutional Law 82(10)

In our society the family unit is swathed in protection of the Constitution, and any substantial interference directly affecting family must be supported by countervailing and superior interest. U.S.C.A. Const. Amend. 14.

12. Constitutional Law 83(1)

Constitutional rights, even those characterized as fundamental, are not absolute; occasionally, exercise of protected right must give way when public interest is sufficiently compelling to justify infringement of personal liberties.

James G. Kincaid, Fort Lauderdale, for appellants.

Michael K. Davis of Watson, Hubert & Davis, Fort Lauderdale, for appellee.

Kovachevich, Elizabeth A., Associate Judge.

Appellants-defendants appeal a final judgment entered in favor of the appellee-plaintiff-condominium which set aside the transfer by deed of a certain ownership interest from one defendant-brother to the other defendant-brother on the basis that the same was contrary to the rules of the declaration of condominium which prohibited ownership by more than one family, and ordered the reconveyance by defendant, Norman Franklin of all of his interest in an apartment back to defendant Marvin Franklin. Of the six points raised on appeal, four have merit, and on the same, we reverse.

Defendants are out-of-state residents who desired to purchase a condominium apartment; their plans were contingent upon owning it jointly. Defendants decided to purchase a certain unit which was then owned by a Mr. and Mrs. Murray, who had listed the property for sale with a real estate broker, who represented those sellers. A salesman for that broker brought the ultimate purchaser, defendant Marvin Franklin, together with the owners in negotiations which culminated in the signing of a contract for the purchase of said apartment in the name of "Marvin Franklin or nominee".

Defendants testified that they wanted this apartment as a joint venture so that their respective families would have a place to stay when they visited Florida; they maintained that this was the sole motivation for their purchase in the first instance. Both defendants applied for approval of ownership and submitted membership applications to the plaintiff. There is a conflict in the testimony as to whether or not the plaintiff failed to give written notice of rejection of either of the applications to the unit owner; defendants contend that under Article XXII of the Declaration of Condominium, failure to give such written notice within ten (10) days was tantamount to consenting to the defendants' applications. At the closing, defendants' attorney was informed that defendant Norman Franklin's application could not be found. Sale of the apartment was made to defendant Marvin Franklin, whose application had been approved, and who then conveyed half his interest to defendant Norman Franklin.

Plaintiff asserted that defendant Norman Franklin's application had never been accepted because he had a child under age twelve in violation of condominium rules. Despite said rules, defendant Norman Franklin had been informed by the

real estate agent for the Murrays that it was permissible for non-Florida residents to have guests under the age of twelve (12) live there, and, defendants were aware of two other non-Florida residents in the condominium with children under twelve (12) years of age. Ten (10) months after the closing, plaintiff brought suit seeking a declaratory judgment that the transfer from defendant Marvin Franklin to himself and his brother vesting an undivided one-half (½) interest in said apartment in each of them was void. The lower court denied defendants' request for a jury trial and subsequently entered a final judgment, as indicated hereinabove.

[1] This point on appeal questions the holding of title jointly by defendants. Ownership by the two defendant blood brothers was permissible; Article X specifically allows joint ownership of condominium apartments: "Membership may be held in the name of more than one owner . . ." In the entire Article there is no mention of any limits upon the amount of owners or the character of the group that might own the apartment; the word "family" is not even mentioned in the provision. It speaks not to the manner of use but specifically to the number of owners. The court should not now aid the plaintiff in reading a new and unstated restriction into the unqualified language of its own condominium document.

The next point questions what a "single family" is. Defendants contend that they were members of a single family and the use to which they put the condominium apartment was that of a single family residence. Article XXIII prohibits use for any other purpose than as a "single family residence." The word "family" has been used to describe a number of different sets of relationships and there is no consensus as to exactly what a family is. A zoning ordinance in *Carroll* v. *City of Miami Beach*, 198 So.2d 643 (Fla. 3rd DCA 1967), defined a family as "one or more persons occupying premises and living as a single housekeeping unit". The most recent federal expression on the same was an opinion filed on May 31, 1977, by the Supreme Court of the United States in *Moore* v. *City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531, wherein a municipal housing ordinance sought to limit occupancy of a dwelling unit to members of a single family, but defined "family" in such a way that the appellant's household did not qualify.

In reversing, the majority concluded that the ordinance there deprived the appellant of her liberty in violation of the due process clause of the Fourteenth Amendment; it expressly selected certain categories of relatives who may live together and declared that others may not. The court indicated that the strong constitutional protection of the sanctity of the family established in numerous decisions of the Supreme Court extends to the family choice involved in that case and is not bound within an arbitrary boundary drawn at the limits of the nuclear family, which essentially is a couple and its dependent children. In conclusion, the court said that the history and tradition of this nation compel a larger conception of the family: " . . . the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns." In his concurring opinion, Mr. Justice Stevens finds that the right involved is the right to use one's own property as one sees fit.

[2–4] The confusion surrounding the definition of the term "family" must be taken into account when interpreting the restrictions in the instant case, sub judice. As a restriction on the free use of property the single family rule must be "strictly construed in favor of free and unrestricted use of real property". *Moore* v. *Stevens*, 90 Fla. 879, 106 So. 901 (1925). "Substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." *Moore*, *supra*, at 904. A restrictive covenant must be read in the context of the entire document in which it is contained. *Moore*, *supra*. When the "single family residence" restriction is read in conjunction with the context of the joint ownership provision, the two sections are inconsistent, and inherently ambiguous. Even if one were to consider that the defendants constitute two separate families, the use to which they put the apartment was that of a single family dwelling; according to the record herein, each of the defendants alternated their stays on the premises.

[5] Two other points involve the subject of approval, but regarding different conveyances. Article XXII deals with written notice of disapproval to the Murrays, who were then owners of the apartment, and did not require notice to the defendants. The Murrays did not convey to both defendant brothers; they conveyed to defendant Marvin Franklin. From the record on appeal, the Murrays

are not parties to this law suit and have made no complaint concerning this procedural matter. Further, the conveyance in dispute, sub judice, is not the conveyance from the Murrays, but rather, is the conveyance from the defendant Marvin Franklin to his brother. Thus, the question is whether or not, under the facts of this case, the conveyance of an undivided one-half interest in the apartment from defendant Marvin Franklin to defendant Norman Franklin required any approval. Article XXII specifically allows transfer of an apartment to a member of the "immediate family"; no approval is needed for such a transfer. Plaintiff concedes that where other requirements and restrictions were satisfied, an owner does not need the approval by the condominium association to convey an outright fee simple interest in the apartment to his brother. Defendant Norman Franklin is a member of the immediate family of Marvin Franklin. Thus, the transfer of part of the interest in the apartment from Marvin Franklin to Marvin Franklin and Norman Franklin was valid.

The final point on appeal that we find has merit relates to a restriction in condominium documents against children under the age of twelve (12) as an unconstitutional restriction and violation of defendant Norman Franklin's rights to marriage, procreation, and association, and violation of his right to equal protection of the laws.

[6] Article XXIII prohibits children under the age of twelve (12) from residing on the condominium premises. This was the reason given by plaintiff for its disapproval of Norman Franklin's membership application. The instant case involves a number of rights which the Supreme Court of the United States has labeled "fundamental": the right to marry, *Loving* v. *Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1966), and the right to procreate, *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Sd. 1655 (1942), and the right to marital privacy, *Griswold* v. *Connecticut*, 381, U.S. 479, 85 S.Ct. 1678, 14 L.Ed 2d 510 (1965). This restriction is an unconstitutional violation of this defendant's rights to marry and procreate. Further, no compelling reason has been shown for refusing to allow children under twelve (12) to reside in the condominium. It seems difficult to comprehend that change that occurs on a child's twelfth birthday which suddenly renders him fit to live in the condominium, and the plaintiff has offered no explanation regarding the same. Additionally, the plaintiff provides for a designation of children guests and has certain families with children under twelve (12) residing on the premises. Thus, the enforcement of the restriction is not only unsupportable by a compelling interest but is obviously unreasonable, since the plaintiff seeks to selectively and arbitrarily enforce the restriction. Even if the rule were valid, such unequal enforcement would be a violation of equal protection, *East Coast Lumber Terminal* v. *Town of Babylon*, 174 F.2d 106 (2d Cir. 1949).

We find that the trial court erroneously ordered defendant Norman Franklin to transfer his interest in the apartment to defendant Marvin Franklin, and reverse the lower court and remand for the entry of a final judgment in favor of defendants, Marvin Franklin and Norman Franklin.

[7] However, on the other point raised on appeal, we affirm the trial court. The lower court did not err in refusing to grant the defendants' motion for a jury trial. In this cause, the question for determination involved title to real property. No claim or counterclaim was made for damages or any other common law issue. Considering the equitable nature of the complaint, any jury trial, if affordable at all, is clearly subject to the discretion of the trial court, and no abuse of discretion is shown. See *Commodore Plaza at Century Twenty One Condominium Association, Inc.* v. *Century Twenty One Commodore Plaza, Inc.* 290 So. 2d 539 (Fla. 3rd DCA 1964); *Davis* v. *McGahee*, 257 So. 2d 62 (Fla. 1st DCA 1972).

Accordingly, we affirm, in part, and reverse, in part, and remand, with directions consistent with the views expressed herein.

Affirmed, in part; Reversed, in part, and Remanded, with directions.

Mager and Cross, JJ., concur.

On petition for rehearing; Cross, Judge.

By petition for rehearing, appellee, White Egret Condominium, Inc., asks reconsideration of our determination that a restrictive covenant contained in condominium documents forbidding residency by families with children under twelve years of age is unconstitutional and therefore is unenforceable in the courts of this state.

[8, 9] Appellee correctly points out that the constitutional protection envisaged by the Fourteenth Amendment to the Constitution of the United States has been consistently held to inhibit only state action and offers no recourse against merely private conduct, no matter how discriminate or repugnant to public notions of wrongfulness.[1] So long as the objectives of these types of agreements are effectuated by voluntary adherence to their terms, it is clear that no action by the state would be involved, and therefore no constitutionally protected rights can be said to have been violated.

State action is, however, a broad concept and the actions of state courts and of judicial officers performing in their official capacities have long been regarded as state action.[2] When the appellee as plaintiff below sought to invoke the powers of the trial court to compel a reconveyance of the interest of Norman Franklin in the condominium apartment to his brother, it invoked the sovereign powers of the state to legitimize the restrictive covenant at issue. This court therefore owed a duty to carefully scrutinize that covenant with a view toward forbidding its enforcement should it fail to pass constitutional muster.

In our original opinion rendered in this matter [3] we chose to concern ourselves with an examination of the constitutional rights of appellants as parents rather than to focus on the rights of appellants' children to be free of discrimination due to their age. The question presented was whether the recognized constitutional right of privacy [4] protects a family from losing its interest in property solely because children under the age of twelve reside with their parents. In view of the unique position of homage which the family unit enjoys in our society [5] and with regard to the panoply of rights associated with family life,[6] we determined that the right of privacy grants to the family protection from unreasonable restrictions on the use of a residence.

We express particular concern for the intrusion which a restrictive covenant such as that at issue has on the decision to beget and bear children. The right to be free of unwarranted interference with the decision to have children has been identified on numerous occasions by the United States Supreme Court as one of the matters protected by the right of privacy.[7] Recent decisions [8] by that court make it clear that the Constitution will not permit any undue burden being placed on the decision to bear a child. There can be little doubt that the restrictive covenant forbidding occupancy of condominium premises by families with young children amounts to a substantial interference with the choice to beget and bear children. The fear of being compelled by the courts of this state through the operation of this covenant to sell or relocate a family domicile merely because a couple may choose to have children is a burden which neither the Constitution nor this court will condone.

[10, 11] We pause to note that other fundamental interests which fall within the penumbra of constitutional protection may also be infringed to varying degrees by the restrictive covenant under consideration: the interest which supports free and open travel among the states,[9] the interest which parents have in being able to supervise their children's education [10] and enjoy their companion-

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[1] *Shelly* v. *Kreamer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). See also *United States* v. *Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883).

[2] *Shelley* v. *Kreamer*, id.

[3] *Franklin* v. *White Egret Condominium, Inc.*, 358 So. 2d 1084 (Fla. 4th DCA Opinion issued August 9, 1977).

[4] See, e. g., *Whalen* v. *Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold* v. *State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[5] See *Trimble* v. *Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (slip opinion issued April 26, 1977); *Moore* v. *City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

[6] See *Moore* v. *City of East Cleveland*, id.; *Stanley* v. *Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Loving* v. *Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Prince* v. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

[7] E. g., *Griswold* v. *State of Connecticut*, supra n.4; *Roe* v. *Wade*, *supra n.4*.

[8] *Carey* v. *Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1974); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

[9] *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *United States* v. *Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

[10] *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Prince* v. *Commonwealth of Massachusetts*, supra n.6; *Pierce* v. *Society of Sisters*, supra n.6; see also *Meyer* v. *Nebraska*, supra n.6.

ship;[11] the interest concerning family living arrangements.[12] In our society the family unit is swathed in the protection of the Constitution, and any substantial interference directly affecting the family must be supported by a countervailing and superior interest.[13]

Appellee-condominium association offers as its only justification in support of this restriction on residency of apartments by families with children under twelve years of age the fact that young children "are noisy, distracting and frequently an imposition upon our neighbors." Although peace and quiet in living accommodations is an admirable objective, we do not believe that this interest is sufficiently important to justify divestiture of one's interest in property.

Appellee argues that all buyers of condominium apartments have voluntarily consented to the imposition of these limitations upon their rights. We emphasize that we have here a willing seller and a willing buyer, and a contract of sale which was properly consummated. It is clear that but for the intervention of the courts, appellants would be free to occupy the property in question without restraint.

Appellee asks us to review the cases of *Riley v. Stoves*, 22 Ariz.App. 223, 526 P.2d 747 (1974), and *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977). In *Riley*, the Court of Appeals of Arizona upheld against constitutional attack a restriction which limited residency of a portion of a mobile home development to persons twenty-one years of age or older. To the extent that the Arizona Court of Appeals determined that restricting residency by children to reduce distractions and disturbances is reasonable in light of the significant interference with the traditional family, we must disagree. To the extent that peace and quiet in a neighborhood is a legitimate objective, restricting occupancy by families with children imposes a burden on the exercise of constitutionally protected rights which is entirely disproportionate to the slight benefit received.

In *Coquina Club*, the Court of Appeals for the Second District of Florida discussed the existence of condominium use restrictions based on age. However, the court admitted that the validity of use and occupancy restrictions was only a "subsidiary question" and was not "dispositive of the primary issue." The court acknowledged that age restrictions in at least one other jurisdiction "have even withstood constitutional attacks," and cited the *Riley* case discussed above. The court also noted that "reasonable" restrictions concerning the use and occupancy are permitted by statute. However, the decision in *Riley* did not address itself to whether such restrictions were reasonable as we have done here today, and therefore it is clear that *Coquina Club* is not in conflict with the views expressed herein.

Finally, appellee re-asserts that the transfer of ownership to Norman Franklin must be voided because it is in violation of a second restrictive covenant which limits use of condominium apartments to "single family" occupancy. In response, we again refer appellee to the decision of the United States Supreme Court in *Moore* v. *City of East Cleveland*, supra n.5, for a constitutionally accepted definition of "single family."

[12] We are cognizant of the great interest which our former opinion in this action has created. We are also aware that restrictive covenants, such as those at issue today, are commonplace among condominium associations in Florida. We believe that the conflicting interests between those who would live with children and those who desire to live apart from families with children are amenable to resolution. Constitutional rights, even those characterized as fundamental, are not absolute. Occasionally, the exercise of a protected right must give way when the public interest is sufficiently compelling to justify the infringement of personal liberties. Several courts have already recognized that senior members of our society possess significant interests which are deserving of special consideration.[14] The proper balancing of the competing interests high-

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[11] *Stanley* v. *Illinois*, supra n.6; *Kovacs* v. *Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (Frankfurter, J., concurring).

[12] *Moore* v. *City of East Cleveland*, supra n.5.

[13] *Moore* v. *City of East Cleveland*, id.; *Roe* v. *Wade*, supra n.4; *Taxpayers' Association of Weymouth Township, Inc.* v. *Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976).

[14] See *Shepard* v. *Woodland Tp. Com. & Plan. Bd.*, 71 N.J. 230, 364 A.2d 1005 (1976); *Maldini* v. *Ambro*, 36 N.Y.2d 481, 369 N.Y.S. 385, 330 N.E.2d 403 (1975); *Taxpayers' Association of Weymouth Township, Inc.* v. *Weymouth Township*, supra n.13. But see *Molino* v. *Mayor and Council of Bor. of Glassboro*, 110 N.J.Super. 195, 281 A.2d 401 (1971).

lighted in this case cannot, however, be achieved through court enforcement of the restrictive covenants.

Accordingly, the petition for rehearing is denied.

Kovachevich, Elizabeth A., Associate Judge, concurs.

Letts, J., dissents, with opinion.

Letts, Judge,[15] dissenting:

I would grant the rehearing.

The majority decision establishes a unique and unfortunate precedent in holding that the Equal Protection Clause of the Fourteenth Amendment applies to age restrictions in an environment created for senior adults.

There are countless examples of apparently valid and enforced age restrictions which run the gamut from the required 3 years of age for Kentucky Derby entrants, all the way to the necessary 35 years that any aspirant to the Presidency must have attained under the Constitution itself. Art. II, § 1, U.S.Const. Judge Kovachevich finds it difficult to comprehend the ". . . change that occurs on a child's twelfth birthday which suddenly renders him fit to live in a condominium." Maybe so, but from whence the magic of a 35th birthday which suddenly renders a person fit to live in the White House, even though one can serve as a U.S. Senator for 5 years before that? (and why 30 years of age for the Senate?) The answer is that, "between night and day, childhood and maturity, or any other extremes . . . a line has to be drawn [somewhere]", *Riley* v. *Stoves*, 22 Ariz. App. 223, 526 P.2d 747, 68 A.L.R.3d 1229 (1974).

The Federal Courts have held repeatedly that age by itself is not a suspect classification even where actual State action results in the mandatory retirement of policemen at age 50 [see *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed. 520 (1976)]. This being so, it has to follow that an age restriction emanating from private contract would be even less suspect—provided it has a rational basis. True, it can be argued that enforcement of an age restriction by the courts, constitute State action; however, I agree with the Arizona Court of Appeals that such an argument is "unrealistic" here. *Riley* v. *Stoves*, supra. In other words, is the line that has been drawn, reasonable?

Adapting this rational basis test to age discrimination, I do not find a restriction barring the RESIDENCY of children under 12 to be unreasonable, for example, in an elderly retirement community or condominium. Nature itself biologically provides that only younger adults can procreate. It is axiomatic that catabolism in the old results in physical and mental frailties which render them not only incapable of reproduction, but also incompetent, to withstand the rough, tumble and noise of rampaging youngsters—inevitable accompaniments to the normal rearing of young children. For this very reason, kids are commonly barred from hospitals. Sick people need peace and quiet and so do old people who lose their erstwhile resilience to turmoil and commotion. Indeed, tranquility is a must for the mental health of older people and I would allow them to have it. So would the only other two Florida decisions that have so far touched on the question. This very court in *Hidden Harbour Estates, Inc.* v. *Norman*, 309 So.2d 180 (Fla. 4th DCA 1975) said, in an opinion written by Judge Downey:

"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. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. The Declaration of Condominium involved herein is replete with examples of the curtailment of individual rights usually associated with the private ownership of property. It provides, for example, that no sale may be effectuated without approval; NO MINORS MAY BE PERMANENT RESIDENTS: no pets are allowed." (emphasis supplied) at page 181.

Likewise the Second District has suggested that age restrictions are not unreasonable and perhaps even enforceable by Statute under Section 718.104(5),

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[15] By the time the petition for rehearing was filed subsequent to the issuance of the original opinion, Judge Mager had resigned from the bench to resume the practice of law. Judge Letts took his place on the panel for the purpose of said petition.

Fla. Stat. (1977).[16] *Coquina Club, Inc.* v. *Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977).

The majority opinion believes that age restrictions run afoul of fundamental rights such as marriage and procreation. These are "motherhood and the flag" proclamations and the cases cited in support simply do not relate these unassailable fundamentals to an age restriction. Certainly this particular age restriction does not deny the right of any adult owner to take a bride and continue to live in his condominium apartment. Nor does it deny him the right to procreate; he simply has to move when the child is born. This is comparable, in principle, to a couple with three kids having to move to a bigger house upon the arrival of the fourth, because the existing living quarters are bursting at the seams and the zoning will not permit the addition of another room.

There is a case noted by Judge Cross, which *did* hold that a zoning ordinance, which had the effect of keeping children out of the municipality, violated the Equal Protection Clause. See *Molino* v. *Mayor and Council of Bor. of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401 (1971). However, the facts of that case reveal an acute shortage of any living units in the area where children could be housed. No such shortage is demonstrated in the case at bar. Moreover, the *Molino* case did involve state action, and all can agree that zoning is ever subject to change in the interests of the general public good. This is a far cry from a private restriction in a declaration of condominium.

The foregoing paragraphs say little about Judge Cross' contribution in defense of the original opinion which defense is much harder to argue with because it covers the constitutional waterfront with blue chip citations. To me, his most telling sentence is where he expresses "the fear of being compelled by the courts of this State through the operation of this covenant to sell or relocate a family domicile merely because a couple may choose to have children . . ." In reply, I would say first, that under the facts of this case, the couple had already had the children BEFORE the purchase, so the argument is not pertinent to the case at bar. There remains, however, the on-going problem of a young couple who have no children when they purchase a condominium, but a child later appears. Such a situation requires a much stricter scrutiny, and I am troubled by it. Nonetheless, I believe that this age restriction still passes the test and I fall back on Judge Downey's language relative to condominium living, already quoted from the *Hidden Harbour Estates* case, supra. All young couples buying living units can foresee the possibility of children and this restriction has not "snuck" up on them, for they well knew of it prior to purchase or conception. The choice was theirs.

In conclusion, I am also not in agreement with much of the reasoning behind the disposition of the other points on appeal, although estoppel could be a factor in this particular case. However, my dissent is already too wordy and I only agonize this long in the hopes that I facilitate higher appellate review of the majority's Equal Protection argument.

ITEM 2. EXCERPTS FROM PROPOSED HOUSING RULES BY THE FLORIDA ATTORNEY GENERAL, SUBMITTED BY ROD TENNYSON,* WEST PALM BEACH, FLA.

Condominium Recreation Leases

In recent years Florida's southern coastal regions have experienced a dramatic change in housing construction with a shift from single family detached housing to multiple family condominium housing. The major reason for this change in housing was escalating land and construction costs which drove the price of detached housing out of the middle income market. Many developers saw this marked change as a way to sell housing units with a continuing income through the use of long-term recreational leases.

A developer starts a condominium project by filing a declaration of condominium and incorporating a condominium association. Before any units are

[16] Said section of the statute reads in part as follows:
The declaration may include covenants and restrictions concerning the use, occupancy and transfer of the units permitted by law with reference to real property.

*See statement, p. 133.

sold, or even constructed, the developer "elects the first board of directors for the condominium association.[1] During this joint control over the boards for the development corporation and the condominium association, the development corporation leases recreational facilities to the condominium association which allows members or unit owners of the association to use recreational facilities to be constructed adjacent to the condominium property. Then, as a condition of sale, a consumer purchasing a condominium unit must accept this recreational lease and agree to pay a monthly rental fee which escalates based on the consumer price index and which is enforced with a lien on the apartment.[2]

At first, the Florida courts were uniformly upholding these leases from numerous attacks.[3] The Attorney General of Florida first sought to attack the recreational leases as violations of Florida's "little FTC" act or Chapter 542, Florida Statutes, based on principle of anticompetitive or monopoly antitrust violations.[4] This so-called "tie-in sale" theory was basically rejected by the Florida Supreme Court[5] but the theory is very actively being litigated in the Federal courts under the Sherman Antitrust Act.[6] However, the most recent decisions of the Florida courts suggest the following remedies to attack recreational leases or portions of the lease.[7]

(1) The lien provisions used to enforce the rental payments may be unconscionable or may violate the homestead protection provisions of Article 10, Section 4, of the Florida Constitution.

(2) The condominium documents themselves may have incorporated the latest additions to the Florida Condominium Act, thereby, eliminating some of the recreational lease provisions such as escalation clauses.

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[1] See Chapter 718, F.S. (1976).

[2] See Sections 718.114 and 718.116, F.S. (1976).

[3] See *Fountainview Association, Inc.* v. *Bell,* 203 So. 2d 657 (Fla. 3d DCA 1967), affirmed, 214 So. 2d 609 (Fla. 1968), and *Point East Management Corp.* v. *Point East One Condominium Corp., Inc.,* 282 So. 2d 628 (Fla. 3d DCA 1973) conformed to 284 So. 2d 233 (Fla. 1973).

[4] *Robert L. Shevin, etc.,* v. *Cenville Communities, Inc., et al.,* 338 So. 2d 1281 (Fla. 1976), wherein the Supreme Court refused to review an order of the First District Court of Appeal which had prohibited the Attorney General from continuing an administrative action against a developer's recreational lease. The District Court wrote no opinion in its order of prohibition against the Attorney General but apparently concluded that the Florida Condominium Act granted condominium developers the right to tie-in the sale of recreational services or leases with condominium units. The Florida Supreme Court denied certiorari because the District Court's order did not conflict with other appellate decisions and did not affect a class of constitutional officers. However, in a separate concurring opinion, justices England, Overton and Adkins stated that jurisdiction may have been obtained had the Attorney General been pursuing a rule-making proceeding:

> It became apparent during oral argument in this case that the writ of prohibition issued by the First District Court of Appeals was not intended to operate as broadly as first appeared. The order "prohibited [the Department of Legal Affairs] from proceeding against the [respondents hereto] in attempting to exercise any jurisdiction under Chapter 501.204(1), Florida Statutes." The restrictive view of that order taken by my colleagues is obviously correct, for it is only if the order is confined to the narrow issue presented to the district court by the Attorney General that it would be within the power or authority of that court to enter. For that reason, I agree with the majority that the Department of Legal Affairs, the Governor and the Cabinet, as rule-makers under the act,[3] are not affected by this lawsuit. Similarly, the offices of State Attorney throughout Florida, in their capacity as enforcing authorities under the act[4] are in no way affected by the district court's decision. It follows that there is no "class" of constitutional or state officers affected by the district court's limited order, and that only one agency of state government, the Department of Legal Affairs, is affected . . . . Had the enforcement powers of the state attorneys been impinged by the district court in this case, for example or had the Cabinet's, we might well have had a different responsibility.
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> [3] See Section 501.205, F.S. (1975).
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> [4] See Section 501.203(4), F.S. (1975).

[5] In *Avila South Condominium Association* v. *Kappa,* 347 So. 2d 599 (Fla. (1977), the Court stated:

> The eighth and final count of the complaint alleges a violation of Section 542.05, Florida Statutes (1975), in that the defendants "preclude competitors . . . from offering the same or similar [recreational] facilities." In dismissing this count, the trial court concluded "that § 711.64 and its predecessor § 711.121 control specifically over the general provisions of Florida Statutes § 542.05 and § 542.10, and that accordingly, Count VIII fails to state a cause of action." Although Section 711.64, has now been repealed, Ch. 76-222, Laws of Florida, we believe the trial court correctly held that tying recreational facilities to housing is at the heart of the condominium concept, a concept which has been repeatedly sanctioned both by the legislature and by the courts; we affirm the trial court's dismissal of the eighth count.

See *Point One Condominium* v. *Point East Developers, Inc.,* 348 So. 2d 32 (Fla. 3d DCA 1977).

[6] See section E. Federal Antitrust Challenges, infra.

[7] See Avila South, note 5, supra.

(3) The lease, or portions thereof, may be unconscionable under common law.

(4) The original board of directors of the condominium association, if controlled by the developer, may have engaged in unlawful self-dealing in contracting for the recreational lease on terms which were designed to gain secret profits for the developers at the expense of the unit owners, all in violation of a fiduciary responsibility to the unit owners.

(5) The developer's sale of housing units conditioned upon the consumer's agreement to also purchase recreational services or the recreational lease may constitute a violation of the Sherman Antitrust Act if interstate commerce was affected and there was a restraint of trade in the sale of recreational services.

A closer examination of each of these potential remedies follows.

A. Recreational Lease Liens and Homestead Protections

Beginning with the 1868 Florida Constitution the State of Florida has taken a liberal attitude in protecting the head of a family and his homestead from levy of creditors.[8] This protection goes to the head of a family's permanent residence home and $1,000 in personal property.[9] Under Article 10, Section 4, of the present Constitution it states:

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereon, or obligations contracted for house, field or other labor performed on the reality, the following property owned by the head of a family: (1) a homestead. . . .

Therefore, the question arises as to whether or not the lien created under the Condominium Act[10] and under many declarations of condominium to enforce the rental payments under a long-term recreational lease can actually be used to foreclose a unit when such unit is the homestead of a family.

This question was recently dealt with in *Gersten* v. *Bessemer*.[11] The recreational lease in this case actually dealt with single family homes rather than condominiums although the leases are similar. The single family subdivision involved was owned by the Behring Corporation which subdivided numerous lots for sale to the public. In February of 1969 the Gerstens bought a lot and home from Behring. The contract for sale specifically provided that the purchaser would agree to pay a monthly maintenance and recreational facility charge to Behring or its assigns. Nowhere in the contract for sale was there any mention of lien against the homestead.

On January 8, 1970, the Behring Corporation recorded a Declaration of Restrictions covering the subdivision on the Gerstens' home. Included within the Declaration was an obligation that each lot owner pay a monthly recreational fee for the use of a recreational facility to be built by Behring upon certain leased lots within the subdivision. The Declaration of Restrictions provided for the establishment of a lien upon each owner's lot for nonpayment of the recreational lease fee and foreclosure in the same manner provided for foreclosure on real property. The Gerstens finally closed in November 1970 and took title to their new home. They moved in shortly thereafter and established a homestead. The Gerstens were on constructive notice of the Declaration of Restrictions as these restrictions were filed eleven months prior to closing. However, they had no actual notice of the lien and did not learn of the lien provisions until the actual foreclosure proceeding had begun. The Gerstens never challenged their contractual obligation to pay the recreational fee but challenged the lien attachment against their homestead property in any foreclosure action for nonpayment of the recreational rents.

The Gerstens argued that the mere recording of a Declaration of Restrictions created no debt and if no debt was created then no lien could attach to the prop-

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[8] See *Crosby and Miller*. "Our Legal Chameleon, The Florida Homestead Exemption," 2 U. Fla. L. R. 12 (Spring, 1949).

[9] Art. 10, § 4, Fla. Const. (1968).

[10] See note 2, supra.

[11] 352 So. 2d 68 (Fla. 4th DCA 1977). This case has been certified to the Florida Supreme Court as a question of great public interest.

erty by the mere filing of a Declaration of Restrictions.[12] The Fourth District Court of Appeals appeared to agree, stating:[13]

> A lien may be created only by contract of the parties or by operation of law. 21 Fla. Jur., Liens, § 3. The original "Contract for Purchase and Sale" makes no reference whatsoever to the creation of a lien. The unilateral recording of a Declaration of Restrictions, to which defendants were not a party, did not create a lien either by contract or by operation of law. Nor do the circumstances reflect creation of an equitable lien. See 21 Fla. Jur., supra, § 8. It would seem that the only way it can be urged that a lien was created by "contract" was at the time the parties executed the deed which allegedly incorporated by reference the Declaration of Restrictions. Since the parties tacitly recognized (at oral argument) that the deed did incorporate by reference the Declaration of Restrictions, it follows that a lien was created by contract at the time of closing. . . .

The District Court then went on to state that because the lien attached, at best, at the time of closing and because homestead status was established shortly thereafter the attachment of the lien and the homestead status were, in effect, simultaneous. If the attachment of the lien and homestead are simultaneous then the homestead must prevail and the lien could not be foreclosed for failure to pay the recreational lease payment:[14]

> The "lien" in question, which was contractually created and arose as a result of a nonpayment of the recreational lease fee, does not fall within any of the permissible exceptions to forced sale set in Article X, section 4. In particular, it is not an "obligation(s) contracted for the purchase" of the homestead such as a mortgage and thereby enforceable by foreclosure. Luten v. Hower, 18 Fla. 872 (1882). Moreover, the lien was not one which, as a matter of law, can be said to have been created *prior* to the establishment of the homestead. Rather, it is a lien which attached to the property after or *simultaneously* with the establishment of the homestead and therefore becomes *subservient* to the homestead protections. Quigley v. Kennedy and Ely Insurance, Inc., 207 So. 2d 431 (Fla. 1968). In other words, the lien was not a lawfully acquired prior lien.

Several questions were left unanswered in *Gersten*, supra. It is uncertain whether or not a reale of the housing unit would still afford homestead protections to the new purchaser versus a purchaser from the original developer. Under the District Court's reasoning, the lien may have attached prior to the resale and therefore a new purchaser may take the homestead subject to a prior recorded lien which might be foreclosable against the homestead.[15]

Another question concerns the situation where purchasers, at time of closing, were asked by the developer to sign some form of pledge agreement. These pledge agreements are sometimes executed with the formality of a second mortgage fully outlining the lien, the consumer's obligation to pay and a pledge of his homestead against the recreational lease payments. Also, some developers had the consumer actually sign the recreational lease itself as an additional lessee.[16] The *Gersten* case did not involve pledge agreements but earlier Florida case law has held that consumers cannot contractually waive their homestead constitutional rights.[17] Therefore, an argument can be made that such pledge agreements were a contractual waiver of homestead rights in violation of public policy and unenforceable.

As previously discussed in other chapters, a violation of public policy constitutes an unfair and deceptive trade practice under the Florida "little FTC" act.[18] Under Federal Trade Commission precedents unfair and deceptive debt collection practices include the use of unenforceable contract provisions.[19] If a developer or holder of a recreational lease threatens or represents to a con-

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[12] See *Hendrie* v. *Hendrie*, 94 F. 2d 534 (5th Cir. 1938); see note 21, infra.
[13] Supra, note 11.
[14] Supra, note 11.
[15] See note 8, supra.
[16] Although an "association" may contract for recreational services under the Condominium Act, may a unit owner also contract or lease the same facilities? See note 2, supra; and *Ackerman* v. *Spring Lake of Broward, Inc.*, 260 So. 2d 264 (Fla. 4th DCA 1972).
[17] *Hodges* v. *Cooksey*, 15 So. 549 (1894); *Sherbill* v. *Miller Manufacturing Co.*, 89 So. 2d 28 (Fla. 1956).
[18] See Chapter 2, supra.
[19] See note 33, Chapter 2, supra.

sumer that their homestead will be foreclosed should the consumer fail to make his recreational lease payments, then such actions by the developer or holder of the lease may constitute unfair and deceptive debt collection practices in violation of the "little FTC" act.[20] However, a "little FTC" act cause of action which would require individual litigation as class action standing has been denied homestead status by the Florida Supreme Court.[21] See practice and procedural forms at the end of this chapter dealing with affirmative defenses to lien foreclosures and counterclaims under the "little FTC" act.

B. Defects in the Condominium Documents

Although lesses of the recreational properties do not have standing to challenge the lessor's recreational properties because of title defects[22] the practitioner should always look to the documents of the condominium itself for potential causes of action. More specifically, it was a common practice of many developers to include the definitional section of the Declaration of Condominium, which incorporated the recreational lease, the following language:

"The Florida Condominium Act as herein referred to shall mean Chapter 711, Florida Statutes, *as it may be amended from time to time.* (e.s.)"

Such language has recently been interpreted to include all new provisions of the Florida Condominium Act, including those provisions prohibiting escalation clauses.[23]

In *Coffin* v. *Shere*,[24] the Court held that a developer or lessor could not enforce the escalation rental provisions of a recreational lease because of the following language which appeared in the definitional section of the Fifth Moorings Condominium Declaration of Condominium:[25]

> Except where variances permitted by law appear in this Declaration or in the annexed By-Laws or in the annexed Charter of Fifth Moorings Condominium, Inc., or in lawful amendments thereto, the provisions of the Condominium Act as presently existing, or *as it may be amended from time to time*, including the definitions therein contained, are adopted and included herein by express reference. (e.s.)

The Court held this language to mean the parties agreed to accept all future changes in the Florida Condominium Act:[26]

> The contested clause unequivocally states that provisions of the Condominium Act are adopted "*as it may be amended from time to time.*" (e.s.) We perceive no ambiguity in this language, and thus find that it was the express intention of all parties concerned that the provisions of the Condominium Act were to become a part of the controlling document of Fifth Moorings whenever they were enacted. Even if we were to find an ambiguity, we would be forced to construe it against the defendant developer/lessors as authors of the Declaration of Condominium. See Bouden v. Walker, 266 So. 2d 253 (Fla. 2d DCA 1972); see generally, 49 Am. Jur. 2d, Landlord and Tenant, § 143.

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[20] See Chapter 2, supra.

[21] See *Avila South*, supra, note 5, wherein the Court stated:

> In the sixth count, plaintiffs complain of an alleged violation of the homestead exemption provisions of the Florida Constitution. From the pleadings and exhibits, it appears that the Association, which is obligated under the recreational lease, looks in turn to its members, the unit owners, for money with which to pay the lease obligations. The unit owners' obligations to the Association, including their pro rata shares of lease payments, are secured by liens on the units, which were created upon the filing of the declaration of condominium. The effect of these arrangements, appellants urge, is that homestead property is subject to forced sale for failure to pay for recreational facilities in contravention of the strong state policy in favor of protecting the homestead against certain creditors. In order to avail himself of the homestead exemption, however, a debtor must establish the homestead character of his property as of the time the lien attaches. The complaint in the present case fails to allege facts that would qualify any unit as homestead property, as of the time of the creation of the liens. For that reason, we conclude that Count VI fails to state a claim for relief. In reversing the trial court's denial of the motion to dismiss as to Count VI, we do not decide any other question as to the efficacy of a lien of this kind, however, and direct that plaintiffs be given leave to amend this count or remand.
> . . . With respect to the sixth count, however, there is no possibility of a class action because the homestead status of each condominium unit will depend on facts peculiar to it. Corporations have no homestead exemption, of course, so the Association could not properly raise such a claim.

[22] See *Avila South*, supra, note 5.

[23] Section 718.401(8), F.S. (1976).

[24] Case No. 76-1429 (Fla. 3d DCA Opinion Filed May 3, 1977). Rehearing has been denied.

[25] Id.

[26] Id.

> We hold that the trial judge properly ruled as a matter of law that Florida Statutes, § 711.236 was incorporated into the Fifth Moorings Declaration of Condominium by virtue of the express wording of the Declaration itself. In light of this holding, the prohibition against further rent increases subsequent to the effective date of Section 711.236 was also proper.

If a particular condominium document and recreational lease contains similar language of the Fifth Moorings Condominium documents then enforcement of escalation clauses by the developer or lessor could again constitute unfair and deceptive debt collection practices under the "little FTC" act. A business' attempt to enforce contractual provisions which it knows to be unenforceable creates a cause of action under the "little FTC" act.[27]

C. Unconscionable Recreation Leases

Although this chapter will attempt to segregate the concepts of unconscionability and corporate self-dealing[28] as separate causes of action, the two theories may overlap and may well be considered together in a cause of action against recreational leases. However, before any discussion on this matter, one must first review the case law in trying to define an unconscionable lease or contract.

The Florida Supreme Court has recently stated on two occasions that a cause of action does exist to attack recreational leases on theories of unconscionability:

> Given the narrow issue presented by these appeals we do not decide questions as to validity of these leases on any other grounds. Thus, although there is reference to the possibility that in some instances lease arrangements for individual unit owners may be unconscionable, inequitable, or contain other deficiencies recognized in law as a basis for judicial invalidation, these matters are not considered or decided here.[29]
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> . . . In affirming the dismissal of the court alleging violations of Section 711.66(5)(e), we do not preclude the plaintiffs on remand the possibility of stating an amended claim of unconscionability independent of Section 711.66(5)(e).[30]

In the above-cited *Fleeman* decision the Florida Supreme Court footnote cites Section 672.302, Florida Statutes, relating to unconscionable contracts under Article 2 of the Uniform Commercial Code.[31] However, in *Gable v. Silver*,[32] the Supreme Court had held that Article 2 of the Uniform Commercial Code does not apply to the sale of condominiums. Perhaps this reference to the UCC is the Court's conclusion that the common law concept of unconscionable contracts or clauses is equivalent to the Uniform Commercial Code's statutory concept of unconscionability. In fact, there is considerable authority that the UCC provision on unconscionability does nothing more than codify the common law rule in this area.[33] If this conclusion is correct then the case law defining unconscionability which makes reference to the UCC provision may be used to attack recreation leases based on common law principles.

Williams v. *Walker Thomas Furniture Co.*[34] is the most often cited case on unconscionability. The contract in question contained a revolving charge account provision wherein the consumer agreed to secure his debt with all after acquired consumer items. If the revolving charge account remained unpaid and in default then the creditor reserved the right to repossess *all* of the consumer's goods that were purchased on the charge account.[35] Default occurred in this particular case in 1962 although the first sales transaction took place in 1957. The consumer was a welfare recipient with limited education living in Washington, D.C.

The contract in *Williams* was challenged as being unconscionable even though the Uniform Commercial Code had not been enacted in the District of Columbia at that time. However, the Court stated:[36]

> The enactment of this section [UCC], which occurred subsequent to the contracts herein suit, does not mean that the common law of the District

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[27] See note 19, supra.
[28] See Section D, Corporate Self-Dealing, infra.
[29] *Fleeman* v. *Case*, 342 So. 2d 815, 818 (Fla. 1977).
[30] *Avila South*, supra, note 5.
[31] *Supra*, note 29 at p. 818.
[32] 258 So. 2d 11 (Fla. 4th DCA 1972), affirmed 264 So. 2d 418 (Fla. 1972).
[33] See Davenport, "Unconscionability and the Uniform Commercial Code," 22 U. Miami L. R. 121 (1967).
[34] 30 F. 2d 44 (D.C. Cir. 1965).
[35] See Section 516.31(4), F.S. (1975).
[36] Supra, note 34.

> of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2–302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time the contract is made, the contract should not be enforced.

The court in *Williams* sets up a two-step approach in determining unconscionability. The first step requires examination of the commercial setting of the transaction at the time the contract was made. Did the circumstances of the transaction allow the consumer a meaningful choice in accepting the contract terms? In many cases a "Meaningful choice" is lacking when there exists a gross inequality of bargaining power between consumer and seller. In other words, a court should look to the facts surrounding the commercial setting, i.e., was there deception; was there an overreaching against inexperienced consumers; or did the consumer have little choice in accepting his contractual obligation,[37]

After analyzing the commercial setting surrounding the initial signing of the contract, the *Williams* court then proceeded to examine the individual contract terms to determine whether or not said terms were "unconscionable." This examination of the contract provisions is the second step in the determination of unconscionability. The court then found the after acquired property security interest provision in the contract to be unconscionable when reviewed with the commercial setting.[38]

The Florida courts have also established a common law or equitable concept of unconscionability. In *Peacock Hotel* v. *Shipman*,[39] the commercial setting involved an inexperienced buyer and a seasoned business seller wherein allegations were made of misrepresentation in the sale of a business. The Court found no fiduciary responsibility between the buyer and the seller,[40] the parties were acting at arms' length, and there was insufficient misrepresentation and deception in the commercial setting to invalidate the contract. However, the Court did state the general rule concerning unconscionable contracts at common law in Florida.[41]

> It seems to be established by the authority that where it is perfectly plain to the court that one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to prevent him to enforce, that a court of equity will not hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. . . . It is not the function of the courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credibility of people are taken advantage of by the shrewdness, overreaching, and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose.

Another Florida case, *Vokes* v. *Arthur Murray, Inc.*,[42] involved a middle aged widow swayed by the advances of a young dashing dance instructor. Here the

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[37] See also In Re: State of New York, 275 N.Y. Supp. 2d 774 (1966); *Jones* v. *Star Credit Corp.*, 298 N.Y. Supp. 2d264 (1969); *Milford Finance Corp.* v. *Lucas*, 8 UCC Rptr. 801 (Mass.App.Ct. 19); *Toker* v. *Westerman*, 8 UCC Rptr. 798 (N.J. Dis. Ct. 1970); *Patterson* v. *Walker-Thomas Furniture Co.*, 277 A. 2d 111 (D.C. 971); and *J. L. McEntire & Sons, Inc.* v. *Hart Cotton Co., Inc.*, 14 UCC Rptr. 1303 (Ark. Sup. Ct. 1974).

[38] In comparison, if the lien provisions of the recreational lease secure rental payments in an unconscionable manner then said lien provisions are unenforceable. See Proposed Rule 2–25. Unconscionable Liens. Chapter 16, Volume 2. For example, *Fairfield Lease Corp.* v. *Amberto*, 7 UCC Rptr. 1181 (N.Y. Civ. Ct., 1970) involved a lease of vending machines wherein the lease required the lessee to make all repairs and pay all taxes and fees on the machines. If the lease was breached, even a minor breach, then the lessor was entitled to not only repossess the machine but also to accelerate all unaccrued and unearned rent on the machine. Therefore, the lessor not only got the machine returned but could hold the lessee liable for all the rents which would have come due under the terms of the lease. The court found the provision allowing both repossession and acceleration of the rents to be unconscionable and to also constitute a form of penalty. The court then found the lease to be unconscionable in its entirety and refused to enforce it. See also *Ashland Oil Co., Inc.* v. *Donohue*, 18 UCC Rptr. 1129 (W.V. App. Ct., 1976).

[39] 138 So. 44 (Fla. 1931).

[40] A greater duty to disclose all facts is imposed upon the seller if he has a fiduciary responsibility to the buyer. *Dale* v. *Jennings*, 107 So. 175 (Fla. 1925).

[41] Supra, note 39 at page 46.

[42] 212 So. 2d 906 (Fla. 2d DCA 1968).

Court clearly looked to the commercial setting finding various forms of deception and overreaching to lure the unsuspecting widow. After reviewing the commercial setting, the Court found the advanced contract price to be both inequitable and unconscionable.

Many of the previously cited cases found some form of fraud, deception or overreaching in the commercial setting of the transaction. The courts in these cases found that because of this deception the consumer lacked a meaningful choice when accepting the contractual terms.[43] However, in examining the commercial setting one may look beyond deception or lack of disclosure. For example, if no deception is uncovered in the transaction then such factors as economic leverage, consumer appeal, or corporate self-dealing may show a lack of meaningful choice in the commercial setting.[44] Also, other courts have found some contracts unconscionable without reviewing the commercial setting of the transaction.

In *Campbell Soup Co.* v. *Wentz*,[45] a group of farmers had contracted with the Campbell Soup Company by way of form adhesion contracts. The contract price for the farmers' crop of carrots was considerably below the market price at the time of delivery. The Court refused to enforce the contract stating:[46]

> The reason that we shall affirm instead of reversing with an order for specific performance is found in the contract itself. We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience. For each individual grower the agreement is made by filling in name and quantity and price on a printed form furnished by the buyer. This form has quite obviously been drawn by skillful draftsmen with the buyer's interests in mind.

It is important to note that the Court in *Campbell Soup* did not review the commercial setting of the transaction, i.e., there was no apparent deception or other forms of fraud and deceit involved. The Court simply looked to the four corners of the document, finding the contract unconscionable and unenforceable. The provisions found to be offensive included: (a) the contract price; (b) the lack of any provision for liquidated or other damages to protect the farmers from Campbell's breach of contract; and (c) a provision allowing the Campbell Soup Company to reject the carrot crop at their sole discretion. The Court did not suggest that the contract was illegal but rather was unenforceable in a court of equity:[47]

> ". . . . that equity does not enforce unconscionable bargains is too well, established to require elaborate citation."

In *American Home Improvement Co.* v. *MacIver*,[48] the sales price in a home improvement contract was considerably over the actual value of the goods and services performed which the Court found to be unconscionable and unenforceable. The contract also violated the New Hampshire Truth-in-Lending laws relating to interest rates, i.e., conceivably some element of deception in the commercial setting. However, the Court appeared to ignore the commercial setting and looked to the four corners of the contract itself. The Court concluded that the price for the home improvement contract was in and of itself unconscionable and unenforceable.

When must a court look to the commercial setting of a contract before determining unconscionability and when may a court simply look to a contract in and of itself in determining unconscionability? Perhaps the answer is best expressed in *Mobile American Corp.* v. *Howard*,[49] wherein the Florida Second District Court of Appeal stated:[50]

> Of those cases dealing with price at all, most require, in addition to a grossly excessive price, some element of nondisclosure, fraud, overreaching or manifestly unequal bargaining position [commercial setting]. Only a few courts have indicated that an excessive price disparity may be sufficient of itself under § 2–302 supra, but such cases involved *grossly* excessive prices and finance charges considering average market conditions.

In summary, contracts or contract provisions may be considered unconscionable when: (a) the contract price or term is excessive coupled with a commercial

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[43] Supra, note 37.
[44] See note 85, infra.
[45] 172 F. 2d 80 (3d Cir. 1948).
[46] Id.
[47] Supra, note 45.
[48] 201 A. 2d 886 (N. Hamp. 1964).
[49] 307 So. 2d 507 (Fla. 2d DCA 1975).
[50] Id. at 508.

setting wherein some form of nondisclosure, fraud, overreaching or manifestly unequal bargaining position plagued the consumer buyer; or (b) the contract term or price is so grossly excessive in comparison with average market conditions that the price or contract term is unconscionable in and of itself, regardless of the commercial setting of the transaction. When does a contract term or price become so grossly excessive in comparison with average market conditions is a case-by-case question of equity.[51]

The use of unconscionable contracts or the attempted enforcement of said contracts constitutes unfair and deceptive trade practices in violation of the "little FTC" act. In *Kugler* v. *Romain*,[52] the Attorney General for the State of New Jersey brought an action under its consumer protection statutes[53] seeking injunctive relief and restitution to injured consumers who were the victims of unconscionable contracts. The Attorney General brought action against the sale of educational devices to uneducated low income consumers through door-to-door solicitations. The Attorney General maintained that because the price of the educational package was approximately two and one-half times its market value, together with deceptive sales practices in the commercial setting, the contracts were therefore unconscionable under the Uniform Commercial Code.

The sellers of the educational program maintained that the Attorney General had no standing under the New Jersey consumer protection statute to enforce the provisions of the Uniform Commercial Code relating to unconscionable contracts. The New Jersey Supreme Court disagreed, stating that if the contracts were unconscionable under the Uniform Commercial Code then the Attorney General had the power under its consumer protection statute to enjoin the activity and seek restitution on behalf of a class of consumers all similarly situated:[54]

> Such price value clearly constitutes unconscionability and renders Section 2 available to the Attorney General in a class-type remedial action for the benefit of all similarly situated consumers.

The Massachusetts Supreme Court has determined that its "little FTC" act[55] may be used to challenge unconscionable contracts. In *Commonwealth* v. *Decotis*,[56] the Attorney General of Massachusetts used its "little FTC" act to enjoin a mobile home park from imposing resale fees on tenants when tenants sought to sell their mobile homes within the park. This resale fee had been disclosed to most of the tenants when they first moved into the park. However, the resale fee had no relation to any services performed by the park owners and was therefore found to be unconscionable.

Although the Massachusetts Court found no deception in the transaction, it looked to other aspects of the commercial setting. The prospective tenants were retired or near retirement age living on fixed incomes. The economics of removing a mobile home, should the tenant refuse to pay the resale fee, precluded

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[51] For example, the Florida court in *Mobile American Corporation, supra* note 49, found the contract price or interest rate of 11.75 percent to be high but within the limits prevalent to the current status of the installment sales market. In other words, the court, finding no deception or overreaching in the commercial setting, looked to the average market price and concluded there was no unconscionability within the contract itself. It is conceivable that had the court found deception or overreaching in the commercial setting then it may well have invalidated the 11.75 percent interest rate as unconscionable. Or if the court had found no deception or overreaching in the commercial setting but had found the interest rate to be greatly in excess of the average market price, then it would have invalidated the interest rate as being unconscionable.

In *Vom Lehn* v. *Astor Art Galleries*, 18 UCC Rptr. 861 (N.Y. trial ct., 1976), a jade statue was sold for $67,000 even though the market value was only approximately $15,000. The seller knew that the buyer was totally unfamiliar with the value of jade, which persuaded the court to find the price to be unconscionable. See also note 37, supra, and *Wechsler* v. *Goldman*, 214 So. 2d 741 (Fla. 3d DCA 1968).

[52] 279 A. 2d 640 (N.J. 1971).

[53] N.J.S.A. 56:8–2.

[54] Supra, note 52 at page 653. Note that the New Jersey Supreme Court in reviewing the commercial setting of the transaction looked at the legalistic complicated language of the contracts, the actual benefits that the educational packages would give to minority uneducated children, and the method of enforcing these contracts as a collection practice. All of these elements constituted the commercial setting of the transaction which, when coupled with the excessive price of the educational packages, resulted in unconscionable and unenforceable contracts.

[55] G.L.c. 93A.

[56] 316 NE 2d 748 (Mass. 1974).

the tenant from any real bargaining power.[57] The fact that the resale fee was a widely used, industry accepted trade practice was not considered a defense.[58] The Court concluded:[59]

> Although deception may not have been involved where the disclosure by the defendants to the prospective tenant was timely and complete, we believe that the practice of charging a fee for no service whatsoever was an unfair act or practice within the intent of § 2(a) of G.L.c. 93A and that it was therefore unlawful....
>
> What we can determine is that the collection of resale charges by the defendants was an unfair act or practice. That provision of the Uniform Commercial Code which permits a court to refuse to enforce a contract or contract provision which is unconscionable provides a reasonable analogy here.

In summary, *Kugler*, supra, and *Decotis*, supra, conclude that the "little FTC" act may be used as a remedy in attacking unconscionable contracts or leases. It is important to note in these cases that the Attorney Generals of New Jersey and Massachusetts were given class action standing to seek restitution for injured consumers who were the victims of unconscionable contracts.[60] These cases are the authority under which the Florida Attorney General, Governor and Cabinet are now promulgating rules under the Florida "little FTC" act defining unconscionable recreational leases and contracts. The proposed rules

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[57] See Chapter 8, supra.

[58] Supra, note 56 at page 753:

> The defendants argue that their actions were not deceptive or unfair because resale charges were uniformly collected by mobile home park operators in the Commonwealth. Such a fact was not proved and, even if it had been, the existence of an industry-wide practice would not constitute a defense to unlawful conduct. *Minter* v. *Federal Trade Commn.*, 102 F. 2d 69, 70 (3d Cir. 1939); *International Art Co.* v. *Federal Trade Commn.*, 109 F. 2d 393, 397 (7th Cir. 1940); cert. den. 310 U.S. 632. 60 S. Ct. 1078. 84 L. Ed. 1402 (1939); *P. F. Collier & Son Corp.* v. *Federal Trade Commn.*, 427 F. 2d 261, 275–276 (6th Cir. 1970). See *Federal Trade Comm.* v. *Keppel & Bro. Inc.*, 291 U.S. 304, 313, 54 S. Ct. 423, 78 L. Ed. 814 (1934).

[59] Supra, note 56 at page 754. The Massachusetts court, even though finding no deception in the transactions, concluded that the $250 resale fee was unconscionable and therefore constituted an unfair trade practice under its "little FTC" act. In analyzing the commercial setting of the transaction, the court noted that most of the tenants were elderly, on fixed incomes, and unable to remove their mobile home if they refused to pay said fee. The court concluded that the commercial setting relevant to unconscionability can be something besides deception or failure to disclose.

[60] See Section 501.207(1)(c), F.S. (1975) and *Avila South*, supra, note 5. Use of the "little FTC" act as a remedy is important as the Act gives damages and attorneys fees. Sections 501.210, 501.211, F.S. (1975). See Chapter 6, supra. Remedies at common law and under the UCC do not give damages or attorneys fees. See *Vom Lehn*, supra, note 51. Use of the "little FTC" act as a remedy allows retroactive application of the Act to leases signed before October 1, 1973:

> Remedial statutes are exceptions to the rule that statutes are addressed to the future, not the past. . . . Remedial statutes do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.

Grammer v. *Roman*, 174 So. 2d 443, 446 (Fla. 2d DCA 1965). The Florida Supreme Court has often applied these principles, including the recent case of *Palm Beach Mobile Homes, Inc.* v. *Strong*, 300 So. 2d 881, 887 (Fla. 1974):

> The remedial law in force at the time the contract is made enters into and becomes a part thereof, but the parties to the contract have no vested right under the contract clause of the Federal Constitution, in the particular remedy or modes of procedure then existing. It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations. See *Pittsburg Steel Co.* v. *Baltimore Equitable Society*, 226 U.S. 455, 33 S. Ct. 167, 57 L. Ed. 297. A state may by legislative enactment modify existing remedies and substitute others without impairing the obligation of contracts, provided a sufficient remedy be left or another sufficient remedy be provided. See *Waggoner* v. *Flack*, 188 U.S. 595, 23 S. Ct. 345, 47 L. Ed. 609.

In interpreting its "little FTC" act the Massachusetts Supreme Court has stated:

> . . . We disagree with the claim that G.L. c. 93A "merely provided for new procedural methods of prosecution for consumer abuse" which could be applied retroactively. [citations] Although G.L. c. 93A admittedly established new procedural devices to aid consumers and others (which in this respect could constitutionally be applied retroactively), it also created new substantive rights by making conduct unlawful which was not unlawful under common law or any prior statute.
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> *Commonwealth* v. *Decotis*, supra, note 56 at page 755; cited also in *Slaney* v. *Westwood Auto, Inc.*, 322 N.E. 8d 768 (Mass. 1975).

See also *Walker & LaBerge, Inc.* v. *Halligan*, 344 So. 2d 239 (Fla. 1977).

basically codify the previously discussed case law both at common law and Section 2–302 of the Uniform Commercial Code.[61]

D. Corporate Self-Dealing

In *Avila South Condominium Association, Inc.* v. *Kappa*,[62] the plaintiff condominium association had alleged that the individual developers were the original incorporators and directors of the condominium association when the association had entered into the recreational lease. The plaintiff's complaint charged such acts of self-dealing to be in breach of the original association board of directors' fiduciary responsibilities. Separate counts of the complaint had also alleged actions sounding in fraud and deceit.[63]

In reviewing the self-dealing allegations of the complaint the Supreme Court discussed its decisions in *Point East Management Corp.* v. *Point East One Condominium Corp.*;[64] *Fountainview Association, Inc. No. 4* v. *Bell*;[65] and *Lake*

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[61] See Proposed Rules 2–25 and 2–26. Chapter 16. Volume 2. During the 1977 session of the Legislature SB 40 was passed. The new law is an evidentiary statute relating to a presumptive of unconscionability and burden of proof:

Section 3. Section 718.122, Florida Statutes, is created to read:

718.122 Unconscionability of certain leases; rebuttable presumption.—

(1) A lease pertaining to use by condominium unit owners of recreational or other common facilities, irrespective of the date on which such lease was entered into, is presumptively unconscionable if all of the following elements exist:

(a) the lease was executed by persons none of whom at the time of the execution of the lease were elected by condominium unit owners, other than the developer, to represent their interests;

(b) the lease requires either the condominium association or the condominium unit owners to pay real estate taxes on the subject real property;

(c) the least requires either the condominium association or the condominium unit owners to insure buildings or other facilities on the subject real property against fire or any other hazard;

(d) the lease requires either the condominium association or the condominium unit owners to perform some or all maintenance obligations pertaining to the subject real property or facilities located upon the subject real property;

(e) the lease requires either the condominium association or the condominium unit owners to pay rents to the lessor for a period of 21 years or more;

(f) the lease provides that failure of the lessee to make payments of rents due under the lease either creates, establishes, or permits establishment of, a lien upon individual condominium units of the condominium to secure claims for rent;

(g) the lease requires an annual rental which exceeds 25 percent of the appraised value of the leased property as improved; provided that for purposes of this paragraph "annual rental" means the amount due during the first twelve months of the lease for all units regardless of whether such units were in fact occupied or sold during that period and "appraised value" means the appraised value placed upon the leased property the first tax year after the sale of a unit in the condominium;

(h) the lease provides for a periodic rental increase based upon reference to a price index;

(i) the lease or other condominium documents require that every transferee of a condominium unit must assume obligations under the lease;

(2) The Legislature expressly finds that many leases involving use of recreational or other common facilities by residents of condominiums were entered into by parties wholly representative of the interests of a condominium developer at a time when the condominium unit owners not only did not control the administration of their condominium, but also had little or no voice in such administration. Such leases often contain numerous obligations on the part of either or both a condominium association and condominium unit owners with relatively few obligations on the part of the lessor. Such leases may or may not be unconscionable in any given case. Nevertheless, the Legislature finds that a combination of certain onerous obligations and circumstances warrants the establishment of a rebuttable presumption of unconscionability of certain leases, as specified in subsection (1). The presumption may be rebutted by a lessor upon the showing of additional facts and circumstances to justify and validate what otherwise appears to be an unconscionable lease under this section. Failure of a lease to contain all enumerated elements shall neither preclude a determination of unconscionability of the lease nor raise a presumption as to its conscionability. It is the intent of the Legislature that this section is remedial and does not create any new cause of action to invalidate any condominium lease, but shall operate as a statutory prescription on procedural matters in actions brought on one or more causes of action existing at the time of the execution of such lease.

[62] 347 So. 2d 599 (Fla. 1977).

[63] These counts were denied class action standing based on *Osceola Groves* v. *Wiley*, 78 So. 2d 700 (Fla. 1955).

[64] 282 So. 2d 628 (Fla. 3d DCA 1973), conformed to 284 So. 2d 233 (Fla. 1973).

[65] 203 So. 2d 657 (Fla. 3d DCA 1967), affirmed, 214 So. 2d 609 (Fla. 1968). In referring to *Fountainview Association*, the Florida Supreme Court in *Avila South*, stated:

While reaffirming our decision in Point East, that self dealing by officers and directors of condominium associations, without more, is not actionable, we believe the time has come to reexamine the laconic imprimatur with which we stamped the Third District's decision in *Fountainview Ass'n, Inc., No. 4* v. *Bell, supra.* The Third District

Mabel Development Corp. v. *Bird.*[66] Although the Court attempted to distinguish the recent *Point East* decision, it in effect overruled the *Fountainview* decision:[67]

> A director occupies a trust relation not only to the present stockholders, but also to those who may become such in the *future*, and . . . for this reason, where directors have profited in some *secret way*, stockholders who are subsequently admitted may demand that an account of the profits be made to the corporation. . . . (e.s.)
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> . . . Transactions in which a corporate fiduciary derives personal profit, either in dealing with the corporation or its property, or in matters of corporate interest, are subject to the closest examination, and the form of the transaction will give way to the substance of what was actually being brought about. Personal dealings with the corporation or transactions with the corporation in which the director has some personal interest may be avoided, unless good faith and fairness are shown. While occupying such a fiduciary relation, the officers and directors of a corporation are precluded from receiving any personal advantage *without the fullest disclosure to, and assent of, all concerned.* . . . (e.s.)

The Court in *Avila* appears to recognize the recreational lease as a possible way to finance condominium projects and to allow the sale of units at a lower price.[68] However, the Court found no excuse for the use of secret misbehavior, i.e., some kind of deception, failure to disclose or misrepresentation. If secret misrepresentation, betrayal of trust, or inordinate personal gain occur, then a cause of action will arise wherein the individual corporate director is personally liable to the condominium association for that amount by which he was unjustly enriched as a result of the recreation lease.[69]

Note that the Court in *Avila* makes reference to full disclosure or forms of deception used in the sale of condominiums.[70] Should these secret dealings be proven then the trial judge, in his discretion and pursuant to concepts of equity, could determine whether or not the excessive rental payments should be reimbursed to the condominium association.

As previously discussed, the commercial setting relating to unconscionability is similar to the commercial setting of self-dealing, i.e., secret nondisclosure or deception.[71] Also, the excessive or unconscionable rental payments are analogous to "inordinate personal gain at the expense of those to whom they owe a fiduciary duty."[72] However, as also previously discussed, unconscionable contracts can be voided without reference to the commercial setting, while self-dealing requires such reference.[73] Therefore, unconscionability may be the most practical remedy

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there held that a condominium association could not recover from former officers and directors even when they were guilty of undisclosed self dealing "upon inflated terms." 203 So. 2d at 658. Insofar as is revealed by the opinion, this decision was based entirely on a misapprehension as to the reach of the *Lake Mabel* case, as we have undertaken to demonstrate, ante pp. 11–12. Neither the Third District nor this Court articulated any basis in public policy for the *Fountainview* decision, and it is difficult to conceive of any.

[66] 126 So. 356 (1930).

[67] Supra, note 62.

[68] Supra, note 62:

> Certain public interests may be served by leaving to developers the possibility of self dealing; such flexibility may facilitate financing of some phases of some projects, with resulting economies that can be passed on to the public. But there is absolutely nothing to recommend a rule of law which encourages persons in positions of trust secretly to betray their trust for inordinate personal gain, at the expense of those to whom they owe a fiduciary duty. We now reaffirm our decision in *News Journal Corporation* v. *Gore*, supra, and hold that any officer or director of a condominium association who has contracted on behalf of the association with himself, or with another corporation in which he is, or becomes substantially interested, or with another for his personal benefit may be liable to the association for that amount by which he was unjustly enriched as a result of his contract. However, no director or officer shall be required to return any portion of moneys paid by the association where it is shown that he received the funds with the consent of the association or with the consent of a substantial number of the individuals comprising the association. After careful consideration of the facts in each case, based upon specific findings, the trial judge, in his discretion, shall grant such relief as equity dictates.

[69] Id.

[70] Supra, note 68.

[71] Supra, note 37.

[72] Supra, note 68.

[73] Supra, note 51.

to invalidate recreational leases, as the cause of action may be litigated by simple reference to the four corners of the lease document.[74]

E. Federal Antitrust Challenges

Although the Florida Supreme Court has stated that recreational leases may not be attacked in state court based on state antitrust laws,[75] the federal courts have allowed antitrust challenges under Federal statutes.

Unfair methods of competition were the first prohibited activities under the Federal Trade Commission Act passed by the Congress in 1914 to protect competition in the marketplace. An unfair trade practice is any activity which violates the "letter or the spirit" of the federal antitrust laws.[76] The federal antitrust laws prohibit restraint of trade and monopolization.[77] Therefore, contracts or leases that restrain or monopolize trade violate the federal antitrust laws.[78]

In *Northern Pacific Railroad Co. and Northwest Improvement Co.* v. *U.S.*,[79] the Northern Pacific Railroad Company was requiring all grantees or lessees of the railroad's land to ship their commodities over the company's railroad. This "tie-in sale" agreement provided that the rates of the railroad were to be equal to those of competing carriers. The government filed suit against this agreement alleging that preferential routing agreements were unlawful as unreasonable restraints of trade under the Sherman Antitrust Act. The Supreme Court held the preferential routing arrangements were, in fact, tying agreements, unlawful under Section 1 of the Sherman Antitrust Act and therefore were *per se* unreasonable restraints of trade. This case was extensively cited by the Fifth Circuit Court of Appeal in a recent case where the court held that a cause of action existed under the Sherman Act for alleged tie-in sales of condominium units and managements services.[80]

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[74] Supra, note 51. If it becomes necessary to examine the commercial setting then questions concerning class action standing will arise. Supra, note 63. The Supreme Court in *Avila South*, supra, note 5, while denying class action standing for actions sounding in fraud and deceit, allowed association and class standing for actions based on self-dealing and unconscionability:

> Although not grounded on a contract theory, the self-dealing claim in Count VII is nevertheless concerned with a contract to which the Association is alleged to be a party, namely, the rereational lease. As this cause of action has been pleaded, the Association is the only party that may properly bring suit because the allegation, boiled down, is that a fiduciary duty owed to the Association was breached. While the Condominium Act expressly saves "any statutory or common law right of any individual unit owner or class of unit owners to bring any action which," is available independently of the Act. Section 718.111(2), Florida Statutes (1976 Supp.), the named, individual plaintiffs in the present case did not plead any injury to themselves distinct from the injury done the Association.
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> In the event the unconscionability count is amended to state a cause of action on remand, the Association would have standing again because the Association is alleged to be a party to the lease. The named, individual plaintiffs are also interested as third party beneficiaries under the recreational lease and might be able to state a claim whether as individuals or as a class.

There appears to be some confusion in the Supreme Court's decision wherein they allowed class or association standing for self-dealing and unconscionability but denied standing in actions sounding in fraud and deceit. The Court indicates that self-dealing and unconscionability may well involve certain allegations of secret dealings or forms of mispresentation and deception. Do these allegations sound in fraud and deceit in relation to each individual unit owner? Does this mean that allegations of self-dealing and unconscionability require that each individual unit owner testify as to the commercial setting and deception in his particular transaction? If such is the case, is the cause of action again sounding in fraud and deceit with subsequent loss of class action standing? The Court does not attempt to answer these questions but simply states that unconscionability and self-dealing will allow standing on behalf of the condominium association. See Chapter 5, Section B, Class Action Standing, supra.

[75] Supra, note 62.

[76] See Chapter 2, supra.

[77] *Charles A. Ramsay Co.* v. *Assoc. Bill Posters of the U.S. and Canada*, 260 U.S. 501 (1923); United Shoe Machinery Corp. v. U.S., 258 U.S. 451 (1922).

[78] Id.

[79] 356 U.S. 1 (1958).

[80] *Miller* v. *Granados*, 529 F. 2d 393, 396–397 (5th Cir. 1976), where the Court stated: Tying arrangements have been defined by the Supreme Court as: "[A]n agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying arrangements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California and Standard Stations* v. *United States*, 337 U.S. 293, 305–306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371, 1381, 1382. They deny competitors free access to the market for the

It is important to note that not all tie-in sales unlawfully restrain trade. Tie-in sales unlawfully restrain trade when the seller has sufficient economic leverage in the sale of one product (condominium units) to, in effect, require the buyer to purchase a different or tied product (recreation services) which excludes interstate commerce competitors in the tied product from a not insubstantial amount of potential business.[81] The necessary elements of an unlawful restraint of trade tie-in sale consist of:[82]

(1) The existence of a conditional sale with the purchase of a condominium unit tied to the buyer's acceptance of another product, the developer's recreational lease.

(2) The existence of economic leverage by the developer over the sale of the tying product, condominium units.

(3) The exclusion of interstate commerce competitors in the recreational services industry from a not insubstantial market, the numerous condominium units within the development.

The first step in proving an unlawful restraint of trade involves the existence of "two products" in the "tie-in sale." If the condominium recreational lease is a "net-net lease,"[83] then the developer will maintain that his sale of the condominium unit and lease of a recreational facility was a "one product" sale and not a "tie-in sale" which requires "two products."[84] However, the existence of one or two products is a question of fact based on the following:

(1) Where is the physical location of the recreational facilities in relation to the condominium units? The more physical segregation of units and recreational area is evidence of "two products."

(2) Have condominium units and recreational facilities or services been sold separately in other similar developments? For example, the successful marketing of similar units with no recreational facilities is evidence that the units and recreation are not inherently "one product."

(3) Are there any interstate commerce businesses such as country clubs, tennis clubs, health spas, YMCA, etc., in the area that contract with consumers to use recreational facilities which are the same or similar to those facilities provided in the recreational lease? The sale of these services independent of housing units is evidence of recreation being a separate product from housing.

Economic leverage is perhaps the most complicated element of an unlawful tie-in sale. One must show that the developer, at the time of sale of the condominium units, had some form of economic leverage over the purchaser in the sale of the condominium unit. Economic leverage over the sale of condominiums may take the form of monopoly, market dominance, consumer desirability, or

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tied product, not because the party imposing the typing requirements has a better product or a lower price but because of his power or leverage in another market."

Northern Pacific Railway Company v. *United States*, 356 U.S. 1, 5, 6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545, 550 (1958). "[T]ying agreement fare harshly under the laws forbidding restraint of trade," *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 606, 73 S. Ct. 872. 879, 97 L. Ed. 1277, 1288 (1953), and are unreasonable per se where a party has sufficient economic power over the tying product to appreciably restrain free competition for the tied product and the amount of interstate commerce involved is 'not insubstantial.' *Fortner Enter., Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 501, 89 S. Ct. 1252, 1257, 22 L. Ed. 495, 503, 504 (1969); *International Salt Co.* v. *United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947); *Northern Pacific Railway Company* v. *United States*, supra, 356 U.S. at 6, 78 S. Ct. at 518, 2 L. Ed. 2d at 550.

[81] Id. Recreational services industry would consist of health spas, tennis clubs, country clubs, etc.

[82] See *Imperial Point Colonnades Condominium Inc.* v. *Mangurian*, 1977–1 CCH Trade Cases. ¶ 61,362 (5th Cir. 1977), Condominium associations do not have standing to represent their unit owners in federal court. *Buckley Towers Condominium, Inc.* v. *Buchwald*, 1976–1 CCH Trade Cases, ¶ 60,937 (5th Cir. 1976).

[83] A "net-net lease" is where the recreational facilities are maintained and taxes are paid by the condominium association and not the developer.

[84] In *Kugler* v. *Aamco Automotive Transmissions, Inc.*, 337 F. Supp. 872. 874 (D. Minn. 1971). the court stated: While the "single product" doctrine is well established, there are few cases which have delineated the criteria for determining singleness. The leading case in this area is apparently *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960). After analyzing the Jerrold case. the court went on to state: A similar test for determining separability is suggested by Professor McCarthy. He contends that whether separate items are involved is a question of economics, and he concludes that the proper way to answer the economic question is to look at the industry as a whole to determine if the items have or can be sold separately.

uniqueness of the condominium unit.[85] This leverage need not have involved all buyers in the market but must have involved some buyers.[86] The following checklist relates to facts needed to prove economic leverage:

(1) At the time of the sale of the condominium units, what type of units were other developers offering in the area? Sometimes different developers are building almost identical units within one large complex and may not be imposing any tie-in.

(2) Is the condominium complex substantially different from other complexes in the area in terms of price, location and physical features? However, as condominiums are creatures of real property one complex may well be inherently unique as compared with other complexes or with other forms of housing. Also, low priced condominiums may well have consumer appeal to evidence economic leverage.

The third element of an unlawful tie-in sale involves a "not insubstantial" effect on interstate commerce competition.[87] Proof of this element does not require an in-depth analysis of the recreational services market in the area.[88] This element can be proven by showing that the recreational payments from unit owners are of such dollar volume that recreational services industry competitors would otherwise be attracted to enter this market but cannot practically do so because of the tie-in sale. The following checklist should be reviewed:

(1) What is the total cost now being paid by unit owners to maintain, operate and lease the developer's recreational facility? Compare the cost with the cost of similar services from a recreational service competitor.

(2) Do competitors in the recreational services industry feel that the developer's recreational lease effectively precludes them from an attractive market of unit owners within the complex? The more units in the complex the more attractive is the market.

Needless to say, the antitrust approach in challenging recreational leases is considerably more complicated than the previously discussed state court actions. However, use of the Sherman Act provides treble damages which can be a potent weapon.[89] The disadvantages of this remedy include high costs and the need to show some effect on interstate commerce.[90]

F. Practice and Procedure

The previously discussed remedies, available to attack recreational leases, should be considered in light of the specific lease and condominium development. In chosing the best remedy, the following check list should be reviewed:

(1) Will the remedy afford class action standing[91] or association standing?[92]

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[85] In *Fortner Enterprises, Inc.* v. *U.S.*, 394–495 (1969), the court discussed the correct standard for finding "substantial economic power." Observing that the economic power over the tying product can be sufficient even though the power exists only with respect to some of the buyers in the market, the court found that crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. The court stated:

Market power is therefore a source of serious concern for essentially the same reason regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of the same group within the market—can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, the proper focus for concern is whether the seller has the power to raise prices, or impose other burdensome terms, as a tie-in, with respect to any appreciable number of buyers within the market. 394 U.S. 495, 503.

Discussing one of the three criteria for finding economic power, the court noted in footnote 2 that:

Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e.g., International Salt; Loew's or physical, as when the product is land, e.g., Northern Pacific. 394 U.S. 495, 505.

Compare the above with the Supreme Court's most recent review of Fortner in *United States Steel* v. *Fortner*, 1977–1 CCH Trade Cases, ¶ 61,294; 97 S. Ct. 861 (1977).

[86] *Id.*

[87] See *Mortensen* v. *First Federal Savings and Loan Ass'n.*, 1977–1 CCH Trade Cases, ¶ 61,259 (3d Cir. 1977) wherein the Court looked to the interstate commerce aspects of both the tying and tied product citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1977).

[88] Tie-in sales are considered per se violations of the antitrust laws. See note 80, supra.

[89] 15 U.S.C. § 15.

[90] Supra, note 87.

[91] Supra, note 74.

[92] Supra, notes 74 and 82.

(2) Can the association legally assess its members to pay costs and attorney's fees? [93]

(3) Do the condominium documents define the Condominium Act as it may be "amended from time to time"? [94]

(4) Did the commercial setting of the sale of condominium units involve any lack of disclosure, deception, overreaching or economic leverage? [95]

(5) Are the rental payments under the escalation clause of the recreational lease grossly excessive in comparison with other available recreational services? [96]

(6) Were the original board of directors of the association the officers, agents or employees of the developer/lessor? [97]

(7) Did the individual unit owners sign or execute any document which obligated them personally to the lease? [98]

(8) Is the lien provision of the lease enforceable against a substantial number of units within the development? [99]

(9) Did the sale of condominium units with a recreational lease affect interstate commerce? [100]

See the pleading and practice forms at the end of this chapter.

Chapter 16

[*Proposed rules*]

(1) DEPARTMENT OF LEGAL AFFAIRS: RULES PROPOSED TO THE GOVERNOR AND CABINET

CHAPTER 2-25 UNCONSCIONABLE RECREATIONAL SERVICE CONTRACTS

CHAPTER 2-26 UNCONSCIONABLE MANAGEMENT AND MAINTENANCE CONTRACTS

JUSTIFICATION AND ECONOMIC IMPACT STATEMENT

The Department of Legal Affairs proposes that Rule Chapters 2-25 and 2-26 be adopted by the Governor and Cabinet pursuant to the authority of Chapter 501, Part II, Florida Statutes, and in accord with the requirements of Chapter 120, Florida Statutes. The rules address a specific practice by persons engaged in the trade or commerce of selling housing units to the public. The specific practices to be prohibited are: The collection or attempted collection of rent under a recreational services contract, which is unconscionable at common law; the enforcement or attempted enforcement of a lien provided for in a recreational services contract which is unconscionable at common law; and the collection or attempted collection of contract payments under management or maintenance contracts which are unconscionable at common law. Such rules are necessary as a result of developers of housing unit projects conditioning the sale of housing units on the buyers acceptance of the obligations of a recreational services contract and/or a management or maintenance contract.

The proposed rules addressed this practice as it is or may be engaged in by sellers in every segment of the housing market including persons who lease housing units to tenants under leases having terms of five years or longer. Although this practice has occurred and will almost certainly continue to occur in all segments of the housing market it is most prevalent in the sale of condominium units. It is in this segment that, to date, the bulk, although not all, of the controversy, litigation and other private or public actions have occurred. Consequently, it is with respect to the practice as it has occurred in the sale of condominiums that most analytical studies, surveys, analyses, and reports have been prepared.

In preparing these proposed rules the staff of the Department has relied to a great extent on the following source materials in addition to the applicable case law precedents: Condominiums/Their Impact on the Southeast Florida Housing

[93] See Sections 718.115, 718.116, F.S. (1976).
[94] Supra, note 24.
[95] Supra, notes 37, 51 and 85.
[96] Supra, note 51.
[97] Supra, note 67.
[98] Supra, note 16.
[99] Supra, note 11.
[100] Supra, note 87.

Market, a report prepared by William Bosher, 1974 Fellow, Intergovernmental Affairs Fellowship Program, U.S. Civil Service Commission; Housing in Florida 1975 and Housing in Florida 1976, reports prepared by the Florida Department of Community Affairs for Governor Reuben O'D. Askew, pursuant to Legislative mandate; the HUD Condominium/Cooperative Study, a three volume study prepared as a result of congressional directive to the United States Secretary of Housing and Urban Development; the Leasehold Condominium: Problems and Prospects, the Report of the Ontario Task Force on Leasehold Condominiums, issued September 1, 1975; various depositions and sworn statements obtained during prior litigation by the Department; testimony adduced at the seven public hearings conducted by the Department for the Governor and Cabinet, pursuant to § 120.54(3), Florida Statutes, relating to proposed Rule Chapters 2-24, 2-25, and 2-26; and information received by the Department through correspondence and other submitted materials.

Because of the massive volume of these materials it is impossible to fully set forth within the scope of this statement even a summary of all the information contained therein which is relevant to the Department's proposal. Therefore, these source materials shall be deemed to be incorporated herein by reference to the extent that they may be applicable to any issues raised in consideration of the proposed rules.

Sales practices by developers or other persons engaging in the business of selling housing units are of primary concern as this industry by its nature is of unique importance, due to the large expenditures and vital needs involved. Adequate housing for every family is basic to the existence of the social order as we know it and necessary to progress in every area of social development. Additionally, as the population continues to increase and the land suitable for housing construction becomes correspondingly more scarce it is incumbent upon every element of the government to take all proper steps to secure for each individual a fair and open opportunity to obtain adequate housing.

The average new home constructed in Florida in 1975 cost $38,000.00, an increase of 8.5 percent over 1974, and an increase of 38 percent over 1970. A major factor contributing to this substantial rise is the corresponding rise in population. By 1985, Florida is expected to have a population of ten million, resulting in a need of an addition of six hundred thousand units to the present housing stock. These figures when related to income and other demographic data already demonstrate that the vast majority of Florida families cannot afford to purchase homes at these prices. However, since housing is a necessity, a situation is created wherein many hundreds of thousands of families must cope with extremely difficult personal economic circumstances.

"Housing poor" is a term commonly used to describe the situation faced by a large number of Floridians. It must be recognized that when people have to spend more than a certain percentage of their income on housing, the amount of spendable income available for other necessities such as food and clothing is diminished. It is commonly accepted that no more than 25 percent of income should be expended on housing in order to insure adequate income for other needs and that an expenditure of 35 percent of income is the maximum that can be spent without an unacceptability high risk of dire economic consequences. Housing poor describes the situation which occurs when these percentages are exceeded. In 1974, it was estimated that there were over five hundred thousand persons paying more than 35 percent of income for housing and over seven hundred forty three thousand paying more than 25 percent.

The distribution, density, change and rate of change of population, income, and sources of income throughout the state also has a direct effect on the housing market. The "gold coast" (Dade, Broward and Palm Beach counties) has the greatest proportion of population income and money in the state and correspondingly the highest retail sales, manufacturing output and volume of construction. However, examination of the available data clearly shows that the population growth trend is traveling north along Florida's east coast as well as expending outward from the state's other metropolitan, population centers. Concurrent with this trend is an increasingly strong demand for affordable housing. It is obvious that when demand is very strong and where the demand is for a non-discretionary necessity such as housing, those who can control the supply are in a dominant economic position. Further, whatever abuses which may occur as a result of the suppliers market strength will have a direct impact on the health, safety and welfare of the population. The HUD study,

referenced above, reveals that the developers of housing have dictated the patterns of growth, particularly in the northern gold coast region, and that this has been reflected in poor planning and inadequate facilities.

Over the past several years, housing construction in South Florida has been dominated by the condominium developers to the extent that it can be fairly concluded that condominiums are the only form of new housing available to the average family. Where, as in South Florida, the largest population bracket is over 62 years of age and primarily on fixed income, developer control of housing, if abused, can and has caused great hardship to many people. Condominium prices on the average cover the same range as prices of traditional detached housing. However, condominiums do offer a greater variety and greater numbers in the moderate to lower price ranges. Consequently, there is an observable trend towards increased condominium purchases by all Floridians. Nevertheless, all segments of the housing market reflect this strong market position on the part of developers and unless appropriate remedies are available there is no reason to believe that the abuses which are most visible in the condominium segment will not occur with increasing frequency in other segments of the housing market.

Based upon the source materials referenced above, the Department takes the following view of Florida's housing situation. Overall demand will continue to keep developers in a strong market position for the foreseeable future. This strong position creates a potential for a certain number of incompetent or unethical developers to enter the market, and a temptation for even the most competent and most ethical developers to engage in overreaching tactics to the detriment of consumers.

Florida's climate in conjunction with the character of a large portion of its population has also resulted in a strong demand for recreational services and facilities. In response to this demand, there exists a competitive and growing recreational services industry. In general this would include businesses offering golf, tennis, swimming, boating, hiking, arts, crafts and various physical fitness programs. Recreational activities such as these are offered in various combinations with varying levels of supervision and instruction available. What has occurred is a tendency among housing developers to seek to take advantage of the strong demand existing in both industries.

One result of this tendency is an increasing trend by developers to offer, in addition to housing units, recreational property and facilities to be used in common by housing unit owners. This has led to a need, and therefore increased demand, for professional management and maintenance services to operate and maintain these commonly used areas. Through the various types of housing documents such as declarations of condominiums and restrictive covenants developers have made it a mandatory condition of purchase to accept the obligations imposed by recreational services contracts and management and maintenance contracts.

With respect to recreational services contracts it has been typical for developers to impose on the housing unit owners and/or their condominium or home owners associations the obligation to pay all maintenance and operating expenses, taxes, insurance, and all other costs of the recreational facilities, holding the developer or lessor safe from any of these costs, and then, in addition, to require the payment of a certain amount of rent to the developer or lessor. It has also been typical to include in the recreational services contract a requirement that these rental payments escalate from time to time in proportion to increases in the consumer price index or similar conveniently available commodity or price indexes.

In addition, these recreational services contracts are easily enforceable because the developer has included a provision which imposes a lien on the housing unit of the purchaser which can result in a homeowner or housing unit owner losing his residence for failure to pay for recreation, regardless of whether the recreational facilities and services offered are those which the housing unit owner would choose if he had free choice. The ultimate result has been that thousands and thousands of Florida residents are locked into contractual arrangements wherein in order to avoid losing their homes, they must pay continually increasing amounts for recreation which they may not be able to use, or desire to use, to the extent that real economic hardship must be viewed as an imminent if not existing reality.

That this severe problem has been widely recognized can be demonstrated by reviewing the changes that the legislature has made to the Florida Condominium Act, now Chapter 718, Florida Statutes. Changes relating to recreational services contracts, or recreational leases as they are commonly called, are very prominent particularly with respect to the disclosures which are required to be made by developers and a prohibition against the inclusion or enforcement of escalation clauses included therein. Unfortunately these legislative actions have not yet been able to significantly resolve the existing problem. Constitutional impediments such as the prohibition against impairing the obligations of contracts has thus far prevented these new statutes from being applied retroactively.

In proposing these rule chapters, the Department has specifically taken an approach designed to avoid these impediments. The operative provisions of the proposed rules apply only to those contracts which would have been unlawful at time that they were created under the common law doctrine of unconscionability. Therefore, the proposed rules are strictly remedial in nature and do not create any new substantive, rights or duties. Consequently pursuant to the applicable legal precedents and authorities, the rules can be applied to both new and existing contractual arrangements without violating the impairment of contracts clauses of the Federal and Florida constitutions.

Without going into an exhaustive legal analysis more appropriate to other forums, the following cases serve to demonstrate the legal support for the Department's position. In *Palm Beach Mobile Homes, Inc.*, v. *Strong*, 300 So. 2d 881 (Fla. 1974), the retroactive application of a legislative enactment was challenged on the basis of the impairment of contracts clause. The statute in question imposed limitations on the circumstances under which a person could be evicted from a mobile home park. In upholding the statutes the Florida Supreme Court noted the importance of housing and the shortage of spaces for mobile homes. The Court went on to rule on the impairment of contracts issue, saying:

"In determining whether legislation violates the contract clause the question is not whether the legislation affects contracts incidentally, directly or indirectly but whether it is addressed to a legitimate end and the measures taken reasonable and appropriate to that end. The remedial law in force at the time the contract is made enters into and becomes a part thereof but the parties to the contract have no vested right under the contract clause of the Federal Constitution in the particular remedy or mode of procedure than existing. It may be assumed that the parties made their contracts with knowledge of the power of the state to change the remedy or method of enforcing the contract, which may be done by a state without impairing contract obligations. A state may by a legislative enactment modify an existing remedy and substitute others without impairing the obligation of contracts, provided a sufficient remedy is left or another sufficient remedy be provided."

The proposed rules make it specifically clear that a remedy exists under the Deceptive Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes, based upon the doctrine of unconscionability. This remedy would exist as an alternative to the remedies available pursuant to common law or the Uniform Commercial Code, which may also be based on the doctrine of unconscionability. In this regard it must be noted that the proposed rules are not absolutely necessary in a strict legal sense, in order to permit housing unit owners or their associations to invoke the doctrine of unconscionability as the basis for relief from these overly burdensome contractual arrangements. Nevertheless, it is submitted that adoption of these rules is very important to maximizing the probabilities that there will ultimately be an overall solution to this severe problem.

The way in which these contractual arrangements are designed and the specific language used in them varies widely from case to case. Therefore, invocation of one remedy as opposed to another will undoubtedly raise various subsidiary legal issues resulting from such things as applicable statutes of limitations and the specific relief available under a particular remedy. The more remedies which are available the more likely it is that housing unit owners or their associations seeking relief from these unconscionable arrangements will be able to select the most appropriate remedy and design their pleadings in a way most likely to lead to a just result.

As to the question of whether the doctrine of unconscionability is a legal theory applicable to the resolution of recreational services contract and management and maintenance contract disputes, recent court decisions make it abundantly clear that this question can be answered in the affirmative. The case of

Fleeman v. *Case*, 342 So. 2d 815 (Fla. 1976), involved a constitutional challenge to the retroactive application of that provision within the Condominium Act which prohibits escalation clauses in recreational leases. The Court ruled that this provision could not be applied retroactively because it lacked the necessary express retroactive intent. In fact the Court went further and stated that even if the required intent were present the provision would be unconstitutional as applied retroactively, because of the contract clause. However, the Court continued, making the following statement:

"Given the narrow issue presented by these appeals we do not decide questions as to the validity of these leases on any other grounds thus although there is reference to the possibility that in some instances lease arrangements for individual unit owners may be unconscionable, inequitable or contain other deficiencies recognized in law as basis for judicial invalidation these matters are not considered or decided here."

In a footnote to this statement, the Court cited Section 672.302, Florida Statutes, which is captioned "Unconscionable Contract or Clause," and which reads:

"If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the Court may refuse to enforce the contract or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Avilla South Condominium Association, Inc. v. *Kappa Corp.*, a very recent decision of the Florida Supreme Court, wherein the opinion was filed March 31, 1977, involved a challenge to the enforceability of a recreational lease based upon several counts. Without reviewing all of the issues decided by this opinion, it should be noted that one of the counts in the complaint challenges the validity of the recreational lease based upon a provision in the Condominium Act that requires such leases to be "fair and reasonable." With respect to this count the Court stated:

"In affirming the dismissal of the count alleging violations of Section 711.66 (5) (e), we do not preclude the plaintiffs on remand the possibility of stating an amended claim of unconscionability, independent of Section 711.66(5) (e)."

In summary then, it is submitted that an extensive web of private contractual arrangements in the nature of recreational services contracts and management and maintenance contracts has created a severe problem affecting the public interest. Under these arrangements, a substantial portion of the population of the State has been placed in circumstances of severe economic hardship to the extent of facing the possible loss of their homes. Previous attempts by the Legislature to alleviate this problem have met with only limited success as a result of legal and constitutional impediments.

The proposed rules avoid these impediments by being remedial in nature. The remedy provided for in these proposed rules constitutes an important step towards the ultimate resolution of this problem. Since the remedy invokes a legal theory based upon principles of equity and fairness and since the remedy may be employed by both public enforcing agencies and private parties, it represents the greatest hope that the existing disputes involving recreational services contracts and management and maintenance contracts can be resolved in a way that provides substantial justice to both sides.

Economic Impact Statement

INTRODUCTION

A preliminary discussion of the housing market, recreational services market, economic effects of recreational services contracts in general, the particular recreational services contracts under study is given below. Similar treatment is given to the management and maintenance services industry and the economic effect of contracts in this area. This introductory material will allow a more concise and informed discussion of the economic impact of the proposed rules.

A caveat is necessary at this point. Most quantitative analysis in this statement are of value only as to a general order of magnitude. Available data does not provide the type of information required to make statistically significant or even unbiased statements of quantitative effects.

Each developer of housing projects has a certain amount of market power with regard to a housing market irrespective of whether the housing units are condominiums, cooperatives, mobile home parks, townhouses, or single family

detached units. The precise nature and extent of this market power is dependent upon the interaction of supply and demand, in consideration of such factors as: the way in which a particular market is defined; price; uniqueness of design and location; and availability of incidental services and facilities.

This interaction can be described as the commercial setting within which housing unit transactions take place. In general, the more limited the supply of available housing within the economic means of the average resident or prospective resident, the more the commercial setting will favor the developer or seller of housing units vis a vis the purchaser.

From this it follows that where the commercial setting favors the developer, he is in a much stronger position than the purchaser in determining the terms and conditions of a housing unit transaction. Given superior bargaining strength it has been a common practice among developers in this state to condition housing unit sales on the purchaser's agreement to accept, as well, the recreational facilities and services or management and maintenance services provided by the developer.

Such practices have been more prevalent in the development and sale of condominiums than with regard to other types of housing units. However, similar practices have been and could easily be used in the development and sale of these other types of units. In certain sections of this state condominiums have been, in recent years, the dominant form of new housing. As a consequence, abuses of the above-described practices have occurred more frequently in the sale of condominiums and much of the data set forth below relates to this area.

Condominiums are the dominant form of new housing in Broward County. In the first six months of 1976, 67 percent of all new housing units sold in Broward County were condominiums.[1] In 1973, 86 percent of all housing units completed in Broward County were condominiums. Total housing units completed in 1973 costing less than $40,000 were 27,436. Of these 23,582 were condominium units. It is significant to note that a 1974 survey reported that four developments in Broward County planned completion of 25,800 units under $40,000. Although the 25,800 units were to be completed over a period of up to three years, the planned completions of these four developments represent 94 percent of total completions in 1974 costing under $40,000.[2] The examination of this statistical information indicates that certain condominium developers may have had substantial market power in Broward County.

The recreational services market is more difficult to measure statistically, as the boundaries of the market are difficult to define. The list of facilities contained in the definition of recreational services contract is adequate for the stated purpose. Absent artificial restraints, the recreational services market should be relatively competitive because of the ease of entry into the market. The easily observable growth in the number of tennis clubs and "health spas" in the country as a whole provides evidence of this fact. The final important observation to be made is that all recreational service competitions are competing for the consumer's discretionary income.

Similarly, the management and maintenance services market is difficult to measure statistically. Nevertheless, it can be stated that there are persons other than developers who engage in the trade or commerce of providing professional management or maintenance services with respect to real property. The required services will vary substantially from case to case. They may consist of managing or maintaining condominium or cooperative property, or of property or facilities owned, leased, or otherwise available for use in common by members of a condominium, cooperative, or home owners association. It has been a common practice, however for developers to designate the entity, often his own company which will provide such services as are deemed necessary for a particular project and to impose such choice on housing unit owners through the relevant housing documents.

The Doctrine of Unconscionability is an equitable doctrine which has historically been part of our common law. More recently, it has been codified by inclusion in the Uniform Commercial Code which has been adopted by Florida as well as many other states. In its simplest terms, this doctrine holds that where a contractual arrangement is so unfair and one-sided that it shocks the conscience of

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[1] Florida Trend. November 1976, at page 50.

[2] William Bosher. Condominiums: Their Impact on the Southeast Florida Housing Market. Note: This source encompasses all of the statistics cited in the paragraph's discussion concerning the years of 1973 and 1974.

a court of equity, the court will not enforce the arrangement. Of course, courts will be guided in applying this doctrine by the case law decisions in which it has been previously applied. It is clear that this doctrine can be applied to recreational services contracts and management and maintenance contracts as well as to contracts in other areas.

Unconscionable agreements may harm competition by excluding competitors from the applicable recreational services or management and maintenance services markets. They also may prevent consumers from making informed choices as to obtaining such services as are desired at the best competitive price available.

The effects of the unconscionable arrangements under study can best be understood by use of a hypothetical example drawn from experience and surveys in Broward County.[3] During certain periods in this decade it appears that some condominium developers had denied meaningful choice to purchasers in the housing market in Broward County. Some of these developers, rather than exploiting their market power in the purchase price of the condominium units, chose to take their unconscionable profits from recreational services contracts which were required as a condition of purchase of the unit. As a result, prices of units were often made at below normal profits or even below costs but the required recreational services contracts often resulted in profits of over 100 percent per annum on investment. The lease then becomes a very valuable item which can be valued many times greater than the value of the underlying facilities. The leases have been sold to investors and used as collateral for loans in some cases.[4]

The damage from the unconscionable arrangements in this instance would result if large numbers of persons are precluded from obtaining recreational services from service competitors. There could be direct injury to recreational service competitors. The existence and extent of this injury are determined by the market power in the housing market and the number of persons who, except for the unconscionable arrangement, would patronize other recreational services.

In addition to the injury which may result to service competition from these unconscionable arrangements, the nature of many of these unconscionable recreational services contracts results in a conceptually different type of injury to the economy as a whole. Many of these leases are extremely longterm, from 50 to 99 years. Because of the time duration of the leases and the number of required payments involved, the owner of the recreational services contract has no incentive to provide the quality, quantity and type of recreational service which may be desired by unit owners in the future. It is reasonable to assume that unit owners, at the time they entered into these long term agreements, could not foresee changes in the recreational services industry or in the nature of recreational services which might take place over the length of the recreational services contract. To this extent, then, these arrangements could induce additional economic inefficiency because of their extremely long-term nature. The long-term nature of the contract could, moreover, exacerbate the damage to competition from the unconscionable arrangement. Since management and maintenance contracts vary much more widely in duration, it is much more difficult to foresee long range damage competition, but the possibility cannot be excluded.

1. A description of the action proposed, the purpose for taking the action, the legal authority for the action, and the plan for implementing such action

Proposed Chapter 2–25 consists of five separate rules, and proposed pursuant to the authority of § 501.205, FS Rule 2–25.01 a statement to clarify and aid in understanding of the subsequent rules. Its primary significance is that it makes clear that the proposed rules are intended to be remedial rather than substantive and therefore are applicable to existing, as well as new recreational service contracts. Rule 2–25.02 provides definitions for terms which are used in the proposed rule chapter. Rules 2–25.03 and 2–25.04 declare it to be an unfair and deceptive trade practice for anyone to collect or attempt to collect rental payments or to foreclose or attempt to foreclose any lien under a recreational services contract which is unconscionable at common law. Rule 2–25.05 is a policy statement intended for adoption by the Governor and Cabinet. The statement was drafted by extracting the material principles of law from the cases applying the doctrine of unconscionability and restating them in the con-

[3] HUD Condominium/Cooperative Study, Volume I: National Evaluation (July, 1975).
[4] For a more detailed discussion, see HUD Report, op. cit., pp. A–48 and A–49.

text of an unconscionable recreational services contract. This rule is for the purpose of providing some guidance to a judicial or administrative body in deciding a case brought pursuant to the rules.

Proposed Chapter 2–26 follows a similar pattern. Rule 2–26.01 again makes it clear that the proposed rules are intended to be remedial. Rule 2–26.02 provides definitions of terms used in the chapter. Rule 2–26.03 declares it to be an unfair or deceptive trade practice to collect or attempt to collect contract payments under a management or maintenance contract which is unconscionable at common law. Rule 2–26.04 is the equivalent of Rule 2–25.05, except that this policy statement is directed to the context of an unconscionable management or maintenance contract. Rule 2–26.05 ties together proposed Chapters 2–25 and 2–26. In cases where someone is subject to both a recreational services contract and a management or maintenance contract, both can be treated together as a set of terms and conditions incident to the ownership of a housing unit. Where the combined terms and conditions would constitute an unconscionable agreement the afore-described remedies would be available.

Both proposed chapters constitute rules pursuant to the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes. This act provides for enforcement by the Department of Legal Affairs, the various State Attorneys and private parties. It is contemplated that the bulk of litigation under these rules will be initiated by private parties. The Department will initiate a few actions for the purpose of establishing sufficient case law precedent to provide guidance to private litigants. Actions by State Attorneys is left to their discretion.

2. A determination of the least cost method for achieving the stated purpose

The proposed rules provide the least cost method for achieving the stated purpose. The alternative of a total ban on these leases could constitute "overkill" and would possibly be inapplicable to recreational services contracts and management and maintenance contracts presently in existence. The other alternative, that of relying solely on case law precedent, would be likely to place a larger burden on public enforcement, lessening the likelihood of negotiated settlement of disputes.

3. A comparison of the cost benefit relation of the action to nonaction

Losses to the economy as a whole will be minimal to nonexistent, although certain persons will be precluded from gaining windfall profits. This, of course, assumes that some of the recreational service contracts and management and maintenance contracts will be reformed. If there are recreational services contracts and management and maintenance contracts reformed, a more competitive market will result in better allocative efficiency. If none of these agreements are unconscionable, then no costs will be incurred. If the recreational services contracts and management and maintenance contracts do injure competition then inaction would result in continued losses in economic efficiency due to that injury of competition. For further explanation of this type of loss refer to the study by James V. Koch entitled, "Microeconomic Theory and Applications," (Little, Brown and Company: Boston).

4. A determination whether the actions represent the most efficient allocation of public and private resources

This action will encourage private resolution of disputes. In addition, public enforcement action can be limited to only those cases which have major impact on public welfare, as these rules may be enforced by private action. This action, therefore, represents the most efficient allocation of public and private resources.

5. A determination of the effect of this action on competition

The purpose of this rule is to reform unconscionable contracts in the recreational services and management and maintenance markets and to make competition more effective. If the rule results in fewer unconscionable arrangement, this rule may make competition in the housing market more effective by allowing consumers to more accurately evaluate the costs of various housing alternatives.

6. A conclusion as to the impact of the proposed agency action on preserving an open market for employment

This rule should have no detrimental effect on employment and could produce increased employment in the recreational services industry and the management and maintenance services industry.

7. *A conclusion as to the economic impact on all persons directly affected by the action including an analysis containing a description as to which persons will bear the costs of the action and which persons will benefit directly from and indirectly from the action*

If, under this rule, recreational services contracts and management and maintenance contracts entered into under an unconscionable arrangement are reformed there will be substantial economic impact upon persons owning the recreational services contracts and management and maintenance contracts, and unit owners previously subject to them.

The value of the lease is often many times greater than the underlying value of the facilities. Leases have been valued at 100 times the value of the underlying facilities.[1] The leases are owned not only by developers, but also by individual investors and financial institutions. Financial institutions which have accepted these leases will be indirectly affected. Housing unit owners will benefit directly from the reforming of any unconscionable arrangement.

The service competitors will enjoy a much expanded group of potential customers. In the Broward and Palm Beach County area, this could result in thousands of potential new customers. In the Bosher study, seven of the eight condominiums surveyed in Broward County required payments for recreational services in one form or another. These seven developments had combined units of 22,384 planned or built.[2] If the 25.5 percent occupancy rate (HUD Report at p. A23) were used, 16,676 occupied units would be under some form of recreational lease. Using a conservative two persons per occupied unit (median is 1.8, but skewed downward),[3] this would translate into 33,352 persons who are effectively excluded as potential customers of service competitors. This figure is given only to represent an order or magnitude. It is biased downward by the exclusion of a number of units under recreational service contracts. It is biased upwards by using total planned units which is probably greater than actual units. If unconscionable agreements are reformed, service competitors could stand to gain a large number of customers, if recreational and management or maintenance charges at condominiums are not dropped to meet the new competition. Costs of services are often significantly lower on a long term basis at service competitors when compared to recreational services contracts.[4]

Unit owners whose unconscionable recreational services contracts are reformed will be the most direct beneficiaries of this rule. The losses suffered by the owners of the contract are gains to the unit owners in terms of decreased future obligations. This decrease in future obligations should also make the housing unit more readily marketable. Those unit owners wishing to make use of recreational facilities would be able to choose the amount and quality of recreational services which they desire at a competitive price.

(2) DEPARTMENT OF LEGAL AFFAIRS: PROPOSED RULES

CHAPTER 2–25 UNCONSCIONABLE RECREATIONAL SERVICE CONTRACTS

Rule 2–25.01. Application

It is the intent of Chapter 2–25, F.A.C., to prohibit the use or enforcement of unconscionable recreational services contracts. The Chapter provides a remedy for the enforcing authority and for consumers, individually or by proper class action, to gain relief from unconscionable recreational services contracts. The Chapter does not retroactively apply new substantive law as unconscionable contracts have always been unenforceable in Florida. The remedial law in force at

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[1] HUD Condominium/Cooperative Study, Volume I: National Evaluation, (July, 1975), p. A–49.

[2] Condominiums: Their Impact on the Southeast Florida Housing Market. Willia Bosher, pp. 19–38.

[3] Table A–19 at page A–29 of HUD Report.

[4] Compare charges listed for recreational leases at pp. A–71–75 of the HUD Report with the charges enumerated in the depositions given In the Mater of Florida Planned Communities, Inc., et al. and Pine Island Ridge, Inc., et al. by the following individuals: Ann Dafner (P. 10); Peter Gorman (pp. 17–18); and Wayne Upton (P. 14); Docket Nos. 74–10097 and 74–10095.

the time the contract is made enters into and becomes a part thereof, but the parties to the contract have no vested right under the contract clause of the Federal Constitution, in the particular remedy or modes of procedure then existing. It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations. Therefore, this rule shall apply to all existing, as well as new, recreational services contracts where such agreements are unconscionable at common law.

Rule 2-25.02. Definitions

For purposes of this Chapter, and unless the context clearly indicates otherwise, the following definitions shall apply:

(1) "Housing unit" means any mobile home lot, single family detached home, townhouse, duplex, condominium or cooperative which is purchased by an individual, or leased by an individual for a period of time exceeding 5 years, to be used primarily for residential, personal, family or household use.

(2) "Recreational services contract" means any lease, contract, restrictive covenant, or other agreement wherein purchasers of housing units are directly or indirectly given the contractual right to use any area or building containing, but not limited to, any of the following in consideration for payment to the holder or assignee of said agreement:

(*a*) swimming pool, or
(*b*) tennis court, or
(*c*) golf course, or
(*d*) sauna bath, or
(*e*) exercise equipment, or
(*f*) auditorium, or
(*g*) game room, or
(*h*) other recreational equipment or facilities.

(3) "Developer" means any person who engages in the trade or commerce of selling housing units.

(4) "Service competitor" means any person who engages in the trade or commerce of providing facilities or services through contract or other agreements wherein individuals are given the contractual right to use any area or building containing, but not limited to, any of the following in consideration for payment to the holder or assignee of said agreement:

(*a*) swimming pool, or
(*b*) tennis court, or
(*c*) golf course, or
(*d*) sauna bath, or
(*e*) exercise equipment, or
(*f*) auditorium, or
(*g*) game room, or
(*h*) other recreational equipment or facilities.

(5) "Association" means any entity which has entered into a recreational services contract on behalf of its members.

(6) "Housing documents" mean declarations of condominium or cooperative, by-laws, articles of incorporation, contracts, leases, declarations of restrictions, or any covenants running with the land which affect the operation or ownership interest of a housing unit.

(7) "Rental or contract payments" means the base and escalated rental payments under the recreational services contract plus those funds or payments which are collected and used to maintain the leased recreational facility including, but not limited to, taxes, maintenance, insurance, personnel and repairs.

Rule 2-25.03. Unconscionable rents

It shall be an unfair and deceptive act or practice for any person to collect or attempt to collect rental payments or portions thereof under a recreational services contract which is unconscionable at common law.

Rule 2-25.04. Unconscionable liens

It shall be an unfair and deceptive act or practice for any person to foreclose or attempt to foreclose any lien under a recreational services contract against an owner of a housing unit when said lien is unconscionable at common law.

Rule 2-25.05. Construction and interpretation

The Governor and Cabinet hereby state that in determining unconscionability under this Chapter the following factors should be considered:

(1) Case law interpreting the provisions of Article 2, Section 302, of the Uniform Commercial Code relating to unconscionable contracts is applicable in defining unconscionability under this Chapter.

(2) A recreational services contract, in relation to an association as a party or lessee of said contract, should be considered unconscionable when: at the time the contract was made the developer controlled the activities of the board of directors of the lessee association; the recreational services contract calls for payments which are in excess of the fair market value of similar recreation offered by service competitors; and during the sale of housing units the developer engaged in the following sales practices:

(*a*) The developer failed to give a conspicuous schedule of projected rental increases to a substantial number of prospective members of the association; or

(*b*) The developer failed to deliver the housing documents to a substantial number of prospective members of the association within a reasonable time before closing, which would have given said prospective members time to review said documents with advice of legal counsel; or

(*c*) The developer failed to gain the specific consent of a substantial number of prospective members allowing profit from rental payments to accrue to the developer or the initial board of directors of the association.

(3) The recreational services contract, in relation to an individual purchaser of a housing unit as a party or lessee of said contract should be considered unconscionable when the recreational service contract calls for payments which are in excess of the fair market value of similar recreation offered by service competitors and the developer engaged in the following sales practices:

(*a*) The developer failed to give a conspicuous schedule of projected rental increases to the prospective purchaser; or

(*b*) The developer failed to deliver the housing documents to the prospective purchaser within a reasonable time before closing, which would have given the prospective purchaser time to review said documents with advice of legal counsel; or

(*c*) The commercial setting was so controlled by the developer that the purchaser was in a manifestly unequal bargaining position in accepting the recreational services contract or had no meaningful choice in determining or accepting the terms of the recreational services contract.

(4) A recreational services contract lien should be considered unconscionable when: the lien attempts to encumber protected homestead property under Article 10, Section 4, Florida Constitution; or, the lien security for the rental payment greatly exceeds the potential loss from default on rental payments and the developer had engaged in the following sales practices:

(*a*) The developer failed to fully and conspicuously disclose the provisions of the lien to the purchaser prior to closing; or

(*b*) The developer failed to deliver the housing documents to the prospective purchaser within a reasonable time before closing, which would have given an average prospective purchaser time to review said documents with advice of legal counsel; or

(*c*) The commercial setting was so controlled by the developer that the purchaser was in a manifestly unequal bargaining position in allowing the imposition of the lien under the recreational services contract or had no meaningful choice in determining or accepting the lien terms of the recreational services contract.

(5) A recreational services contract, in relation to an association or individual purchaser of a housing unit as a party or lessee of said contract, should be considered unconscionable when the combined terms of said contract, in and of themselves, are so one-sided in favor of the developer or lessor because of, but not limited to, the following:

(*a*) The rental payments are grossly excessive in comparison with the fair market value of similar recreation offered by service competitors after giving consideration to the initial purchase price of the housing units; and

(*b*) The lien security for the rental payment greatly exceeds the potential loss from default on rental payments; and

(*c*) Condemnation or casualty losses on the recreational facility are the responsibility of the association or housing unit owners; and

(*d*) Default or indemnification provisions which give remedies to the developer or lessor but no similar remedies to the association or housing unit owners.

(3) Department of Legal Affairs: Proposed Rules

CHAPTER 2-26 UNCONSCIONABLE MANAGEMENT AND MAINTENANCE CONTRACTS

Rule 2-26.01. Application

It is the intent of Chapter 2-25, F.A.C., to prohibit the use or enforcement of unconscionable management or maintenance contracts. The Chapter provides a remedy for the enforcing authority and for consumers, individually or by proper class action, to gain relief from unconscionable management and maintenance contracts. The Chapter does not retroactively apply new substantive law as unconscionable contracts have always been unenforceable in Florida. The remedial law in force at the time the contract is made enters into and becomes a part thereof, but the parties to the contract have no vested right under the contract clause of the Federal Constitution, in the particular remedy or modes of procedure then existing. It may be assumed that the parties made their contract with knowledge of the power of the State to change the remedy or method of enforcing the contract, which may be done by a State without impairing contract obligations. Therefore, this rule shall apply to all existing, as well as new, management and maintenance contracts where such agreements are unconscionable at common law.

Rule 2-26.02. Definitions

For purposes of this Chapter, and unless the context clearly indicates otherwise, the following definitions shall apply:

(1) "Housing unit" means any mobile home lot, single family detached home, townhouse, duplex, condominium or cooperative which is purchased by an individual, or leased by an individual for a period of time exceeding 5 years, to be used primarily for residential, personal, family or household use.

(2) "Management or maintenance contract" means any contract, restrictive convenant, or other agreement:

(*a*) Wherein housing unit owners in a condominium, cooperative, or mobile home park are provided with services or the management, maintenance, operation, repair, or upkeep of their housing units, or of any property or facilities owned, leased, or otherwise used in common by such housing unit owners; or

(*b*) Wherein housing unit owners of single family detached homes, townhouses, or duplexes are collectively, through a home owner's association or otherwise, provided with services for the management, maintenance, operation, repair or upkeep of their housing units, or of any property or facilities owned, leased, or otherwise used in common by such housing unit owners; and

(*c*) Wherein housing unit owners as described in subparagraphs (a) and (b) are required either directly or through an association to make payments under the management or maintenance contract to a developer or other entity for the services provided, as described above.

(3) "Developer" means any person who engages in the trade or commerce of selling housing units.

(4) "Service competitor" means any person who engages in the trade or commerce of providing or performing services for the management, maintenance, operation, repair, or upkeep of housing units or of property leased, owned, or otherwise used in common by housing unit owners, or associations thereof.

(5) "Association" means any entity which has entered into a management or maintenance contract on behalf of its members.

(6) "Housing documents" mean declarations of condominium or cooperative by-laws, articles of incorporation, contracts, leases, declarations of restrictions, or any covenants running with the land which affect the operation or ownership interest of a housing unit.

Rule 2-26.03. Unconscionable management or maintenance contracts

It shall be an unfair and deceptive act or practice for any person to collect or attempt to collect contract payments under a management or maintenance contract which is unconscionable at common law.

Rule 2-26.04. Construction and interpretation

The Governor and Cabinet hereby state that in determining unconscionability under this Chapter the following factors should be considered:

(1) Case law interpreting the provisions of Article 2, Section 302, of the Uniform Commercial Code relating to unconscionable contracts is applicable in defining unconscionability under this Chapter.

(2) A management or maintenance contract, in relation to an association as a party of said contract, should be considered unconscionable when: at the time the contract was made the developer controlled the activities of the board of directors of the association; the management or maintenance contract calls for payments which are in excess of the fair market value of similar management or maintenance services offered by service competitors; and during the sale of housing units the developer engaged in the following sales practices:

(*a*) The developer failed to give a conspicuous schedule of projected payments or payment increases to a substantial number of prospective members of the association; or

(*b*) The developer failed to deliver the housing documents or other documents related to the providing of management and maintenance services to a substantial number of prospective members of the association within a reasonable time before closing, which would have given the prospective purchaser time to review said documents with advice of legal counsel; or

(*c*) The developer failed to gain the specific consent of a substantial number of prospective members allowing profits from contract payments to accrue to the developer or the initial board of directors of the association.

(3) The management or maintenance contract, in relation to an individual purchaser of a housing unit as a party to said contract, should be considered unconscionable when the management or maintenance contract calls for payments which are in excess of the fair market value of similar services offered by service competitors and the developer engaged in the following sales practices:

(*a*) The developer failed to give a conspicuous schedule of projected payments or payment increases to the prospective purchaser; or

(*b*) The developer failed to deliver the housing documents or other documents related to the providing of management and maintenance services to the prospective purchaser within a reasonable time before closing, which would have given the prospective purchaser time to review said documents with the advice of legal counsel; or

(*c*) The commercial setting was so controlled by the developer that the purchaser was in a manifestly unequal bargaining position in accepting the management or maintenance contract or had no meaningful choice in determining or accepting the terms of the management or maintenance contract.

(4) A management maintenance contract, in relation to an association or individual purchaser of a housing unit as a party to said contract, should be considered unconscionable when the combined terms of said contract, in and of themselves, are so one-sided in favor of the developer or provider of the management or maintenance service because of, but not limited to, the following:

(*a*) The contract payments are grossly excessive in comparison with the fair market value of similar services offered by service competitors; and

(*b*) The sum total of the covenants contained in the management or maintenance contract demonstrate that the bargain is so one-sided, by requiring a gross inequity of price, performance, security, and remedies, to the detriment of the housing unit owners, or their association, that the developer, or other entity providing the management or maintenance services would not be entitled to relief in a court of equity.

ITEM 3. NEWSPAPER ARTICLES SUBMITTED BY ABE BENZMAN,[1] WEST PALM BEACH, FLA.

[From the Palm Beach (Fla.) Post-Times, Dec. 22, 1978]

JUDGE STUDYING CENTURY VILLAGE LEASES

Palm Beach County Circuit Court Judge Vaughn Rudnick yesterday was asked to freeze Century Village recreation lease rents at the 1975 level.

Unit owner association lawyer Rod Tennyson urged the judge to prevent Century Village, Inc., from collecting increases averaging 8 percent a year since 1975 when a state law was passed invalidating automatic escalation clauses.

The ban on escalation clauses was incorporated into the Century Village leases by provisions adopting the Florida Condominium Act "as it may be amended from time to time," Tennyson argued. He cited a recent, interim supreme court decision in the case which he said effectively ordered the Condominium Act amendments.

Calling the issue "extremely complex," Judge Rudnick said he will have to study the issues and may not rule "for some time." Century Village attorneys George Bailey and Sam Spector, of Tallahassee, argued the supreme court decision relied on by Tennyson, *Wellington* versus *Century Village*, ordered only that unit owners be allowed to deposit rent monies in escrow while challenging leases in court. The state's high court specifically refused to review a West Palm Beach appellate court decision upholding escalator clauses in similar leases, ruling the statutory ban had not become a part of the lease, Spector said.

Bailey also questioned the standing of newly incorporated unit owners associations to challenge leases made with unincorporated associations.

"The supreme court has already looked at the Century Village documents," Tennyson said. "We have a situation now where the law is being violated. The court has a duty to enforce the law which says that "there can be no price index escalation clauses."

[From the Palm Beach (Fla.) Post-Times, Dec. 25, 1978]

CONDO LAWS DON'T SOLVE THE HASSLES

(By Martha Musgrove)

About 1 million Floridians live in condominiums, a form of homeownership that combines the convenience of apartment living with the tax advantages and security of property ownership.

Many were "pioneers" of what has been packaged and sold as a lifestyle of leisure and is so popular the Department of Housing and Urban Development (HUD) estimates in 2 years half of all new housing starts will be condominiums.

Since 1975 the purchasers, many of them retirees, of new condominiums in the state have enjoyed the protection of strong pro-consumer regulatory acts. The Florida Condominium Act requires full disclosure of the financial obligations buyers incur, prohibits recreation lease escalation clauses, regulates the use of sales deposits, provides access to the courts and sets standards by which courts should judge the fairness of unit owner's contracts.

But for the "pioneers," those who purchased units and signed leases before June 5, 1975, condominium living is still a thicket of legalities. State courts have ruled the pioneers cannot be blessed by the reforms their bad experiences spawned for the protection of others. Lawsuits have become a way of life.

What happened? Why? And where will unit owners find relief?

The Florida condominium boom rode the crest of soaring land and construction costs. At its height, the building industry was strapped by shortages of materials and skilled labor. Housing in general was tight and expensive. The condominium developer entered the picture, offering reasonably priced dwellings tied to leases on often impressive recreational facilities and services.

Assistant Attorney General Thomas Pflaum testified before Senator Lawton Chiles' (D-Fla.) Special Committee on Aging: "In practical economic terms, the leases were devised as an indirect method of financing the sale of the condominium units and perhaps of concealing the actual cost. Accordingly, the recreational and land lease was used to permit the solicitation of sales based on low

[1] See statement, p. 149.

advertised price, thus attracting purchasers without disclosing the actual investment cost would be recovered by means of the leases. So today, the return on the leases seldom reflects the value of the property but "rather the developer's profit on the entire project."

The examples are numerous. Recreational facilities at one Broward condominium were built for $200,000 but returned $300,000 the first year. Based on a 5-percent cost-of-living adjustment, the lease will return some $700 million over its life. In another 100-unit condominium, the recreation facilities, consisting of a swimming pool and shuffleboard court, cost $50,000 to build. The developer realized a 600-percent profit in the first 6 years and at a projected 6.5 percent inflation rate will take $1 million annually within 40 years.

But between 1968 and 1975 purchasers—dazzled by the low sales, mortgage price and the lifestyle, assured by salesmen that maintenance and recreation lease costs would "never be more than a few dollars monthly" and without a crystal ball to predict double-digit and persistent inflation—rushed to sign the sales contracts.

Almost uniformly unit owners say they were not given copies of the leases before closing or were handed 100-page documents which made references to recorded declarations minutes before closing. Many say they didn't learn of the liens on their property or the leases which had been signed for them by then developer-controlled associations until years after purchase.

As inflation became a way of life, the condo owner on a fixed pension found himself with automatically increasing lease payments on property he was obliged to maintain and in some instances, insure, pay all taxes on and return in 99 years in as good or better condition than when received. The lawsuits began.

At first, courts universally upheld the leases and ignored the pleas of unit owners to set them aside. Recently there have been hints courts might be receptive to various types of attacks. Organized and with a common cause the unit-owners also have begun to assert their political clout electing reform-minded law makers and throwing support to state and national candidates receptive to their pleas. But victories have been difficult to come by.

Today a summary of the law finds:

(1) Although statutes make it illegal to tie a recreation or maintenance lease to a consumer or commodity price index, State courts have held the prohibition cannot be applied to leases signed before the statute's (June 5, 1975) effective date. Also invalidated have been administrative rules proposed under the 1973 Little FTC Act to retroactively void the leases. Proponents of Federal legislation now pending argue only Congress has the power to retroactively invalidate leases. Opponents say Congress lacks the power.

(2) While tie-in sales—those in which the purchase of one product is contingent upon the purchase of another—are generally illegal under anti-trust laws, the Florida Supreme Court has upheld the typing of recreational facilities to housing as "the heart of the condominium concept."

The ruling in a landmark case, called Avilla South, effectively ended attempts to invalidate recreation leases through anti-trust actions in State courts. The fifth circuit court of appeals, though, recently told its district courts to open their doors to unit owners seeking to bring antitrust actions.

(3) Unconscionable, or flagrantly unfair, contracts are unenforceable. The Florida Supreme Court recently suggested, in a footnote in one case and as an aside in another, that recreation leases signed by a developer with himself or a corporation under his control on behalf of future unit owners may be unconscionable.

However, courts have never precisely defined unconscionability so whether a control is or isn't depends on a case-by-case analysis. What courts may find to be unconscionable if signed by a widow with an eighth-grade education, dined and flattered by a salesman may not be unconscionable if signed by a retired New York lawyer or real estate broker. The legislature has attempted to establish standards by which leases should be judged, but in *Stuart* the first court challenge of unconscionability to a recreation lease failed. The challenge was based in part on the fact that promised tennis courts and a golf course had never been built. The judge did order the developer to build the additional facilities.

(4) Some leases include language incorporating the Florida Condominium Act "as it may be amended from time to time." A Miami appellate court used the "magic words" to invalidate recreation rent escalation clauses in the lease of the Fifth Moorings Condominium. The Florida Supreme Court seemed to agree

in a Century Village case but in November refused to review a seemingly conflicting West Palm Beach appellate court decision in which Palm Aire Condominium leases were held not to be automatically amended when the Condominium Act is amended. The two decisions have put the Century Village leases in limbo.

(5) Still pending before the Florida Supreme Court is the question of whether foreclosure of a homestead can be used to enforce an owners' obligation to pay the recreational lease rents. The West Palm Beach appellate court has said it can't cite a State constitution prohibition against foreclosing a homestead except for nonpayment of taxes or mortgages.

Few lawyers in the field believe any stunning new precedents are likely to come. Most hopes are pinned to unconscionability. But "with a single exception our (unit owner advocates) efforts have been noticeably unsuccessful in striking down or reforming a land or recreational lease on a theory which has ready application to developments throughout the State," says Pflaum.

But adds attorney Rod Tennyson who initiated many of the attorney general's original actions, "We created causes of action such as unconscionability and homestead protection. We won some settlements and got some buy-outs. The bottom line is there's not going to be a great judicial fiat or legislative act that solves all the problems. It's going to be a case-by-case resolution over a long time."

"The judiciary has to base its decisions and look at the effect of a law across the board, not just the facts in a specific case," explains developer attorney Brian Sherr, who is chairman of a bar committee on condominium law.

Virtually all involved say the lease and escalation clause issues ultimately will be settled by negotiations leading to the sale of recreational facilities or land leases to unit owners. Lawsuits and legislative action are the tools being used to shove the parties toward agreement.

"A lot of developers feel they've done nothing wrong," Sherr said. "They've put up substantial dollars and sustained a lot of attacks the courts have ruled weren't based on good legal grounds. They feel they sold their units at a good price and the value of the property has increased. The developer develops an animosity toward people he thinks are harassing him while the unit owners think they're being exploited."

But, he adds, "I've seen a lot of negotiating go on while litigation raged. Unit owners gained tremendous leverage when they won the right to put rentals in escrow and as the cases get closer the pressure is to settle."

"Hopefully," Tennyson said, "on a case-by-case basis we can put the unit owners in a position to buy out their recreation leases."

[From the Palm Beach (Fla.) Post-Times, Dec. 30, 1978]

CONDO'S REC FEE UP 9.2 PERCENT

(By Martha Musgrove)

Century Village recreation lease rents will go up 9.2 percent in 1979, developer Irwin Levy said yesterday.

Notices of the increase, based on last year's Consumer Price Index (CPI), are going out to 3,500 residents. Many residents have filed suit challenging the fairness of the leases and are seeking an injunction to prohibit collection of previous years' increases.

Levy said the increase amounts to about $4 per month for each affected unit owner.

"Everyone's been hurt by inflation," Levy said. "Some of these people have been hurt the hardest, but we've been hurt, too. Theoretically, they get a cost-of-living increase in their social security to help pay for the increases caused by inflation."

Currently, residents pay about $45 a month for the recreation facilities.

Rod Tennyson, West Palm Beach attorney for unit owners seeking to invalidate the automatic rent-escalation clause in the leases, called the increase "a further showing of the need to enforce the law prohibiting escalation clauses, which is what we've asked (Circuit Court Judge Vaughn) Rudnick to do. The increased costs of operating those facilities is nowhere near 9 percent."

Suing residents have claimed recent State statutes prohibiting escalation clauses became a part of the Century Villages leases. They say provisions in the

leases incorporate amendments to the Florida Condominium Act. Century Village officials say amendments to the condominium act are not automatically incorporated into the leases. Both sides have cited supreme court decisions and Rudnick is considering the dispute.

The Century Village leases require the developer to pay all costs of maintenance and replacement. Levy disputes contentions that the CPI bears no relation to costs of operating and maintaining the facilities.

"It certainly does and we run a year behind in collecting. We have to absorb all the costs of inflation for a year before making a single adjustment," Levy said. Utility bills were "once so small we carried them as miscellany on our books, but today they're $150,000 yearly," he said. "The janitorial service runs $5,000 a week and they want a 15 percent increase.

"President Carter with his guidelines of 7 percent is very nice, but our contract says the rent is based on the CPI. If he ran the country so the CPI was 4 percent and issued guidelines of 7 percent, we'd still only charge 4 percent," Levy said.

A number of residents getting notices of the increases were angry.

"They think Century Village should be held in contempt of court for trying this while we're in court seeking an injunction against it. They're very mad," said Morris Blumstein, executive vice president of the council of area residents. Blumstein is also president of Salisbury Condominium Association.

"Naturally people are upset," Village Mutual President Kelly Mann said. "I haven't received any official notification, but I think it's going to affect everyone out here."

Appendix 2

Statements Submitted by the Hearing Audience

During the course of the hearing, a form was made available by the committee on those attending who wished to make suggestions and recommendations but were unable to testify because of time limitations. The form read as follows:

Dear Senator Chiles: If there had been time for everyone to speak at the hearing on "Condominiums and the Older Purchaser" in West Palm Beach, Fla., on November 29, 1978, I would have said:

The following replies were received:

Fay and Joseph Apfelberg, West Palm Beach, Fla.

We agree wholeheartedly with the testimony of Kelly Mann and Bernard Kantor. In addition to all is the injustice against the condominium unit owner by the developer. As an example, in Century village the unit owner pays an average of $600 a year for recreation services. This amounts to over $4.5 million a year, a profit to the developer of close to $3 million, yet we cannot get a meeting place of any size unless we hire a hall elsewhere. We have pleaded, supplicated, etc., to get a sizeable hall from management at any time they saw fit, but to no avail, unless it suits the profit of management.

We have protested to the Land Sales and Condominium Commission of Florida. The right of assembly is violated, laughed at by the developers. We could go to the courts. That is a fearful alternative because of cost to us.

Hope you will introduce legislation to help ease our situation.

Henrietta and Lewis Arfine, Delray Beach, Fla.

We feel the need for more transportation for the elderly. The need is for rides to medical facilities, shopping, and other care for our seniors.

Also needed are hot meals for the elderly who are not able to care for themselves.

Harold H. Bokar, Delray Beach, Fla.

Please break the unconscionable 99-year lease.

Protect us from liens and foreclosures without due process of law.

Make the developer responsible and reimburse the condo buyer for faulty construction.

Blanche B. Cohen, Lake Worth, Fla.

Misrepresentation: Developers do not live up to promises, both verbal and in writing. We are having problems at Covered Bridge (Lake Worth, Fla.).

Even though we had no speaker today, we are pursuing our problems through Jeff Andrew's office in Tallahassee.

Harvel B. Ehrlich, Tamarac, Fla.

I am president of Bermuda Club Five Association, Inc., and chairman of the Advisory Committee of Bermuda Club Management Council, consisting of a

condominium containing 972 apartments and 1,800 persons. I am a member of the Board of the Condominium Cooperative Executives Council, Inc., representing 400 condominiums and cooperatives, and chairman of its advisory committee.

On their behalf, I urge the enactment, without delay, of the Condominium Act of 1978, with amendments.

The amendments recommended are:

Section 210—Civil Actions—Unconscionable Leases: The inclusion, by definition in section 201, and by direct reference in section 210, of all cooperative housing associations, individual homeowners associations, and mobile home owners associations, who come within the characteristics of section 210 (a), (b) and (c); that is, all homeowners and homeowner associations burdened with long-term, escalated-rental, recreation facility leases.

Section 213—Jurisdiction: The insertion of clarifying language to give the district courts of the United States, etc., jurisdiction of an "action seeking a judicial determination that a lease or leases, or portions thereof, are unconscionable" if the characteristics and conditions prescribed in Section 210 are present.

Section 223—Effective Date: Removing section 210 from the exceptions to effectiveness upon enactment.

The reasons for the proposed amendments are: There are many planned unit developments, in addition to condominiums, which are encumbered by so-called recreational facility leases. Unless their inclusion is inconsistent with Section 2919 or create passage difficulties, the inclusion of these associations and homeowners would greatly increase the number of persons in support of passage of the bill. Their support may convince congressmen in doubt. Section 213 refers to offenses and violations, suits in equity or law brought to enforce a liability or duty or to suits to enforce rights under sections 205 and 206. There is no reference to an action seeking a judicial determination that a lease is unconscionable.

We are in a period of high inflation. A delay of 1 year in the effective date of section 210 could undoubtedly mean a 10 percent unnecessary and unwarranted increase in recreation facility rent. Once the increase is effected, it means increased payments for the balance of the lease term.

Early enactment and concomitant effectiveness will lead to a reawakening of conscience and reasonableness on the part of developers and many lease "buyouts", so that the increase in federal litigation would be minimal.

In a great number of instances, the individual developers operated through a series of corporations; to wit: developer corporation; management corporation; recreation facility corporation; sales corporation and condominium association in each of which the individual developer and his spouse, agents, servants, or employees were sole stockholders, agents, and officers.

Prior to the sale of apartments in the condominium, the developer, through his corporate alter egos, contracted on behalf of the condominium association with the other corporations or some of them for the lease of recreation facilities owned by the developer individually or through the recreation facility corporation.

Such leases of recreation facilities were for long terms, and obligated the condominium association and the apartment owners therein to pay rent for such facilities, often for as long as 99 years.

Such leases gave to the developer or his recreation facility corporation a lien on the apartments of each of the apartment owners in such condominium association as security for the payment of such rentals for such 99-year period.

Such leases obligated such apartment owners of the condominium and the condominium association to pay all taxes, insurance premiums, repairs, replacements, furnishings and maintenance expenses of such recreation facilities, so that the rentals required to be paid to the developer or his recreation facility corporation were free of deductions of any kind whatsoever.

The rentals imposed by the developer and the developer's alter ego corporations were arbitrarily fixed by them and are greatly disproportionate to the value or extent of the facilities so leased.

The net-net rentals so imposed upon such apartment owners were made subject to any and all increases in the national cost of living index, despite the fact that the developer and/or his corporate alter ego had no disbursements therefor subject to inflation or any change in the cost of living index.

Such leases entered into under such circumstances, are unconscionable and cry out for remedy and relief for those upon whom they were imposed.

The public and the governmental bodies are awakened to the unconscionability of the recreation leases and the cost-of-living escalation clause, and legislatures in some areas here prescribed such leases.

Federal agencies have contemplated, and may have by now, rejected loans on planned unit developments subject to long-term leases.

The burden of such existing leases and the prohibition of such leases in newer planned unit developments and the denial of financing to sales of such units, has depreciated and will further depreciate the value of all such housing units still subject to such leases.

Inasmuch as most owners of housing units in condominiums and other planned unit developments are widows and retirees, the relief promised in the Condominium Act of 1978 is very urgently needed.

FRED ENGEL, LAUDERDALE LAKES, FLA.

Murry Hills, Lake Worth, has the usual 99-year lease with 5-year adjustment tied into cost of living. It started out returning $90,000. Now, after first 5 years, it amounts to $125,000. With present cost-of-living increases, we are going to have another increase next year which will be greater than the first one.

Our management contract was declared null and void after a 2½-year legal battle. Thus, it would appear the entire condo declaration could be found illegal. But this all costs money. The majority can't afford all these legal fees.

Our land lease percent figures were not arrived at from any standard basis. We have four apartments with the starting figures of $10, $14, $17, $20. This ties into nothing: square feet of area, sale price, or any other basis. Thus, the percent figure is based on total land lease income divided by the charge originally assessed.

For example, my share of ownership of the land my apartment building sets on is 5.9 (24 percent). Thus, although I can only use one space in the auditorium, pool, or shuffleboard courts, I have to pay almost twice as much as the owner of a one bedroom.

Senator Chiles, you asked one of the attorneys if they knew of condos sold below cost. My condo building must have sold below cost as the savings and loan foreclosed and claimed they had taken a fall to the tune of over $1,250,000 to $1,750,000; in fact, the S & L now received all release (?) money from our place, one-half of another, and the total of still another.

Unconscionable contract as drawn up by State of Florida—we meet every point—but the legal cost and time involved makes me wonder if its worth while.

NORMAN FEINBERG, WEST PALM BEACH, FLA.

Thank you Senator Chiles for coming to West Palm Beach to address yourself to the condo problems, we are faced with. Listening is a lost art in today's society and you evidenced that you still have that art. Your summation of the hearings and your forthright explanation of effecting congressional approval was taken by me as an honest statement of fact.

I had the opportunity to ask Governor Askew why he didn't campaign as hard for the condo owners as he did to defeat the casino issue. The retirees brought more income and services to Florida, superceded only by tourism. He pointed out the original bill was passed before he took office. I did not dispute this with him since he added that contracts were a constitutional issue.

Mr. Poliakoff's presentation addressed itself to the fact that the evil still persists and must be dealt with, especially since the condo concept will grow nationally because of the high cost of housing. The retirees have worked hard to save those who followed (1975) as condo buyers from the injustices we are still living with. Florida legislators should alert other congressional leaders to support your bill to control abuses that could befall their constitutents and not be deterred by their lack of understanding.

There is nothing like good communication from the "top to the bottom and back again." You conducted the hearing in such a fashion for which I wish to commend you.

Best wishes for the holidays to you and yours.

ROSE AND SOL FELLER, DELRAY BEACH, FLA.

We are in favor of transportation for the senior citizens at all times, and for meals-on-wheels for the sick and disabled citizens.

SAM FRANKEL, WEST PALM BEACH, FLA.

Our developer (the Cenville Corp. and Century Village) has said "We will continue to cause you (the owners) tremendous court costs and attorney fees until you no longer can afford to fight us." Our court cases have been stretched out until our entire village is of feeling that the courts, judges and, yes, even our attorneys are all cooperating to continue litigation until we go broke. Our developer gives campaign donations to both sides and our people are just losing confidence in government, which to my mind is worse than even losing our home. What do we have left, if we can't trust our government?

DORIS AND SIDNEY H. GREENE, WEST PALM BEACH, FLA.

The statements given here today are true. I cannot add much more, other than to say that corrections in the condominium must be made quickly. Our time is running out.

Thank you, sir.

SHIRLEY GUTCHIN, DELRAY BEACH, FLA.

I purchased a resale condo in 1974. I knew nothing about a 99-year lease and feel now that I was taken. It is beyond my scope of imagination that a lien can be placed upon my condo if I don't pay any assessment fostered upon me by the board of directors. It makes me sick to be forced to pay an assessment which I feel is illegal, without being taken to a court of law. It seems to be unconstitutional.

MURRAY H. IKE, DELRAY BEACH, FLA.

Keep up the good work.

Something should be done about raising the homestead exemptions and senior citizen exemptions which are literally wiped out when additional yearly appraisals raise assessments. These exemptions become almost meaningless under such laws and regulations.

MR. AND MRS. A. ITZKAWITZ, DELRAY BEACH, FLA.

Break the unconscionable 99-year lease.

Protect us from liens and foreclosures without due process of law.

Make the developer responsible for faulty constitution, and reimburse the condo owner.

H. AND J. KAGEL, DELRAY BEACH, FLA.

We are residents of Kings Point. When we bought our condo we knew nothing of a 99-year lease. I think this is a violation, and we hope this will be changed.

MARY KATZ, DELRAY BEACH, FLA.

Please try to alleviate the mistake of the 99-year lease that we have here at Kings Point.

Please, Senator, do something about the continuous escalation of the maintenance fees. It is difficult to keep up with it.

MOLLIE KOGOS, DELRAY BEACH, FLA.

Please try to alleviate the mistake of the 99-year lease that we have here at Kings Point.

Please, Senator, do something about the continuous escalation of the maintenance fees. It is difficult to keep up.

MORRIS KRAVITZ, WEST PALM BEACH, FLA.

Everything that was said was the truth.

ADA AND MILTON KRUBLIT, DELRAY BEACH, FLA.

Try to abolish the 99-year condo leases, which are unconscionable and detrimental to the welfare of senior citizens.

We need senior citizen food assistance in Palm Beach County, Fla.

Improvement of public transportation in Palm Beach County.

Prevent cutting back of social security benefits and income tax deductions for senior citizens.

SAMUEL LAMPERT, DELRAY BEACH, FLA.

Please enact legislation to abolish the 99-year lease on condos.

We need assistance for senior citizens who are homebound and require meals-on-wheels.

Better transportation on buses in Palm Beach County.

NATHAN MAKLER, DELRAY BEACH, FLA.

Your concern in all areas for senior citizens is most gratifying. I would like you to also check cost of food in Delray area. Public shaffery stores. Grocery prices have suddenly risen the second week in November 1978 in most all items, from 12 percent, practically overnight; 90 percent of all shopping is done in these stores by senior citizens of fixed incomes. This is outrageous. And surely your people in this locality will bear out the true fact.

Please continue your good concern, including the ripoff of quality and cost of condos to senior citizens. God bless you.

MILDRED MARGOLIN, WEST PALM BEACH, FLA.

If we can't have the law rolled back before 1974, at least please make every effort to freeze it as of now. We'll bless you.

BERTHA AND JOSEPH MENCHER, DELRAY BEACH, FLA.

We have no rec. lease but even though we have a written guarantee of no increase until January 1, 1982, we just received a notice from Kings Point Realty of an increase of approximately $3 per month for "recreation."

Even though they have no legal leg to stand on, they are trying to circumvent their own provisions when they sold us our unit.

We wish to bring this to your attention that a written contract seems to have no value in Florida.

We have just taken over our unit on December 20. It is our understanding that a building be turned over complete. Our unit had no lighting fixture, our air conditioner was not in working order, and our electric system was incomplete.

RUTH MOSKOWITZ, DELRAY BEACH, FLA.

Please try to alleviate the mistake of the 99-year lease that we have here at Kings Point.

Please, Senator, do something about the continuous escalation of the maintenance fees. It's difficult to keep up with it.

ANNE R. NATHAN, DELRAY BEACH, FLA.

I would like to to see public transportation; also, a hospital for the residents of Delray Beach.

MARY NUDELMAN, WEST PALM BEACH, FLA.

I never believed that I would retire and work harder now than I ever did before I retired because of the fact that I cannot stand injustice of any kind and we surely have plenty of it in Century Village. Because of the fact that I cannot sit back idly, and do care about people and the future of our senior citizens, I am in the fight against the unscrupulous developers all over the State of Florida. I never believed that a democratic country like ours could allow developers to keep us in a state of serfdom in the last years of our lives.

LOUIS REITER, DELRAY BEACH, FLA.

We definately need transportation to doctor's offices and hospitals.

We are saddled with a 99-year lease. We are all senior citizens at Kings Point and we desperately need some relief and hot meals for the incapacitated.

BETTY AND BEN SHERMAN, WEST PALM BEACH, FLA.

Speaking of buses, many people who do have cars, who never use the trains and buses as provided, still have to pay for community services. I appreciate the time, effort, and interest shown by you and Senator Stone, as well as your committee. I pray and hope that when you too reach the age of many citizens who live here in Century Village, you will have and enjoy the peace as well as good health we are all speaking. May God bless all of you in your efforts in our behalf.

HARRY SOLDBERG, DELRAY BEACH, FLA.

Please try to correct the error of the 99-year lease that we here at Kings Point have. Also, please try to get the elderly hot lunches; it would be greatly appreciated.

RAYMOND STACK, BOYNTON BEACH, FLA.

As a cosponsor with Senator Stone of Federal legislation S. 2919, what can we expect in the near future—time being of the essence?

What happened to bill H.R. 12124?

How does the Florida Senate bill 803 benefit condo's (if it does that, as represented)?

The 99-year recreation/land lease on 5 year CPI index of 1973 to 1978, starting at $35 monthly for a land lease, would cost $12¼ million in 99 years for one unit and he also pays all taxes, insurance, and all increased maintenance.

[Attachment]

GULFSTREAM TRUST/NOVO TRUST,
Delray Beach, Fla., April 28, 1978.

Re Long-term lease executed April 28, 1973.

RAYMOND STACK,
President, Gulfstream Condominium Association, Inc.,
Boynton Beach, Fla.

GENTLEMEN: In accordance with paragraph 5(c)(1) of the long-term lease executed on April 28, 1973, between Joseph Novotny, as trustee of the Novo Trust and as Trustee of Gulfstream Irrevocable Trust (landlord), and Gulfstream Condominium Association, Inc. (tenant), you are hereby notified of at adjustment in the "basic rental" based on the cost of living. The adjusted rental date is May 15, 1978, and the date on which the adjustment shall take effect is May 15, 1978.

Here is a computation of the tentative revised rent. The reason why this adjustment is tentative is that the rental as adjusted shall be in effect commencing from May 15, 1978; however, the Consumer Price Index figure for May 1978 will not be published before July 1978. Therefore, this computation is based on the latest available Consumer Price Index figure, namely, March 1978. When the actual figure is available to the undersigned, we will recompute and make the necessary adjustments.

(a) Consumer Price Index, January 1973, all items..... 127.7
(b) Consumer Price Index, March 1978, all items..... 189.7
(c) Based on the formula in the lease, 189.7 is divided by 127.7. This results in a 48.55 percent increase in the monthly payments.

Therefore, the new monthly payment is calculated as follows:

	Individual unit per month	All units per month
Current monthly payment	$35.00	$12,600.00
Multiply to 48.55 percent equals	16.99	6,116.40
New monthly payment	51.99	18,716.40

Note: 99-yr cost per unit, $12,250,000.

For the payment due May 1, 1978, use one-half of the old figure and one-half of the new figure; that is, $6,300 plus $9,358.20, total $15,658.20 ($43.50 per unit).

For the payment due in June and July 1978, the figure will be $18,716.40.

During July 1978, we should be able to determine the actual Consumer Price Index figure for May 1978, and we will resubmit the computations at that time. However, until we so notify you, continue to make payments of $18,716.40 monthly. We are enclosing copies of the index figures to substantiate the calculations. If you have any questions, please do not hesitate to contact this office.

Yours truly,

JOSEPH NOVOTNY,
Trustee, Gulfstream Trust/Novo Trust.

SADIE STERLING, WEST PALM BEACH, FLA.

Why do I feel this hearing is another charade? This issue has been dragging on for years and I'm losing confidence in the fairness of our representatives to legislate with justice and fair play for the general population, but in favor of the real estate development interests.

Dare we hope something will be done now?

FRED TRUDING, WEST PALM BEACH, FLA.

Thank you for visiting West Palm Beach and giving us the opportunity to be heard on the unconscionable 99-year leases on the recreational area.

SAMUEL VOGEL, DELRAY BEACH, FLA.

Delighted to see you carrying the ball for senior citizens.

Legislate to prevent rip-offs from builders, utilities, and the medical community. Provide local medical facilities at nominal fees. Provide local clinics for emergencies.

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