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# SPECIAL PROBLEMS RELATED TO CONDOMINIUM CONSTRUCTION LITIGATION

W. MICHAEL HOLM†

## INTRODUCTION

In recent years the condominium form of ownership of real property has grown in significance as the cost of land and housing has skyrocketed. For many people, the high cost of owning single-family homes makes condominiums the only type of affordable housing. Additionally, with our increasingly mobile society, condominiums offer an excellent investment. Individuals can purchase and live in a unit without the normal requirements of upkeep associated with a single-family home, while at the same time, be assured of some appreciation in the value of their property as well as an ever expanding market for units.

Unfortunately, because condominiums have expanded rapidly, so has litigation involving their construction and management. In this litigation certain legal issues reoccur, often with courts taking different approaches to the resolution of the issues. There has been little, if any, treatment given to this subject in the literature.

Many condominium suits involve construction defects in the common elements, those undivided portions of the condominium which are owned by the unit owners as tenants-in-common, for example, roofs, sidewalks, driveways, and building exteriors. Often these suits are based upon negligence or breach of express, implied or statutory warranties. Additionally, the suits often allege a breach of the fiduciary duties owed by the declarant appointed director of the unit owners association to the unit owners.

This article will examine several significant issues often encountered in litigating condominium suits, will analyze the existing case law in the area, and will attempt to set forth what is or ought to be the law in Virginia on these issues. In particular, the article will focus on three primary areas of controversy: (1) The fiduciary obligation existing between the developer/declarant, its appointed members of the unit owners association board of directors, and the individual unit owners themselves; (2) The standing of unit owners associations to sue for common element deficiencies; and (3) The types of damages recoverable for common element deficiencies, and the class of person who may recover those damages.

In 1974, the General Assembly adopted the Virginia Condominium Act which is codified in sections 55-79 of the Virginia Code and following. This

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Act has served as a model for many jurisdictions nationwide which have adopted similar condominium acts. Unfortunately, there have only been two decisions of the Virginia Supreme Court dealing with the interpretation of this Act. Neither of them have involved the issues presented herein. Necessarily then, this article will focus on other states' interpretations of condominium statutes. In so doing, the article will attempt to suggest what the Virginia courts' interpretation would be, and where necessary, recommend statutory modifications.

### I. BREACH OF FIDUCIARY DUTY

Under the Virginia Condominium Act, the unit owners association (association) is vested with the authority to manage the condominium, particularly with regard to the upkeep of common elements.<sup>1</sup> The governing body of the association is its board of directors which, among other things, sets the condominium fee, authorizes special assessments and makes decisions regarding the maintenance and repair of the common elements.

During the period of declarant control, that is until seventy-five percent of the individual units have been conveyed, unless the condominium instruments call for declarant control to cease earlier, the declarant appoints the board of directors of the association.<sup>2</sup> The manner in which the board of directors undertakes to fulfill its obligations, during the period of declarant control, often becomes the factual predicate of lawsuits. The association's relationship and obligations to the individual unit owners creates a special degree of responsibility for the conduct of its affairs; that is, through its individual directors, the association occupies a fiduciary relationship to the unit owners. The conduct of its directors in exercising their power of control, therefore, becomes significant.

Fiduciary duties can be rooted in the common law or in statutes. There was no statutory fiduciary duty in Virginia until 1978 when section 59-79.74(a) of the Virginia Condominium Act was amended to create such a duty imposed on the declarant and its representatives appointed to the board of directors of the association. Under that section, the declarant or his appointed directors occupy a fiduciary relationship to the unit owners and are liable to the owners for their acts or omissions during the period of declarant control.<sup>3</sup> Even absent this codification, the clear trend among

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1. VA. CODE § 55-79.80 (Supp. 1984).

2. VA. CODE § 55-79.74 (Supp. 1984).

3. VA. CODE § 55-79.74(a) (Supp. 1984) now provides:

The declarant or the managing agent or such other person or persons selected by the declarant to so appoint and remove officers and/or the executive organ or to exercise such powers and responsibilities otherwise assigned to the unit owners' association, the officers, or the executive organ shall be subject to liability as fiduciaries of the unit owners for their action or omissions during the period of declarant control as specified in the condominium instruments or if not so specified, within such period as defined in this section.

jurisdictions nationwide has been to apply the common law fiduciary obligations owed by directors of a corporation to its stockholders in the condominium context.<sup>4</sup>

At common law, controlling stockholders, directors, or officers of a corporation occupy a fiduciary relation to the corporation<sup>5</sup> and its stockholders.<sup>6</sup> As fiduciaries, their powers are in trust; when challenged, their dealings with the corporations are subject to rigorous scrutiny, and they must bear the burden of proving the good faith and inherent fairness of their transactions with the corporation.<sup>7</sup> Moreover, a director of a corporation must act in the utmost good faith, and not permit himself to be placed in a position where his individual interest clashes with his duty to the corporation.<sup>8</sup>

Under Virginia law, this fiduciary duty runs to the shareholders as a class, rather than to shareholders in their individual capacities.<sup>9</sup> Thus, in the

4. See *Ireland v. Wynkoop*, 36 Colo. App. 205, 539 P.2d 1349 (1975) (kickbacks, mismanagement of funds); *Shore Terrace Coop., Inc. v. Roche*, 25 A.D.2d 666, 268 N.Y.S.2d 278 (1966) (per curiam) (suit by association against promoters for accounting); see also *Raven's Cove Town Homes, Inc. v. Knappe Dev. Co.*, 114 Cal. App.3d 783, 171 Cal. Rptr. 334 (1981); 2720 Wisconsin Ave. Coop. Ass'n v. Wisconsin Ave. Assoc., No. 2583-76, Memorandum Opinion (D.C. Super Ct. 1979); *Angora Enters. v. Cole*, 439 So.2d 832 (Fla. 1983) (recognizing cause of action), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 1710 (1984); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1978); *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977); *Point East Mgmt. Corp. v. Point East One Condominium Corp.*, 282 So.2d 628, 634 (Fla. 1973) (Ervin, J., dissenting), *cert. denied*, 415 U.S. 921 (1974); *Kelly v. Astor Investors, Inc.*, 123 Ill. App.3d 593, 462 N.E.2d 996 (1984); *Wolinsky v. Kadison*, 114 Ill. App.3d 527, 449 N.E.2d 151 (1983); *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568, *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 395 (1983); *Papalexioiu v. Tower West Condominium*, 167 N.J. Super. 516, 401 A.2d 280 (1979); *Northridge Coop. Sec. No. 1 v. 32nd Ave. C. Corp.*, 2 N.Y.2d 514, 161 N.Y.S.2d 404, 141 N.E.2d 802 (1957); *Schwarzmann v. Association of Apartment Owners of Bridge Haven*, 33 Wash. App. 397, 655 P.2d 1177 (1982).

While this issue has not been litigated in the Virginia Supreme Court, the Circuit Court of the City of Alexandria in *Kuhn v. West Alexandria Properties, Inc.*, No. 5416 (Judge A. Grenadier, March 30, 1980), did address the issue and held that absent this statute, the directors of the unit owners association were under no common law fiduciary obligation.

5. See *Rowland v. Kable*, 174 Va. 343, 6 S.E.2d 633 (1940); *Deford v. Ballentine Realty Corp.*, 164 Va. 436, 180 S.E. 164 (1935). This common law fiduciary obligation in Virginia applies to corporations operated for profit. There do not appear to be any Virginia cases applying it to not-for-profit corporations. *But see, e.g.*, *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1978); *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568 (applying principle to not-for-profit incorporated condominium associations), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 395 (1983).

6. See *Adelman v. Conotti*, 215 Va. 782, 213 S.E.2d 774 (1975).

7. See *Pepper v. Litton*, 308 U.S. 295 (1939); *Bayliss v. Rood*, 424 F.2d 142, 146 (4th Cir. 1970); *Braddy v. Randolph*, 352 F.2d 80 (4th Cir. 1965).

8. See *Adelman v. Conotti Corp.*, 215 Va. 782, 789-90, 213 S.E.2d 774, 779 (1975); *Rowland v. Kable*, 174 Va. 343, 366, 6 S.E.2d 633, 642 (1940).

9. See *American General Ins. Co. v. Equitable General Corp.*, 493 F. Supp. 721, 741 (E.D. Va. 1980). *But see* *Kors v. Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960) (proposition that allegations of fraud may be exception to this general rule).

condominium context, it is arguable that a suit against the directors of an association for breach of their common law fiduciary duties would properly be brought by the association rather than by a unit owner.<sup>10</sup> The only way an individual unit owner could bring an action would be in the nature of a stockholder's derivative suit which is proper only under limited circumstances.<sup>11</sup> Nevertheless, the trend in other jurisdictions has been to permit such suits to be maintained by individual unit owners under the theory that the fiduciary obligation runs to both the association and the unit owners.<sup>12</sup>

This fiduciary duty to the association, however, exists on two levels. Directors are held to an extremely high standard of virtually undivided loyalty when evaluating their personal dealings with the corporation which results in a court imposed burden on the director to prove the fairness of his transactions with the corporation.<sup>13</sup> However, when the "business" decisions of the board of directors are challenged, a different standard applies. In these circumstances, courts often apply what has been termed the "business judgment rule" to defeat recovery.<sup>14</sup> The business judgment rule

10. See *Ireland v. Wynkoop*, 36 Colo. App. 205, 539 P.2d 1349 (1975). Thus, the association would appear to have standing to assert the claim. However, this appears dissonant with the argument addressed in this article, suggesting that the association lacks the requisite standing to assert warranty or negligence claims for damage to the common elements. See, e.g., *Summerhouse Condominium Ass'n v. Magestic Sav. & L.*, 44 Colo. App. 462, 615 P.2d 71 (1980).

11. Such a suit is proper only if the shareholder shows that a request or demand was made upon the board of directors that they institute a suit on the part of the corporation against the wrongdoers and the request was refused; or he must allege that the wrongdoers constitute a majority of the board of directors and, thus, demand would be fruitless. See *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713 (E.D. Va. 1980); *Mount v. Radford Trust Co.*, 93 Va. 427, 25 S.E. 244 (1896). Such would be the case during the period of declarant control of the unit owners association. See *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568, 574, cert. denied, \_\_\_ U.S. \_\_\_, 104 S.Ct. 395 (1983).

12. See *Cohen v. S & S Constr. Co.*, 151 Cal. App. 3d 941, 201 Cal. Rptr. 173 (1984); *Cohen v. Kite Hill Community Ass'n*, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1977); *Wolinsky v. Kadison*, 114 Ill. App. 3d 527, 449 N.E.2d 151 (1983); *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568, cert. denied, \_\_\_ U.S. \_\_\_, 104 S.Ct. 395 (1983); *Papalexioiu v. Tower West Condominium*, 167 N.J. Super. 516, 401 A.2d 280 (Ch. Div. 1979). As a result of the 1978 amendment to § 55-79.74 of the Virginia Code, it is arguable that such would not be the result in Virginia. This would obviate the necessity of deciding the standing issue as to fiduciary duty claims by the association.

13. See *supra* notes 7-8.

14. An excellent statement of the "business judgment rule" is found in 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 1039, at 37-38 (1975):

It is too well settled to admit controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact. In other words, directors of a commercial corporation may take chances, the same kind of chances that a man would take in his own business. Because they are given this wide latitude, the law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes. And that is true even though the errors may be so gross that they

protects directors from liability for actions taken on behalf of the corporation which are within the directors' powers where there is a reasonable basis to believe that the decision was made in good faith.<sup>15</sup> Under Virginia law, management decisions concerning the internal affairs of corporations will not be upset absent a showing of gross mismanagement or bad faith.<sup>16</sup>

The business judgment rule has been applied to preclude recovery in the condominium context in several cases. In *Schwarzmann v. Association of Apartment Owners of Bridge Haven*,<sup>17</sup> several unit owners sued the association and individual directors claiming damage as a result of the directors' failure to remedy a water problem. The court applied the business judgment rule and, because there was no evidence of bad faith or improper motive, denied the relief requested.<sup>18</sup> In *Papalexiou v. Tower West Condominium*,<sup>19</sup> at issue was the propriety of a special assessment levied by the board of directors of the unit owners association to pay for necessary repairs to the common elements. The court held that this determination was within the board's power and, absent a showing of bad faith, self dealing, dishonesty or incompetency, would not be judicially reviewed.<sup>20</sup> Finally, *Rywalt v. Writer Corp.*<sup>21</sup> involved an action by homeowners in a subdivision against the homeowners' association. The plaintiffs attempted to enjoin the association from constructing a tennis court in a particular location arguing that the action was ultra vires.<sup>22</sup> The court found no evidence of bad faith or fraud and held that in the absence of such evidence, the business judgment of the directors of the association would not be disturbed.<sup>23</sup>

In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,<sup>24</sup> a case involving director dealings at a non-profit charitable hospital, the court examined the fiduciary duty concept in light of the business judgment rule. In so doing the court expostulated the types of

may demonstrate the unfitness of the directors to manage the corporate affairs. This rule is commonly referred to as the "business judgment rule." (footnotes omitted).

See also H. HENN, LAW OF CORPORATION § 242 (1970).

15. *Schwarzmann v. Association of Apartment Owners of Bridgehaven*, 33 Wash. App. 397, 655 P.2d 1177 (1982). See generally W. HYATT, CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW 58-65 (1981).

16. *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713 (E.D. Va. 1980); *Penn v. Pemberton & Penn, Inc.*, 189 Va. 649, 53 S.E.2d 823 (1949).

17. 33 Wash. App. 397, 655 P.2d 1177 (1982).

18. 655 P.2d at 1181.

19. 167 N.J. Super. 516, 401 A.2d 280 (1979).

20. 401 A.2d at 286. The court adopted the "reasonableness" test as articulated in *Hidden Harbour Estates v. Norman*, 309 So.2d 180 (Fla. Dist. Ct. App. 1975), and noted that all that is required of directors in carrying out their duties is that they act in good faith. 401 A.2d at 285-86. This test subsequently was adopted in Virginia with respect to amendments to the condominium restrictions, rules, and regulations. See *Unit Owners Ass'n. of Buildamerica-1 v. Gilman*, 223 Va. 752, 292 S.E.2d 378 (1982).

21. 34 Col. App. 334, 526 P.2d 316 (1974).

22. 526 P.2d at 317.

23. *Id.*

24. 381 F. Supp. 1003 (D. D.C. 1974).

activities which violate a director's fiduciary obligation.<sup>25</sup> According to the *Stern* court, those activities include: (1) The failure to use due diligence in supervising the actions of officers, employees, or outside experts to whom had been delegated day-to-day responsibilities for the affairs of the corporation; (2) knowingly permitting the corporation to enter into a transaction with the director of any corporation, partnership, or association in which the director held a substantial interest or served as an officer, director, or manager, without having previously disclosed to those responsible for approving the transaction the interest or any reasons why the transaction might not be in the best interest of the corporation; (3) participating in or voting in favor of a decision to transact such business with himself or a corporation, partnership, or association in which he held a substantial interest or served as an officer, director, or manager; and (4) failing to perform the director's duties honestly, with a reasonable amount of diligence and care in good faith.<sup>26</sup> While this case did not involve condominiums, the principles and analysis are directly applicable.<sup>27</sup>

This fiduciary obligation of directors has been extended beyond the personal strata and imputed to the declarant during the period that it controls the association.<sup>28</sup> Courts have based this holding on an agency theory, although Virginia has codified the duty at section 55-79.74 of the Virginia Condominium Act.<sup>29</sup> Conversely, during the time when it owns the majority

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25. *Id.* at 1015.

26. *Id.*

27. In *Kelly v. Astor Investors, Inc.*, plaintiffs sought to hold declarant appointed members of the condominium association board of directors personally liable for breach of their fiduciary duties. See *Kelly v. Astor Investors, Inc.*, 123 Ill. App.3d 593, —, 462 N.E.2d 996, 998 (1984). The Illinois appellate court refused to hold the directors liable noting that they had only been directors of the association for three days. *Id.* In doing so, however, the court set forth the standards to be applied in determining whether such a director had violated his fiduciary duty to the association's members. Accordingly, the court determined that individual liability will attach where there is sufficient evidence of active participation (citing *National Acceptance Co. v. Pintura Corp.*, 94 Ill. App.3d 703, 418 N.E.2d 1114 (1981)) or either substantial control over the corporation or disregard of corporate formalities (citing *Macaluso v. Jenkins*, 95 Ill. App.3d 461, 420 N.E.2d 251 (1981)). *Id.* at 999.

Illinois codified this fiduciary duty as an amendment to the Condominium Property Act. See ILL. REV. STAT. ch. 30, § 318.4 (amended effective July 1, 1984). Interestingly, despite this codification and the common law fiduciary duty recognized in *Kelley*, that court held that there was no applicable restriction on the right of a declarant to limit such liability through the association's by-laws. 462 N.E.2d at 999. In the absence of legislative directive to the contrary the court was unwilling to rule that such limitation was unlawful. *Id.* at 1000.

Query whether such a limitation by a declarant in the association's by-laws would be valid in Virginia in light of Virginia Code § 55-79.74(a)? The probable answer is yes.

28. See *Cohen v. S & S Constr. Co.*, 151 Cal. App. 3d 941, 201 Cal. Rptr. 173 (1984); *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981).

29. See VA. CODE §55-79.74 (Supp. 1984). See generally *Jefferson Standard Life Ins. Co. v. Hedrick*, 181 Va. 824, 27 S.E.2d 198 (1943) (under agency theory, director is agent of declarant) (under basic principles of agency, principal is liable to third persons for wrongful acts of his agent within scope of agent's employment); see also *supra* note 3 (setting out

of units, the declarant may owe the same fiduciary duty to the other unit owners that a majority shareholder of a corporation owes to its minority shareholders.<sup>30</sup> This duty is based solely upon the control held and exercised by the majority stockholder.<sup>31</sup> The Superior Court of Connecticut adopted this position in the condominium context in *Governors Grove Condominium Association, Inc. v. Hill Development Corp.*<sup>32</sup> Where the declarant is in a fiduciary relationship to the unit owners, that fiduciary obligation cannot be delegated to members of the board of directors of the association selected by the declarant.<sup>33</sup>

### *Conflict of Interest*

Where directors of an association have been selected as representatives of the declarant during the period of declarant control, there is an inherent conflict of interest. On the one hand, the director has a fiduciary obligation to the operation of the association and protection of its interests. On the other hand, the director has an obligation of loyalty to the declarant in terms of facilitating the development and marketing of the project. A representative of the declarant may not make decisions as a member of the board of the association which benefit his own interests (and presumably the declarant's interests) at the expense of the association or its members.<sup>34</sup> There are a number of specific areas in which the fiduciary obligations may be breached.

1. *Assessments.* The condominium documents invariably require the board of directors of the association to develop a long term budget and

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pertinent provisions of VA. CODE § 55-79.74(a)); ILL. REV. STAT. ch. 30, § 318.4 (amended effective July 1, 1984).

30. See *Governors Grove Condominium Ass'n v. Hill Dev. Corp.*, 36 Conn. Supp. 144, 414 A.2d 1177 (1980). See also *Pepper v. Litton*, 308 U.S. 295 (1939); *Southern Pacific Co. v. Bogert*, 250 U.S. 483 (1919); *Mardell Sec., Inc. v. Alexandria Gazette Corp.*, 320 F.2d 890 (4th Cir. 1963); *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955); *Cathedral Estates v. Taft Realty Corp.*, 157 F. Supp. 895 (D. Conn. 1954), *aff'd mem.*, 228 F.2d 85 (2d Cir. 1955), *aff'd*, 251 F.2d 340 (2d Cir. 1957).

31. See *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492 (1919); *Governors Grove Condominium Ass'n v. Hill Dev. Corp.*, 36 Conn. Supp. 144, 414 A.2d 1177, 1184 (1980).

32. 36 Conn. Supp. 144, 414 A.2d 1177 (1980).

33. See *Stern v. Lucy Webb Hayes Training School*, 381 F. Supp. 1003 (D.D.C. 1974) (can delegate ministerial responsibilities but not fiduciary obligation).

34. See *North Ridge Coop. Section No. 1, Inc. v. 32d Avenue Constr. Corp.*, 2 N.Y.2d 514, 141 N.E.2d 802, 161 N.Y.S.2d 404 (1957) (building coop on land leased at exorbitant rent from corporation owned by directors); *Shore Terrace Coop., Inc. v. Roche*, 25 A.D.2d 666, 268 N.Y.S.2d 278 (1966) (per curiam) (accounting of directors required). Cf. *Raven's Cove Town Homes, Inc. v. Knappe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) (individual directors similarly liable for failure to maintain adequate reserves); *Ireland v. Wynkoop*, 36 Colo. App. 205, 539 P.2d 1349 (1975) (kickbacks and mismanagement of funds); *2720 Wisconsin Ave. Coop. Ass'n v. Wisconsin Ave. Assoc.*, No. 2583-76, Memorandum Opinion (D.C. Super. Ct. 1979); *Avila South Condominium Ass'n. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977) (director self-dealing); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1977) (holding individual directors liable for failure to assess declarant for maintenance payments).



collect the reserves necessary to fund the budget, as well as cover the cost of nonwarranted repairs to the common elements. During the period of declarant control, the declarant-selected members of the board may establish inadequate reserves by setting a low unit assessment. While disadvantageous to the long term interests of the association, the declarant is benefited financially by this lower assessment in that the lower assessment is more attractive to buyers, the lower assessment helps more people qualify for financing, stimulating unit sales, the declarant's share of the assessment which must be paid for unsold units is lower, and the lower assessments and increased sales result in greater profits for the declarant.

The long term effects of the underassessment are that invariably it is discovered that the reserves are inadequate to cover necessary major common element repairs. Most often, however, this occurs long after the declarant has relinquished control of the unit owners association.<sup>35</sup>

2. *Acceptance of the Common Elements.* Often the declarant is the builder as well as the developer of a project. In some instances, the declarant may accept work on the common elements which is below the industries' standards; that is, the materials used are inferior and/or the construction itself is flawed. Such acceptance by the declarant with the knowledge of the declarant-appointed directors places the directors in a precarious position. Demanding proper workmanship and materials reduces the declarant's profit margin, while the failure to do so and to warn the unit owners of the condition violates the directors' fiduciary duty to the unit owners.<sup>36</sup>

3. *Maintenance of Common Elements.* Often condominium projects do not sell out as quickly as the declarant envisions. As a result, declarant controlled boards of directors must often consider how to maintain and/or when to repair the common elements. From a cost standpoint, it is easier to effect cosmetic repairs rather than the repairs necessary to correct the underlying problems. In many instances, however, the declarant controlled board will opt for the cosmetic repairs reasoning that it will be less expensive to the declarant, and the declarant may have vanished by the time the defects again manifest themselves. Another problem may result when, during the period of declarant control, the board of directors authorizes the use of association reserves to pay for common element deficiencies which should be warranted by the declarant.

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35. See *Raven's Cove Townhouse, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) (failure to maintain adequate reserves); *B & J Holding Corp. v. Weiss*, 353 So.2d 141 (Fla. Dist. Ct. App. 1977) (failure to collect assessments on declarant owned units).

36. This type of conduct could also support a cause of action based upon fraud. *But see Lakeview Townhomes Condominium Ass'n*, 454 So.2d 576, 577-78 (Fla. Dist. Ct. App. 1984) (principals of corporate developer-builder who serve pursuant to designation of developer, as directors of condominium association prior to assumption of control by unit owners, are not liable personally in that latter capacity to association for existence of, or failure to correct construction defects in condominium building which are allegedly created by developer itself); *Olympian West Condominium Ass'n v. Kramer*, 427 So.2d 1039, 1039 (Fla. Dist. Ct. App. 1983) (same).

4. *Disclosure.* During the course of development of the condominium, the declarant appointed board members may become aware of construction deficiencies or potential hazards. The failure to disclose these to other unit owners, while more advantageous to the declarant, would violate the fiduciary obligation of the directors to the unit owners.<sup>37</sup>

Thus, the control of the association by the declarant, with its attendant responsibilities and duties, creates an inherent conflict of interest. The declarant and its representatives on the board must be extremely cautious in the conduct of the association's affairs. To do otherwise invites litigation with the consequences discussed herein.

## II. STANDING

One of the significant areas of controversy in condominium litigation has been the standing of the unit owners association to assert claims on behalf of its members against developers for common element deficiencies. Case law on the issue is relatively uniform in holding that, in the absence of a statutory grant, an association is without standing to sue for common element deficiencies because the association is not the "real party in interest."<sup>38</sup>

### A. Common Law Approach

Generally, at common law, an action on a contract must be brought in the name of the party in whom the legal interest is vested. This legal interest ordinarily is vested only in the promisee or promisor and, consequently, they or their privies are the only persons who can sue on the contract.<sup>39</sup> Similarly, an action for a tort must be brought in the name of the person whose legal right has been affected and who was legally interested in the property at the time the injury to the property was committed.<sup>40</sup>

Under the condominium form of ownership, title to the common elements generally is vested in the unit owners individually as tenants in common of an undivided interest.<sup>41</sup> Within this context, cases have generally been uniform in holding that in the absence of a statute, a condominium association does not have standing to assert the rights of the individual unit owners.<sup>42</sup> Where the association has been granted standing to sue, in the absence of a statutory scheme, it generally has been when the association

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37. Here again, an action sounding in fraud could also lie for this conduct.

38. See *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App.3d 783, 171 Cal. Rptr. 334 (1981); *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); *Governors Grove Condominium Ass'n v. Hill Dev. Corp.*, 35 Conn. Supp. 199, 404 A.2d 131 (1979); *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 579 P.2d 775 (1978); see also *Wittington Condominium Apartments, Inc. v. Braemar Corp.*, 313 So.2d 463 (Fla. Dist. Ct. App. 1975) (Downey, J., concurring).

39. See *Cemetery Consultants, Inc. v. Tidewater Funeral Directors Ass'n*, 219 Va. 1001, 1003, 254 S.E.2d 61, 62 (1979); *Clarksons v. Doddridge*, 55 Va. (14 Gratt.) 42 (1857).

40. *Norfolk & Western R.R. v. Dougherty*, 92 Va. 372, 373, 23 S.E. 777, 777 (1895).

41. See VA. CODE § 55-79.55 (Supp. 1984).

42. See *supra* note 38.

itself owned title to the common elements,<sup>43</sup> when there had been a contract between the developer and the association upon which the action was based,<sup>44</sup> or when the developer had impliedly warranted the common elements to the association as an entity.<sup>45</sup>

One of the earliest cases to address the issue of an association's standing to sue was *Friendly Village Community Association, Inc., No. IV v. Silva and Hill Construction Co.*,<sup>46</sup> an action arising California. In *Friendly Village*, the unit owners association filed suit alleging damage to the common elements based upon theories of negligence and strict liability.<sup>47</sup> The court noted that the association could not allege ownership in the real property allegedly damaged, a prerequisite to being deemed the "real party in interest."<sup>48</sup> While the association had alleged that it was under a duty to repair and maintain the common elements, the court found this an insufficient interest to grant standing, reasoning that, while the repairs to the common elements had to be made by the association, the cost of the repairs would be borne by the individual unit owners.<sup>49</sup> The unit owners, therefore, were held to be the "real parties in interest" with standing to sue for defects.<sup>50</sup>

The Supreme Court of Nevada applied this same logic in *I. C. Deal v. 999 Lakeshore Association*.<sup>51</sup> In *Deal*, the association sued for negligent

43. See *Doyle v. A&P Realty Corp.*, 36 Conn. Supp. 126, 414 A.2d 204 (1980); *Roundtree Villas Ass'n v. 4701 Kings Corp.*, 321 S.E.2d 46 (S.C. 1984); *Chimney Hill Owners' Ass'n v. Antignani*, 392 A.2d 423 (Vt. 1978).

44. See *Andrikopoulos v. Broadmoor Mgmt. Co.*, 670 P.2d 435 (Colo. 1983).

45. See *Greentree Condominium Ass'n v. RSP Corp.*, 36 Conn. Supp. 160, 415 A.2d 248 (1980).

46. 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973).

47. 107 Cal. Rptr. at 124.

48. See *id.* at 126.

49. See *id.*

50. See *id.* It is notable that subsequent to the *Friendly Village* case, the California legislature adopted a statute granting standing to the unit owners associated in matters of this type. See CAL. CIV. PROC. CODE § 374 (Deering 1976).

51. 94 Nev. 301, 579 P.2d 775 (1978) (court relied on *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 31 Cal. App.2d 220, 107 Cal. Rptr. 123 (1973) and *Wittington Condominium Apartments, Inc. v. Braemar Corp.*, 313 So.2d 463 (Fla. Dist. Ct. App. 1975)). Another early case denying standing to unit owners associations arose in Florida. In *Hendler v. Rogers House Condominium, Inc.*, 234 So.2d 128 (Fla. 1970), the association was held not to have statutory standing to maintain a class action on behalf of the unit owners. In *Commodore Plaza at Century 21 Condominium Ass'n v. Saul J. Morgan, Ent.*, 301 So.2d 783 (Fla. Dist. Ct. App. 1974), it was held that a unit owners association did not have standing to bring suit either in a representative capacity or as a real party in interest to quiet title to the common elements. *Accord Reibel v. Rolling Green Condominium A, Inc.*, 311 So.2d 156 (Fla. Dist. Ct. App. 1975) (holding, however, that based upon Florida statute effective October 1, 1974, association could maintain action in representative capacity on behalf of unit owners or as class action for damage to common elements); *Royal Bahamian Ass'n v. Morgan*, 338 So.2d 876 (Fla. Dist. Ct. App. 1976). The Florida court in *Rubenstein v. Burleigh House, Inc.*, 305 So.2d 311 (Fla. Dist. Ct. App. 1975), held that a condominium association did not have standing to bring an action for damages for various defects allegedly constituting breach of warranty against the developer of a condominium.

construction, breach of implied and express warranties, strict liability for defective manufacture and design, and failure to account to the condominium association for certain revenues.<sup>52</sup> Nevertheless, the court held that only the unit owners themselves could maintain the action.<sup>53</sup>

In *Summer House Condominium Association, Inc. v. Majestic Savings & Loan Association*,<sup>54</sup> the Colorado Court of Appeals denied an association's standing to sue for breach of contract, breach of warranty, and breach of fiduciary duty on the basis that it was neither a party to any contract nor an entity to which a fiduciary duty was owed, such as would be necessary to grant it standing to sue on behalf of its members.<sup>55</sup> The court also held that language in the declaration and bylaws appointing the association attorney-in-fact to deal with problems related to the common elements, did not afford the association standing to sue for construction defects, but only as to issues affecting the common elements and damage sustained subsequent to the original construction.<sup>56</sup>

The Superior Court of Pennsylvania has failed to follow this line of cases, but rather, relying upon the United States Supreme Court's opinion in *Warth v. Selden*<sup>57</sup> and its progeny, has held that an association does have standing in a representative capacity to sue for common element deficiencies despite a lack of statutory authorization.<sup>58</sup> In *1000 Grandview Association, Inc. v. Mt. Washington Associates*,<sup>59</sup> the Superior Court of Pennsylvania held that an association may have representational standing to assert the rights of individual unit owners if it alleges an immediate, direct, and substantial injury to any unit owner.<sup>60</sup> The court's analysis in *Grandview* and its interpretation of *Warth*, however, may not be correct.

In *Warth*, various organizations and individuals brought suit against a town and members of its zoning, planning, and town boards attacking its zoning ordinances as discriminatory.<sup>61</sup> One of the issues addressed was the standing of several associations to maintain the action. The United States Supreme Court held that an association can represent its members so long as those members are suffering immediate or threatened injury as a result of the challenged action, and so long as the nature of the claim and the relief sought do not make the individual participation of each injured party

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52. I.C. Deal v. 999 Lakeshore Ass'n, 94 Nev. 301, \_\_\_\_\_, 579 P.2d 775, 777 (1978).

53. 579 P.2d at 777.

54. 44 Colo. 462, 615 P.2d 71 (1980).

55. 615 P.2d at 73.

56. See *id.* at 74.

57. 422 U.S. 490 (1975).

58. See *1000 Grandview Ass'n v. Mt. Washington Assocs.*, 290 Pa. Super. 365, 434 A.2d 796 (1981).

59. 290 Pa. Super. 365, 434 A.2d 796 (1981).

60. See 434 A.2d at 798. *Accord* *Fay v. Bohlin & Powell*, 298 Pa. Super. 69, 444 A.2d 179 (1982).

61. See *Warth v. Selden*, 422 U.S. 490 (1975).

indispensable to a proper resolution of the cause.<sup>62</sup> In so holding, however, the Court limited the type of relief which could be sought by an association suing in a representative capacity.<sup>63</sup> The Court held that associations can have standing to sue for declaratory, injunctive or some other form of *prospective* relief because the remedy granted will inure to the benefit of the members of the association actually injured.<sup>64</sup> However, the Court was quick to point out that in *Warth*, the association was suing for monetary damages, yet the association could allege no monetary injury to itself, nor any assignment of the damage claims of its members.<sup>65</sup> Therefore, since no award could be made to the association itself and the damages were not shared in equal degree by the membership, the association did not have standing to seek damage relief on behalf of its members.<sup>66</sup> The Supreme Court later followed the same analysis in *Hunt v. Washington State Apple Advertising Commission*.<sup>67</sup>

In *Grandview*, as in the typical suit for damage to the common elements, the award being sought by the association was monetary damages as opposed to some sort of prospective or injunctive relief. Therefore, reliance upon the *Warth* case and its progeny is of little, if any, assistance in resolving the issue.<sup>68</sup> The courts in Pennsylvania which have cited this precedent apparently have ignored the limited type of relief which the *Warth* decision sanctioned.<sup>69</sup>

The most recent case to address the standing issue in a state without a relevant statute was *Equitable Life Assurance Society of the United States v. Tensley Mill Village*,<sup>70</sup> a case arising in Georgia. In *Tensley Mill*, the association was seeking monetary damages as well as injunctive relief. The court, again looking to the real party in interest, held that the property and right to have it protected belonged exclusively to the owners of the property; thus the association did not have standing to assert the claims on their behalf.<sup>71</sup> In other cases where, in the absence of a particular statute, the courts have granted the association standing, they have done so based upon other facts which are distinguishable from the typical case.<sup>72</sup>

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62. *See id.* at 511.

63. *See id.* at 515.

64. *See id.*

65. *See id.*

66. *See id.*

67. 432 U.S. 333 (1977).

68. *See Salton City Area Property Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal. App. 3d 184, 141 Cal. Rptr. 895 (1977).

69. *See 1000 Grandview Ass'n v. Mt. Washington Assocs.*, 209 Pa. Super. 365, \_\_\_\_, 434 A.2d 796, 797-98 (1981); *Fay v. Bohlin & Powell*, 298 Pa. Super. 69, 72, 444 A.2d 179, 180 (1982) (relying on *Grandview*).

70. 249 Ga. 769, 294 S.E.2d 495 (1982).

71. *See 294 S.E.2d at 497-98.*

72. For example, in *Andrikopoulos v. Broadmoor Management Co.*, 670 P.2d 435 (Colo. App. 1983), the court found the association to have standing because it was attempting to enforce a contract to which it was a party. In *Greentree Condominium Ass'n v. RSP Corp.*, 36 Conn. Supp. 160, 415 A.2d 248 (1980), the court held that the association had standing to sue

There is one case which appears to be an analytical anomaly. In *Quail Hollow East Condominium Association v. Donald J. Scholz Co.*,<sup>73</sup> the Court of Appeals of North Carolina granted an association standing to sue an architect for negligence in the design and supervision of a condominium construction project solely on the basis of the tort theory of foreseeability.<sup>74</sup> The court granted the association standing without addressing any of the cases previously cited nor any of the relevant analyses contained therein.<sup>75</sup> For this reason the case seems to be of little precedential value.

A number of jurisdictions have adopted statutes purportedly giving associations standing to sue in a representative capacity for common element deficiencies.<sup>76</sup> Uniformly, after the effective date of these statutes, courts have upheld the standing of associations to sue for this type of damage.<sup>77</sup> In

for breach of implied warranty when the defendants had admitted that they gave an implied warranty to the association itself. In *Doyle v. A&P Realty Corp.*, 36 Conn. Supp. 126, 414 A.2d 204 (1980), the court held that the association had standing to sue for damages arising out of structural deficiencies in the project when the association itself owned the common elements, a fact which clearly made the association the real party in interest. Finally, in *Chimney Hill Owners Ass'n v. Antignani*, 136 Vt. 446, 392 A.2d 423 (1978), the court also held the association to be the real party in interest in that it owned title to the common elements of the condominium.

73. 47 N.C. App. 518, 268 S.E.2d 12 (1980).

74. 268 S.E.2d at 17.

75. See *supra* notes 46-56 and accompanying text.

76. See CAL. CIV. PROC. CODE § 374 (West Supp. 1984-85); D.C. CODE ANN. § 5-924(a) (1973); FLA. R. CIV. P. 1.220; ILL. REV. STAT. ch. 30, § 309.1 (1978); MD. REAL PROP. CODE ANN. § 11-109(d)(4) (Supp. 1984); N.J. STAT. ANN. § 46:8B-15(a) (West Supp. 1983); OR. REV. STAT. § 94.146 (1983); 68 PA. CONS. STAT. § 3302(a)(4) (Supp. 1984); UTAH CODE ANN. § 57-8-33 (1953).

77. See *Mission Hills Condominium Ass'n M-1 v. Corley*, 570 F. Supp. 453 (N.D. Ill. 1983) (standing to sue only for injunctive relief for violation of antitrust laws); *Raven's Cove Townhomes, Inc. v. Knappe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981); *Salton City Area Property Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal. App. 3d 184, 141 Cal Rptr. 895 (1977); *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890 (D.C. 1977); *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App. 3d 163, 454 N.E.2d 363 (1983); *Tassan v. United Co.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1980) (dicta); *Starfish Condominium Ass'n v. Yorkridge Service Corp.*, 458 A.2d 805 (Md. App. 1983); *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568, cert. denied, \_\_\_ U.S. \_\_\_, 104 S. Ct. 395 (1983); *Towerhill Condominium Ass'n v. American Condominium Homes, Inc.*, 66 Ore. App. 342, 675 P.2d 1051 (1984); *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983).

The evolution of Florida's statutory scheme has been somewhat unusual. Florida first enacted Florida statute § 711.12(2) in 1974 which provided in part:

(2) The association, whether or not incorporated, shall be an entity which shall act through its officers and shall have the capability of contracting, bringing suit and being sued with respect to the exercise or nonexercise of its powers. For these purposes the powers of the association shall include, but not be limited to, the maintenance, management and operation of the condominium property. When the board of administration is not controlled by the developer the association shall have authority and the power to maintain a class action and to settle a cause of action on behalf of unit owners of a condominium with reference to matters of common interest, including but not limited to the common elements, the roof and structural components of a

several of these post-statute cases granting associations representational standing, the courts have addressed the policy arguments behind such a grant. In *Raven's Cove Townhomes v. Knuppe Development Co.*,<sup>78</sup> the court noted that were there no standing, the costs of prosecution of the case would not be a common expense, thus greatly increasing the difficulty of individual owners in seeking redress against a corporate defendant.<sup>79</sup> In *Del Mar Beach*

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building or other improvement, and mechanical, electrical and plumbing elements serving an improvement or a building as distinguished from mechanical elements serving only a unit....

In interpreting the statute the District Court of Appeals of Florida, in *Reibel v. Rolling Green Condominium A, Inc.*, 311 So.2d 156 (Fla. Dist. Ct. App. 1975), held that the statute authorized an association to institute an action concerning the common elements only in a representative capacity. 311 So.2d at 158. In *Reibel*, however, the association brought a declaratory judgment action on their own behalf attempting to invalidate certain leases. This, the court held, was insufficient to make them the real party in interest. See *id.* The District Court of Appeals of Florida, in *Wittington Condominium Apartments, Inc. v. Braemar Corp.*, 313 So.2d 463 (Fla. Dist. Ct. App. 1975), relied upon both § 711.12 of the Florida statutes and the condominium documents to grant an association standing in its individual capacity to maintain an action for injury to the common elements. See 313 So.2d at 467-68. The precise basis for this holding, however, is not clear from the opinion. In *Imperial Towers Condominium, Inc. v. Brown*, 338 So.2d 1081 (Fla. Dist. Ct. App. 1976), the same court that decided the *Wittington* case relied upon a 1974 amendment to § 711.12(2) of the Florida statutes in granting an association standing to maintain a class action on behalf of the unit owners for injury to the common elements. See 338 So.2d at 1083.

This precedent was overruled in *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So.2d 599 (1977), by the Supreme Court of Florida. In a somewhat strange holding the court struck down Florida statute § 711.12(2) (1975) and its successor, Florida statute § 718.111(2) (Supp. 1976), on the basis that the statutes were procedural and their adoption was an "impermissible incursion by the legislature into the exclusive prerogative of [the] court to adopt rules for 'practice and procedure in all courts.'" 347 So.2d at 608. The court went on, however, to adopt the substance of the sections in amending Florida Rule of Civil Procedure 1.220, "Class Actions," to add paragraph (b) which provided:

(b) *Condominium Associations.* After control of a condominium association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common law right of any individual unit owner or class of unit owners to bring any action which may otherwise be available.

*Id.* This rule of procedure has been relied upon in granting standing to the unit owners association in *Margate Village Condominium Ass'n v. Wilfred, Inc.*, 350 So.2d 16 (Fla. Dist. Ct. App. 1977), and *Kohl v. Bay Colony Club Condominium, Inc.*, 398 So.2d 865 (Fla. Dist. Ct. App. 1981).

78. 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981).

79. 171 Cal. Rptr. at 338-39.

*Club Owners Association, Inc. v. Imperial Contracting Co.*,<sup>80</sup> the court noted that because damage to the common elements affected all unit owners, it was logical as well as judicially economical to resolve common questions of law and fact in one proceeding.<sup>81</sup> The court in *Brickyard Homeowners Association v. Gibbons Realty Co.*,<sup>82</sup> noted that in many cases the unit owners are best represented by an association in that the amount of damages suffered by each individual unit owner would not justify the legal expense one would incur in seeking redress.<sup>83</sup>

Perhaps the best articulation of policy reasons for granting associational standing came in *Siller v. Hartz Mountain Associates*.<sup>84</sup> In *Siller*, the Supreme Court of New Jersey reasoned that avoidance of a multiplicity of suits, economic savings incident to one trial, elimination of contradictory adjudications, expedition in resolution of controversies, accomplishment of repairs, and positive effect on judicial administration were supportive policy reasons.<sup>85</sup> The court also noted that it would be impractical to sanction lawsuits by individual owners whose damages would represent but a fraction of the whole.<sup>86</sup> If the individual owner were permitted to bring claims regarding common elements, any recovery equitably would have to be given to the association to pay for repairs and replacements.<sup>87</sup> The court concluded that a sensible reading of the statute led to the conclusion that such causes of action belong exclusively to the association which, unlike the individual owner, may apply the funds recovered on behalf of all owners of the common elements.<sup>88</sup> The court in *Brickyard Homeowners Association* later cited *Siller* approvingly and stated:

To deprive the association of the rights to act on behalf of all unit owners in such matters would leave the responsibility for and authority over the common elements fragmented and, thus, make vindication of the common rights highly uncertain, difficult and burdensome. The statute is clearly designed to avoid just that result.<sup>89</sup>

### B. Statutory Basis for Standing

The Supreme Court of Virginia has yet to decide a case involving a condominium where the standing of the association to sue was raised as a defense. The issue has been raised, however, in a number of circuit and

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80. 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (1981).

81. 176 Cal. Rptr. at 890.

82. 668 P.2d 535 (Utah 1983).

83. *Id.* at 542.

84. 93 N.J. 370, 461 A.2d 568, *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 395 (1983).

85. *See id.* at 572-73.

86. *Id.* at 573.

87. *Id.*

88. *Id.* at 573-74.

89. *Brickyard*, 668 P.2d at 541 (citing *Siller*).



federal district court cases in Virginia.<sup>90</sup> In those cases, plaintiffs have often argued that their standing to litigate was based upon particular sections of the Code of Virginia. Those sections will be addressed seriatim.

Virginia Code section 8.01-15 provides:

All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated.

This statute, however, rather than granting standing to an unincorporated association to sue, merely recognizes that an association has the capacity to sue or be sued in its own name. The section does not define when the association is the real party in interest in a suit which would give it standing to maintain the action.<sup>91</sup>

Virginia Code section 55-79.53 makes lack of compliance with the Condominium Act or the provisions of the condominium instruments grounds for an action or suit. This section provides:

Compliance with condominium instruments.—The declarant, every unit owner, and all those entitled to occupy a unit shall comply with all laws or provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners association, or by its executive or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.

However, the statute only authorizes an action by the unit owners association when it would be "maintainable" by the association itself, for example, if the association entered into a contract for repainting a common hallway and wanted to file suit to enforce it. There is no provision in this statute authorizing suit by a unit owners association in a representative capacity on behalf of individual unit owners. By inference, this statute

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90. See, e.g., *Council of Co-owners of the Colonies Condominium v. Continental Illinois Corp.*, No. 82-0156-A (E.D. Va. 1982); *Council of Co-owners of the Representative Condominium v. Representative, Inc.*, Law No. 21843 (Arlington County Circuit Court, 1980); *Kuhn v. West Alexandria Properties*, Law No. 5416 (Alexandria City Circuit Court, 1979); *Concord Mews Condominium Unit Owners Ass'n v. Richmarr Dev.*, Law No. 21104 (Arlington County Circuit Court, 1980); *Hallmark Condominium Unit Owners Assoc. v. Parkway Assocs.*, Law No. 5717 (Alexandria City Circuit Court, 1979).

91. See *Richmond Black Police Officers Ass'n v. Richmond*, 386 F. Supp. 151 (E.D. Va. 1974); *Equitable Life Assurance Soc'y of the United States v. Tinsley Mill Village*, 249 Ga. 769, 772, 294 S.E.2d 495, 497 (1982). See generally *Concord Mews Condominium Unit Owners Ass'n v. Richmarr Dev.*, Law No. 21104 (Arlington County Circuit Court, 1980).

precludes such action when it states that unit owners must take this action "on their own behalf" and makes no mention of the association's right likewise to do so.<sup>92</sup>

It has been argued that Virginia Code section 55-79.79(a) grants associations standing to assert claims for common element problems.<sup>93</sup> That statute provides in part:

Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (1) to the unit owners association in the case of common elements, and (2) to the individual unit owner in the case of any unit or any part thereof.

This provision, however, does not give the association the right to assert claims for damage to the common elements arising out of improper construction. Rather, this section assigns responsibility for the maintenance of the common elements to the association. To the extent that it can be argued that this section would grant standing to the association, that standing would necessarily be limited to enforcement of contracts entered into by the association within its responsibility for, for example, maintenance and repair of the common elements.<sup>94</sup>

Finally, it has been argued that paragraph (b1) of Virginia Code section 55-79.80, which was enacted in 1981, expressly grants standing to associations in such instances.<sup>95</sup> That paragraph provides:

Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the executive organ of the unit owners' association, if any, and if not, then the unit owners association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title after the expiration of any period of declarant

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92. In *Hallmark Condominium Unit Owners Ass'n v. Parkway Assoc.*, Law No. 5717 (Alexandria Circuit Court, 1979), the plaintiff association brought suit in a representative capacity on behalf of the unit owners for, among other things, breach of warranty. In an unpublished opinion of the Circuit Court of Alexandria, Virginia, Judge Wiley R. Wright, Jr., held that Virginia Code § 55-79.53 did not grant standing to the unit owners association to sue in a representative capacity. *See* Opinion at p.3; *see also* *Kuhn v. West Alexandria Properties*, Law No. 5416 (Alexandria City Circuit Court, 1979) (unpublished memorandum opinion); *see generally* *Concord Mews Condominium Unit Owners Ass'n v. Richmarr Dev.*, Law No. 21104 (Arlington County Circuit Court, 1980).

93. *See* *Kuhn v. West Alexandria Properties*, Law No. 5416 (Alexandria City Circuit Court, 1979); *Hallmark Condominium Unit Owners Assoc. v. Parkway Assocs.*, Law No. 5717 (Alexandria City Circuit Court, 1979).

94. *See supra* text accompanying notes 96-101.

95. *See* *Council of Co-owners of the Colonies Condominium v. Continental Illinois Corp.*, No. 82-0156-A (E.D. Va. 1982); *Kuhn v. West Alexandria Properties*, Law No. 5416 (Alexandria City Circuit Court, 1979); *Hallmark Condominium Unit Owners Assoc. v. Parkway Assocs.*, Law No. 5717 (Alexandria City Circuit Court, 1979).

control reserved pursuant to § 55-79.74(a), to assert, through litigation or otherwise, defend against, compromise, adjust, and settle any claims or actions related to common elements.

While this appears to have been an intentional effort by the General Assembly to grant an association standing, it may not have achieved its intended effect. In *Summerhouse Condominium Association, Inc. v. Majestic Savings & Loan Association*,<sup>96</sup> the court addressed a situation involving similar grants of power to an association. In *Summerhouse*, the unit owners association brought suit “for itself and on behalf of its members” against the developer for, among other things, breach of warranty.<sup>97</sup> The association was given the authority in the condominium documents to “maintain, repair and reconstruct” the improvements upon damage, destruction or obsolescence.<sup>98</sup> This duty is similar to that codified in Virginia Code section 55-79.79(a). Additionally, the association was appointed attorney-in-fact to deal with these problems, was empowered to execute contracts and other instruments, and empowered to “protect and defend...in the name of the Association any part or all of the condominium from loss or damage by suit or otherwise.”<sup>99</sup> The *Summerhouse* court did not construe those provisions to empower the association to seek damages on behalf of its members for breach of the purchase agreement, which would include original faulty construction, breach of implied warranty, and breach of fiduciary duty.<sup>100</sup> In denying the association standing to sue in this context, the court in *Summerhouse* noted that “although the association is authorized to bring suit to ‘protect’ the condominium from loss or damage, this language implies that damage subject to such protection is only that sustained subsequent to the original construction.”<sup>101</sup>

This suit is particularly persuasive in that Virginia Code section 55-79.80(b1) gives the association power as attorney-in-fact on behalf of the unit owners to “defend against, compromise, adjust and settle any claims or actions related to the common elements.” To the extent that this section gives the association standing, that standing should necessarily be limited to matters arising subsequent to construction of the common elements.

Moreover, in attempting to grant the association standing, the legislature appears to have irretrievably stripped the unit owners of the right to singly or jointly file such a suit.<sup>102</sup> Accordingly, in addition to procedural rights, the statute affects substantive rights. When substantive rights are affected,

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96. 44 Col. 462, 615 P.2d 71 (1980).

97. 615 P.2d at 73.

98. *Id.* at 74.

99. *Id.*

100. *See id.* at 73-74.

101. *See id.* at 74.

102. This is so because the statute gives the association or its executive organ the irrevocable power as attorney-in-fact on behalf of all unit owners and their successors in interest. *See* VA. CODE § 55-79.80(b1) (Supp. 1984).

statutes only are applied prospectively in the absence of directive language to the contrary.<sup>103</sup> Thus, section 55-79.80(b1) would apply only to condomi-

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103. The long standing general rule in Virginia with respect to the application of new laws is that:

A statute is never construed to be retroactive, except the intent that it shall so operate plainly appears upon its face ... Every statute which takes away or impairs a vested right, acquired under existing laws or creating a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in its operation, and opposed to those principles of jurisprudence which have been universally recognized as sound. . . . [E]ven *remedial* statutes are to be deemed *prospective* in their operation, and not to be applied to *proceedings pending at the time of their enactment*, unless a contrary intent appears. (emphasis in original) (citations omitted).

City of Richmond v. Supervisors of Henrico County, 83 Va. 204, 212, 2 S.E. 26, 30 (1887).

In *Ferguson v. Ferguson*, 169 Va. 77, 192 S.E. 774 (1937), the Virginia Supreme Court again addressed the issue of prospective versus retrospective application of statutory amendments. At issue in *Ferguson* was an amendment to a statute of limitations which reduced the limitation period from two years to one year. See 192 S.E. at 776. There was nothing in the language of the amendment to indicate that the legislature intended to give it retrospective operation. See *id.* The court reasoned that:

[T]here appears to be no good reason for excluding statutes of limitations, or remedial statutes, from the general rule, that retroactive or retrospective legislation is not favored, in the absence of any words expressing a contrary intention... It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention... A great majority of opinion, and we think the better opinion, applies the same rule of construction to new or changed provisions of statutes of limitation that it applies to the construction of other statutes. In following this rule, the new enactment is held to apply to all rights or causes of action after its passage, leaving all rights or causes of action existing at the time of such passage subject to the operation of prior limitations, unless otherwise provided. *Therefore, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute, will not be affected by it, but will be governed by the original statute, unless a contrary intention is expressed in the later statute.* (emphasis added) (citations omitted).

*Id.* at 777.

In holding that the amended statute of limitation should not be applied retrospectively, the court noted another distinction to be used in interpreting the effective date of statutes:

[W]here the amended act relates to questions of remedy merely, it may be considered as having a retrospective operation. A distinction is made in these cases between those involving remedy alone and those which involve a combination of right and remedy, and such holding is not applied to the latter class.

*Id.* at 776. The court held that the statute at issue in *Ferguson* conferred both the right of action as a remedy and therefore retrospective application was improper. See *id.* at 777.

In *Gloucester Realty Corp. v. Guthrie*, 182 Va. 869, 30 S.E.2d 686 (1944), the court refused to apply a statute retrospectively where *contract* rights would be infringed. The court stated:

The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; the courts will apply new statutes only to future cases unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retrospective action.

30 S.E.2d at 688-89.

The applicability of a long arm statute, enacted after a cause of action arose, was addressed

niums created after its effective date, July 1, 1981. To the extent that it was designed to apply to all condominiums of record at the time of its enactment, it arguably unconstitutionally defeats vested rights of those unit owners.<sup>104</sup>

However, it can be argued that this statute<sup>105</sup> does no more than grant the association "capacity to sue" for these types of defects. "Capacity to sue" must be distinguished from "standing to sue." This distinction was addressed in *Summerhouse*:

Capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right of interest or is the real party in interest. Generally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and typically is determined without regard to the particular claim or defense being asserted.<sup>106</sup>

In *Richmond Black Police Officer's Association v. City of Richmond*,<sup>107</sup> an association sued the City of Richmond for alleged discriminatory em-

by the court in *Walke v. Dallas, Inc.*, 209 Va. 32, 161 S.E.2d 722 (1968). The court stated:

[R]emedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes.

161 S.E.2d at 724 (quoting 50 AM. JUR. *Statutes* § 482, at 505). The court further noted that "statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before." *Id.* (quoting *Link v. Receivers of Seaboard Airline Ry. Co.*, 73 F.2d 149, 151 (4th Cir. 1934)).

The *Walke* court distinguished the long arm statute from those statutes affected by the general rule that statutes of limitation, or remedial statutes, are not retrospective in their application in the absence of clear legislative intent. *See id.* The court held that the statutes at issue created no new cause of action and took away no existing right or remedy. *See id.* at 724-25. They only provided a forum for asserting an existing right, with respect to which, the law in force at the time of trial must prevail. *See id.*

Thus, in analyzing statutory amendments, Virginia courts have set out a number of factors to be considered: (1) The language of the amendment; (2) whether the amendment merely provides a remedy or creates a right of action and provides a remedy; (3) whether the amendment merely creates a forum in which to pursue an existing right of action; and (4) whether any contract rights would be affected by retrospective application of the statute.

The language of Virginia Code §55-79.80(b1) contains no language making it retroactive in application. Given that the statute clearly was an attempt to create a right of action and provide a remedy to the association, the law of statutory construction would suggest that it should not apply to any rights vested prior to July 1, 1981, its effective date. Thus, to the extent that the section granted standing to the association to sue for common element deficiencies, it only did so for condominiums created after July 1, 1981.

104. *See United Masonry, Inc. v. Jefferson Mews, Inc.*, 218 Va. 360, 237 S.E.2d 171, 182 (1977).

105. VA. CODE § 55-79.80(b1) (Supp. 1984).

106. *Summerhouse*, 615 P.2d at 74 (citing 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1559 (1971)).

107. 386 F. Supp. 151 (E.D. Va. 1974).

ployment practices. The court held that the association had the requisite capacity to sue, but lacked standing to maintain a civil rights action representing its members against the City.<sup>108</sup> The court noted:

There is no allegation that the Association *itself* suffered either an injury in fact or a deprivation of any constitutionally protected rights. The Association cannot base its cause of action on the alleged violation of rights that are personal to some or all of its members. An allegation that the members of the Association have been injured is not an allegation that the Association itself has been injured.<sup>109</sup>

While this decision pre-dates the Supreme Court's opinion in *Warth v. Selden*,<sup>110</sup> the Richmond Black Police Officers Association sought damages in their action. Under *Warth*, damage relief cannot be sought by an association on behalf of its members absent a showing of monetary injury to the association itself.<sup>111</sup>

As the unit owners hold title to the common elements, to the extent that there is injury to those common elements, the injury necessarily is suffered by the individual owners not by the association. Thus, any violations of rights resulting from alleged breaches of warranties are necessarily personal to the unit owners. Even though Virginia Code section 55-79.80(b1) grants associations the status of attorney-in-fact of the unit owners, it can be argued that this grant is merely one of capacity to sue on their behalf rather than one which would grant the association standing as the real party in interest to assert the claim. It seems appropriate, therefore, to look at particular statutes in other states where courts have held that the association had the requisite standing to sue on behalf of the unit owners for common element deficiencies. Such an analysis will demonstrate that no statutes contain the same language as the Virginia statute and in fact, many of the statutes are clear with respect to the rights and obligations of the association.

Many condominium statutes were modeled after the Federal Housing Administration's Model Statute for the Creation of Apartment Ownership.<sup>112</sup> Section 27 of that statute recognizes the right of associations to sue on behalf of the unit owners. It provides in part:

Actions. Without limiting the rights of any apartment owner, actions may be brought by the manager or Board of Directors, in either case in the discretion of the Board of Directors, on behalf of two or more of the apartment owners, as their respective interests may appear, with respect to any cause of action relating to the common areas and facilities or more than one apartment...<sup>113</sup>

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108. *See id.* at 155.

109. *Id.* (emphasis original).

110. 422 U.S. 490 (1975).

111. *See id.* at 515. *See also supra* text accompanying notes 61-66.

112. *See* 1A J. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE, app. B-3 (1965).

113. *Id.* at 35.

This statute with slight modifications has been adopted by the District of Columbia,<sup>114</sup> and Utah.<sup>115</sup> In both states these statutes have been interpreted to grant the association standing to sue for common element deficiencies.<sup>116</sup>

In 1979, Illinois adopted a statute which has been interpreted to allow the association to sue on behalf of its members.<sup>117</sup> It provides: "The board of managers [of the condominium association] shall have standing and capacity to act in a representative capacity in relation to matters involving the common elements or more than one unit, on behalf of the unit owners, as their interests may appear." Maryland and Oregon also have similarly worded statutes. Maryland's provides that the council of unit owners has the power, among other things, "to sue and be sued, complain and defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium."<sup>118</sup> Similarly the Oregon statute provides:

(4) Subject to the provisions of the condominium's declaration and bylaws, and whether or not the association is unincorporated, the association may:

. . .

(d) Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or on behalf of two or more unit owners on matters affecting the condominium.<sup>119</sup>

Perhaps the most artfully worded statute, however, is the one adopted in California, as amended in 1979. It now provides:

114. D.C. CODE ANN. § 5-927(a) (1973) provides:

Without limiting the right of any co-owner, actions may be brought on behalf of any two or more of the unit owners, as their respective interests may appear, by the manager, or Board of Directors, or administration with respect to any cause of action relating to the common elements for more than one unit.

115. UTAH CODE ANN. § 37-8-33 (1953) provides:

Without limiting the rights of any unit owner, actions may be brought by the manager or management committee, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common areas and facilities or more than one unit...

116. See *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890 (D.C. 1977); *Brickyard Homeowners Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983).

117. ILL. REV. STAT. ch. 30, § 309.1(b) (1978). See *Mission Hills Condominium Ass'n M-1 v. Corley*, 570 F. Supp. 453 (N.D. Ill. E.D. 1983); *Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App.3d 163, 454 N.E.2d 363 (1983); *St. Francis Courts Condominium Ass'n v. Investors Real Estate*, 104 Ill. App. 3d 663, 432 N.E.2d 1274 (1982); *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 410 N.E. 2d 902 (1980) (dicta), *appeal denied*, 82 Ill.2d 588 (1981).

118. MD. REAL PROP. CODE ANN. § 11-109(d)(4) (1981 & Supp. 1984). See *Starfish Condominium Ass'n v. Yorkridge Service Corp.*, 458 A.2d 805 (Md. 1983).

119. 1979 OR. LAWS ch. 650, § 9 (OR. REV. STAT. § 94.146). See *Towerhill Condominium Ass'n v. American Condominium Homes, Inc.*, 66 Ore. App. 342, 675 P.2d 1051 (1984).

An owners association established in a project consisting of condominiums, as defined in Section 783 of the Civil Code, or of a community apartment project, as defined in Section 11004 of the Business and Professions Code, an undivided interest subdivision project, as defined in Section 11000.1 of the Business and Professions Code, or a planned development, as defined in Section 11003 of the Business and Professions Code, shall have standing to sue as the real party in interest for any damages to commonly owned lots, parcels, or areas or individually owned lots, parcels, or areas which the owners association is obligated to maintain, preserve or repair occasioned by the acts or omissions of others, without joining with it the individual owners of such project or development.<sup>120</sup>

All of these statutes appear to be more carefully drawn to avoid possible interpretive challenges than section 55-79.80(b1) of the Virginia Condominium Act. In particular the California statute is a model of clarity whose interpretation cannot be left to conjecture. It is not clear that Virginia's statute grants associations the right to sue for common element deficiencies, despite its intention to do so.<sup>121</sup> The discussion of *Summerhouse* so demonstrates.<sup>122</sup>

Two avenues appear to be available to the General Assembly to ensure the standing of associations to sue for common element deficiencies. One would be to amend Virginia Code section 55-79.55 to require that common elements be titled in the name of the association. Such an approach, however, would not benefit associations whose condominiums were created prior to the effective date of such an amendment.

The other method, one which could be comprehensive, would be to amend Virginia Code section 55-79.80(b1) by repealing the section as written and substituting the following:

Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, and without limiting the rights of any unit owner, the executive organ of the Unit Owners Association, if any, and if not, then the Unit Owners Association itself, shall have standing to sue in its own name as the real party in interest for any damages to the common elements occurring during or subsequent to the construction of the common elements, occasioned by the acts or omissions of others, without joining with it the individual owners of such common areas. This

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120. CAL. CIV. PROC. CODE § 374 (Supp. 1984-85). See *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981); *Salton City Area Property Owners Ass'n v. M. Penn Phillips Co.*, 75 Cal. App. 3d 184, 141 Cal. Rptr. 895 (1977).

121. Virginia Code § 55.79.80(b1) was enacted in 1981 to avoid the procedural problems encountered in *Kuhn* and *Hallmark*. See *supra* note 90.

122. See *supra* text accompanying notes 96-103.



section shall apply to all condominiums created after July 1, 1974, under Va. Code § 55-79.39 *et seq.*

Such an amendment if enacted would eliminate the confusion that exists regarding the proper interpretation of Virginia Code section 55-79.80(b1) and by its express language could be made to apply retroactively to all condominiums created under the Virginia Condominium Act.

### III. THE SUBSEQUENT PURCHASER DAMAGES PROGRAM (WHO CAN SUE FOR WHAT?)

In the typical condominium construction case, suit will have been initiated after some units have been conveyed by the original purchasers and resold to subsequent purchasers. This circumstance gives rise to two questions:

1. Can subsequent purchasers recover damages from the original developer for condominium construction deficiencies? If so, on what theory?
2. If not, what damages are recoverable by the remaining original purchasers who bought their units from the declarant/developer?

#### A. Implied Warranties

Until 1931, the courts consistently ruled that no implied warranties arose in connection with the sale of housing. The first exception to this rule was suggested by dictum in *Miller v. Cannon Hill Estates Ltd.*,<sup>123</sup> where the court indicated an implied warranty of good materials, good construction, and fitness for habitation would arise if the sale took place before the house was completed.<sup>124</sup>

In 1964, the Colorado Supreme Court decided *Carpenter v. Donohoe*<sup>125</sup> holding for the first time that the sale of a finished house carried with it the implied warranty that the house was built in a workmanlike manner and was suitable for habitation.<sup>126</sup> By 1980, at least thirty-five state courts had adopted the "modern rule" recognizing implied warranties with respect to new home sales.<sup>127</sup>

123. 2 K.B. 113 (1931).

124. *See id.*; Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950).

125. 154 Colo. 78, 388 P.2d 399 (1964).

126. *See* 388 P.2d at 402.

127. *See* Cochran v. Keeton, 287 Ala. 439, 252 So.2d 313 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Gable v. Silver, 258 So.2d 11 (Fla. Dist. Ct. App.), *cert. dismissed*, 264 So.2d 418 (Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Theis v. Heuer, 149 Ind. App. 52, 270 N.E.2d 764 (1971); Crawley v. Terhune, 437 S.W.2d 743 (Ky. App. 1969); Banville v. Huckins, 407 A.2d 294 (Me. 1979); Krol v. York Terrace Building, Inc., 35 Md. App. 321, 370 A.2d 589 (1977); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 24 Mich. App. 681, 181 N.W.2d

The basic premise underlying the "modern rule" is that purchasers depend upon the abilities of builder-vendors of houses to construct and sell homes of sound structure. The builder stands in the best position to know which contractors can perform the required work adequately. The buyers have no choice. Thus, because of the unusual dependent relationship of the buyer upon the builder-vendor the courts imply a warranty of habitability.<sup>128</sup>

Since the adoption of the "modern rule" recognizing implied warranties in house sales, at least eight jurisdictions have held that the implied warranty extends not only to the initial home buyer but to his subsequent purchaser.<sup>129</sup> The trend is clearly in the direction of permitting subsequent purchasers to recover for breach of implied warranty from developers. However, the implied warranty recognized generally applies only to latent defects which are not discoverable upon a reasonable inspection and only manifest themselves after the subsequent purchaser's purchase of the house.<sup>130</sup>

Several jurisdictions have addressed the subsequent purchaser issue in the condominium context. The results have been relatively uniform. In

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271 (1970); *Brown v. Elton Chalk, Inc.*, 358 So.2d 721 (Miss. 1978); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972); *Chandler v. Madsen*, 642 P.2d 1028 (Mont. 1982); *Norton v. Burleaud*, 342 A.2d 629 (N.H. 1975); *Schipper v. Leviitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965); *DeSoche v. Dame*, 75 A.D.2d 384, 430 N.Y.S. 2d 390 (1980); *Hartley v. Ballou*, 20 N.C. App. 493, 201 S.E.2d 712, *rev'd*, 286 N.C. 51, 209 S.E.2d 776 (1974); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); *Waggoner v. Midwestern Dev. Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). *See also* Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL ESTATE L.J. 291, 308, 316 (1980). For an exposition of the history of the "modern rule," see Roberts, *The Case of the Unwary Homebuyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Young & Harper, *Quaere: Caveat Emptor or Caveat Venditor?*, 24 ARK. L. REV. 245 (1970).

128. *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 587, 410 N.E.2d 902, 908 (1980), *appeal denied*, 82 Ill.2d 588 (1981).

129. *See* *Graham v. United States*, 441 F. Supp. 741 (M.D. Tex. 1977); *Blagg v. Fred Hunt Co.*, 727 Ark. 185, 612 S.W.2d 321 (1981); *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); *Barnes v. Mac Brown and Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976); *Hermes v. Staiano*, 181 N.J. Super. 424, 437 A.2d 925 (1981); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Terlinde v. Neeley*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *contra, e.g.*, *Dunkin v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Simmons v. Owens*, 363 So.2d 142 (Fla. Dist. Ct. App. 1978); *Oliver v. City Builders, Inc.*, 303 So.2d 466 (Miss. 1974); *John H. Armbruster & Co. v. Hayden Company-Builder Developer, Inc.*, 622 S.W.2d 784 (Mo. App. 1981); *Herz v. Thornwood Acres "D," Inc.*, 86 Misc. 2d 53, 381 N.Y.S. 2d 761 (1976), *aff'd*, 91 Misc. 2d 130, 397 N.Y.S. 2d 358 (1977). Although none of these cases involve condominiums, by the reasoning of these decisions, implied warranties would run to subsequent purchasers of condominiums, as well as detached houses.

130. *See* *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 185, 441 N.E.2d 324, 331 (1982).

*Governors Grove Condominium Association, Inc. v. Hill Development Corp.*,<sup>131</sup> the Superior Court of Connecticut, relying on *Coburn v. Lenox Homes, Inc.*,<sup>132</sup> held that implied warranties covering the purchase of homes were limited to original purchasers who were in privity of contract with the builder.<sup>133</sup> The same result was reached in the Florida decision, *Parliament Towers Condominium v. Parliament House Realty, Inc.*<sup>134</sup>

The only jurisdiction not in accord with Florida and Connecticut was the District of Columbia in *Berman v. Watergate West, Inc.*<sup>135</sup> In *Berman*, the court held that notwithstanding the absence of privity of contract, a tenant shareholder in the housing cooperative had a cause of action for breach of implied warranty against any entity which played an integral part in the producing and marketing of the cooperative.<sup>136</sup> While the ruling provided for a recovery in contract, it was based upon an application of the principles of strict liability in tort.<sup>137</sup> This particular opinion appears to be an anomaly in the law.

Virginia has not adopted the "modern rule." In *Bruce Farms, Inc. v. Coupe*,<sup>138</sup> the Supreme Court of Virginia declared that *caveat emptor* is the rule in Virginia and that the adoption of the "modern rule" is a decision to be made, if at all, by the General Assembly. The court in *Bruce Farms* stated:

We express no view whether the new rule is better than the old, for we must apply the law as we find it to be. We believe that the decision whether a common law rule of such ancient vintage as the one at bar should be reversed is one properly within the province of the General Assembly. The issue involves a multitude of competing economic, cultural, and societal values which courts are ill equipped to balance.... On the other hand, the legislative machinery is specially geared to the task.<sup>139</sup>

Thus, in accordance with *Bruce Farms*, there are no implied warranties as to new housing in Virginia.<sup>140</sup>

131. 36 Conn. Supp. 144, 414 A.2d 1177 (1980).

132. 173 Conn. 567, 378 A.2d 599 (1977).

133. *Governors Grove*, 414 A.2d at 1180.

134. 377 So.2d 976 (Fla. Dist. Ct. App. 1979). *Accord* *Schmeck v. Sea Oats Condominium Ass'n*, 441 So.2d 1092 (Fla. Dist. Ct. App. 1983); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981), *rehearing denied*, 417 So.2d 328 (1982); *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So.2d 689 (Fla. Dist. Ct. App. 1979); *Strathmore Riverside Villas Condominium Ass'n v. Paver Dev. Corp.*, 369 So.2d 971 (Fla. Dist. Ct. App. 1979).

135. 391 A.2d 1251 (D.C. 1978).

136. *See id.* at 1259.

137. *See id.*

138. 219 Va. 287, 247 S.E.2d 400 (1978).

139. 247 S.E.2d at 404. The strength of the doctrine of *caveat emptor* in Virginia has been recently reaffirmed. *See* *Watson v. Avon Street Business Center, Inc.*, 226 Va. 614, 311 S.E.2d 795 (1984); *Kuczanski v. Gill*, 225 Va. 367, 302 S.E.2d 48 (1983).

140. Statutory warranties are generally considered express warranties. *E.g.*, *Kuhn v. West*

In response to the *Bruce Farms* decision, the General Assembly enacted Virginia Code section 55-70.1 which provides that new dwellings must be warranted to be free from structural defects, constructed in a workmanlike manner so as to pass without objection in the trade, and fit for habitation.<sup>141</sup> As the General Assembly had earlier recognized, the statutory warranty with respect to condominiums by passage of Virginia Code section 55-79.79, section 55-70.1 was expressly made inapplicable to condominiums.

In the condominium context, Virginia had enacted a statutory warranty that the unit be free from structural defects as early as 1974.<sup>142</sup> In 1980 the statute was amended to add the additional warranties of habitability and constructed in a workmanlike manner.<sup>143</sup> Until 1984, Virginia Code section 55-79.79 provided in pertinent part:

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Alexandria Properties, Inc., Law No. 5416 (Alexandria City Circuit Court, 1979).

141. Virginia Code § 55-70.1 provides in part:

A. In every contract for the sale of a new dwelling, the vendor shall be held to warrant to the vendee that, at the time of the transfer of record title or the vendee's taking possession, whichever occurs first, the dwelling with all its fixtures is, to the best of the actual knowledge of the vendor or his agents, sufficiently (i) free from structural defects so as to pass without objection in the trade, and (ii) constructed in a workmanlike manner so as to pass without objection in the trade.

B. In addition, in every contract for the sale of a new dwelling, the vendor, if he be in the business of building or selling such dwellings, shall be held to warrant to the vendee that, at the time of transfer of record title or the vendee's taking possession, whichever occurs first, the dwelling together with all its fixtures is sufficiently (i) free from structural defects, so as to pass without objection in the trade, (ii) constructed in a workmanlike manner, so as to pass without objection in the trade, and (iii) fit for habitation.

142. VA. CODE § 55-79.79 (Supp. 1984).

143. The question of whether these implied warranties apply to situations involving the conversion of an existing apartment complex into condominium units has not been addressed in Virginia. Virginia Code § 55-79.79(b), however, would appear to apply to conversions as well as new units. Two opinions exist in other jurisdictions regarding this issue. In *Towers Terrant Ass'n, Inc. v. Towers Limited Partnership*, 563 F. Supp. 566 (D.D.C. 1983), the District Court for the District of Columbia was faced with a conversion where the developer had undertaken extensive rehabilitative construction, and latent defects in the new construction became the basis for the plaintiff's complaint. *Id.* at 575. Under those circumstances, the court imposed the doctrine of implied warranty for the defective conditions noting that there was little difference between a newly constructed apartment and a significantly refurbished older one. *Id.* The court explicitly did not decide whether the declarant would be liable for defects that preexisted the conversion and which were not repaired. *Id.*

An Illinois court in *Kelly v. Astor Investors, Inc.*, 123 Ill. App.3d 593, 462 N.E.2d 996 (1984), adopted the principal holding of the *Towers* case but limited it somewhat. *See* 462 N.E.2d at 998. In *Kelly*, the plaintiffs sought to hold a declarant liable for leaky roofs which had not been repaired or replaced during the conversion. *Id.* at 997. The court refused to apply the implied warranty noting that "absent such extensive refurbishing and renovation, the reasons for applying the doctrine of implied warranty of habitability to the conversion of existing structures into condominiums do not exist." *Id.* at 998.

Virginia Code § 55-79.79(b) would appear to apply to all latent defects manifesting themselves after construction or conversion. If this is the intended effect of the statute, then developers who do not conduct extensive renovation on buildings converted into condominiums may well be subject to liability for defects not of their creation. It is more likely, however,

(b) Notwithstanding anything in this section to the contrary, the declarant shall warrant or guarantee, against structural defects, each of the units for two years from the date each is conveyed, and all of the common elements for two years. In the case of each unit the declarant shall also warrant that the unit is fit for habitation and constructed in a workmanlike manner so as to pass without objection in the trade.... For the purposes of this subsection, structural defects shall be those defects in components constituting any unit or common element which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration, or replacement. Nothing in this subsection shall be construed to make the declarant responsible for any items of maintenance relating to the units or common elements.

Prior to 1984, there was a significant question as to whether this statutory warranty ran to subsequent purchasers of the units. While it could be argued that the warranty ran to any owner of the unit during that two-year period, it is more probable that the Virginia Supreme Court would have held that the warranty ran only to the initial condominium purchaser. If the legislature had intended to implement a system of strict liability, it would have done so, as was done in Virginia Code section 8.2-318,<sup>144</sup> eliminating privity as a defense to implied warranty actions arising under the Uniform Commercial Code.<sup>145</sup>

Moreover, the court would have had to illogically assume that the General Assembly intended to create a cause of action for breach of implied warranty in favor of the remote purchaser of a condominium but not the remote purchaser of other new housing. (Virginia Code section 55-70.1 specifically limits the statutory warranty for other new housing to the "vendee" thereby precluding it from running in favor of subsequent purchasers.)

In 1984 the General Assembly amended Virginia Code Section 55-79.79 by adding the language: "Any conveyance of a condominium unit transfers to the purchaser all of the declarant's warranties against structural defects imposed by this subsection." Thus, it is now clear that the subsequent purchasers can recover damages for structural deficiencies contained in their units and the common elements.

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given the discussion of the role of *caveat emptor*, *infra*, and the Virginia Supreme Court's conservative history, that when faced with such a situation, the supreme court would apply the reasoning of the *Kelly* court in denying recovery to the purchaser.

144. This section now provides:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty-two.

VA. CODE § 8.2-318 (1965).

145. See generally *Governors Grove*, 414 A.2d at 1180.

Nevertheless, this statutory amendment has not eliminated all confusion. The amendment specifically does not extend the warranties of habitability and constructed in a workmanlike manner to subsequent purchasers. Thus, with the exception of structural defects, it appears that a subsequent purchaser cannot sue a developer/declarant with whom he is not in privity for breach of implied warranty or the warranties of habitability or constructed in a workmanlike manner created by Virginia Code Section 55-79.79.

### B. Negligence

Negligence actions by subsequent purchasers were precluded by the defense of lack of privity first recognized in *Winterbottom v. Wright*.<sup>146</sup> In particular, the doctrine of *caveat emptor* precluded suits by even the initial homebuyer for breach of implied warranty and negligence.<sup>147</sup>

After World War II, however, dramatic changes occurred in the housing industry. The custom built home was to a great extent replaced by the mass-produced home. In response to this change, courts began analogizing homes to other mass-produced products. They began to apply the evolving products liability concepts of breach of implied warranty, negligence, and strict liability in tort to cases involving housing deficiencies.<sup>148</sup> In fact, following Justice

146. See 10 Mess. & W. 109, 152 Eng. Rep. 402 (1842).

147. See *Dooley v. Berkner*, 113 Ga. App. 162, 162, 147 S.E.2d 685, 686 (1966):

Implicit in the rule that there is no implied warranty in a conveyance of realty is a further principle that the vendee accepts the property as it is and assumes full responsibility for defects... This legal consequence excludes the tort liability based on the doctrine of products liability as initiated by *MacPherson v. Buick Motor Company*.

*Dooley* was overruled in 1981 by the Court of Appeals of Georgia in *Holmes v. Worthey*, 159 Ga. App. 262, 282 S.E.2d 919 (1981). In so doing the court adopted the "modern rule" to the extent that, while a buyer of a new home has no right of action under implied warranty, he may bring an action in negligence against a builder or builder-seller for negligent construction. See 282 S.E.2d at 926. This was a significant weakening of the doctrine of *caveat emptor* of which, heretofore, Georgia had been an ardent supporter. The court held that *caveat emptor* applies,

[E]xcept in cases of fraud and except where a dwelling is sold containing latent defects which the builder in the exercise of ordinary care knew or should have known and which the buyer could not have reasonably discovered in the exercise of ordinary care on his own part.

*Id.* In so limiting the doctrine, the court noted that "the past development of law is insupportable and is not in harmony with public policy considerations of this state or with modern business realities." *Id.* at 921. See Annot., A.L.R. 3d 383 (1969) (annotation concerning liability for defective condition relied on by court in *Holmes*).

Virginia remains closely tied to the doctrine of *caveat emptor*, having recently reaffirmed its stronghold on the law of real property in the Commonwealth in *Kuczanski v. Gill*, 225 Va. 367, 302 S.E.2d 48 (1983), and *Watson v. Avon Street Business Center, Inc.*, 226 Va. 614, 311 S.E.2d 795 (1984). Notably, *Bruce Farms* recognized and expostulated the modern rule set forth in 25 A.L.R. 3d 383 (1969), precisely the authoritative basis for the Georgia decision in *Holmes v. Worthey*, yet rejected it completely. Therefore, it would appear that as Virginia clings to *caveat emptor*, the policy arguments and statement of the law in Georgia prior to *Holmes v. Worthey* would be of significant value in predicting the approach the Virginia courts would take in approaching similar issues.

148. See, e.g., *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963); *Kriegler v. Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (1969) (strict liability); *State Stove Co. v.*

Cardozo's opinion in *MacPherson v. Buick Motor Co.*,<sup>149</sup> eliminating privity as a defense in products liability cases involving manufactured products, lack of privity was eliminated as a defense in negligence actions in most jurisdictions. In his seminal article, *The Assault Upon the Citadel (Strict Liability to the Consumer)*,<sup>150</sup> Dean Prosser was able to state that lack of privity was no longer a viable defense in products liability litigation, except in Mississippi and, perhaps, Virginia.

As a consequence of these developments, some courts, disregarding lack of privity as a defense to negligence actions, have held that subsequent purchasers may recover against the original builder in negligence for housing defects.<sup>151</sup> Courts in Florida and New York have so held in the condominium context.<sup>152</sup> As late as 1961, Virginia clearly had not abandoned the lack of privity defense in products liability negligence actions, except as to eminently dangerous products.<sup>153</sup> In 1962, in response to the *General Bronze Corp. v. Kostopoulos*<sup>154</sup> decision, the General Assembly enacted Virginia Code section 8-654.3 (now section 8.2-318), eliminating the lack of privity as a defense in products liability cases involving "goods."<sup>155</sup>

In 1966, the General Assembly apparently eliminated lack of privity as a defense in all negligence cases by enactment of Virginia Code section 8-654.4 (section 8.01-223) which provides: "In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense." Section 8.2-318 is limited to chattels and is not applicable to real estate.<sup>156</sup>

The Supreme Court of Virginia has never addressed whether a subsequent purchaser of a condominium (or other housing) can sue a builder/developer with whom he is not in privity for negligence resulting in construction

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Hodges, 189 So.2d 113 (Miss. 1966). Virginia does not recognize the doctrine of strict liability in tort. See *Moore v. Allied Chemical Corp.*, 480 F. Supp. 364, 376 (E.D. Va. 1979) (citing *Brockett v. Harrell Brothers, Inc.*, 206 Va. 457, 143 S.E.2d 897, 902 (1965)).

149. 217 N.Y. 382, 111 N.E. 1050 (1916).

150. 69 YALE L.J. 1099, 1100 (1960).

151. See, e.g., *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972); *Coburn v. Lennox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Simmons v. Owens*, 363 So.2d 142 (Fla. Dist. Ct. App. 1978); *Morris v. Holt*, 380 Mass. 133, 401 N.E.2d 851 (1980); *Newman v. Tualatin Dev. Co.*, 287 Ore. 47, 597 P.2d 800 (1979); *Terilinde v. Neeley*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979). See also Annot. 10 A.L.R. 4th 385 (1981).

152. See *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981), rehearing denied, 417 So.2d 328 (Fla. 1982); *Schmeck v. Sea Oaks Condominium Ass'n*, 441 So.2d 1092 (Fla. Dist. Ct. App. 1983); *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So.2d 689 (Fla. Dist. Ct. App. 1979); *Parliament Towers Condominium v. Parliament House Realty, Inc.*, 377 So.2d 976 (Fla. Dist. Ct. App. 1979); *Arnold v. New City Condominium Corp.*, 78 A.D.2d 882, 433 N.Y.S. 2d 196 (1980).

153. See *General Bronze Corp. v. Kostopoulos*, 203 Va. 66, 122 S.E.2d 548 (1961).

154. 203 Va. 66, 122 S.E.2d 548 (1961).

155. See *supra* note 141 (text of section). See also *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967).

156. *Hoffman v. Horton*, 212 Va. 565, 186 S.E.2d 79 (1972).

deficiencies.<sup>157</sup> The doctrine of *caveat emptor*, however, despite Virginia Code section 8.01-223, may bar such a suit. As previously mentioned, this doctrine in its pure form would appear to bar any cause of action related to the purchase of real property.<sup>158</sup> The Georgia court in *Dooley v. Berkner*, in so holding noted:

We are foreclosed from an abandonment of the common law rule of *caveat emptor* in cases of realty sales because the common law of force prior to May 14, 1776, is of force in this state except where modified by statute or not adjusted to our circumstances. [Citations omitted]. To hold otherwise would be a clear usurpation of legislative power.<sup>159</sup>

This rationale closely parallels the Supreme Court of Virginia's recognition in *Bruce Farms* of Virginia's statutory requirement.<sup>160</sup> Virginia Code section 1-10 provides: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Thus, given the scope of the doctrine of *caveat emptor*, and that, with the exception of Virginia Code sections 55-70.1 and 55-79.79, Virginia has made no other statutory modifications, the doctrine would appear to bar any action by an initial or subsequent purchaser of real property for negligent construction. Absent legislative action repealing the rule, Virginia courts would be without power to sanction such an action.

This analysis suggests that given the strength of *caveat emptor* in Virginia, subsequent purchasers of condominium units are without a remedy for construction deficiencies unless such deficiencies are structural. They have no action on the basis of implied warranty, appear not to be able to assert breach of the statutory warranties of habitability or constructed in a workmanlike manner, and probably cannot bring such an action under a negligence theory.

This situation can only be remedied by the General Assembly. The following proposed statute, if adopted, would go far toward correcting the existing situation. While not creating implied warranties in the sale of dwellings or condominiums, it would permit subsequent purchasers to sue for breach of express warranties and those statutory warranties contained in

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157. In *Kuhn v. West Alexandria Properties, Inc.*, Law No. 5416 (Alexandria City Circuit Court, 1979), unit owners of the Watergate at Landmark Condominium, individually and as the representatives of the class of other condominium owners, sued the developers for negligence for alleged construction deficiencies. See Memorandum Opinion of Judge Grenadier at 1-2. The trial court dismissed the negligence count on the basis that the plaintiffs had not shown any legal duty of non-negligent conduct on the part of the developer to the condominium purchasers. See *id.* at 19.

158. See *Dooley*, 147 S.E.2d at 686. See *supra* note 140 and accompanying text.

159. *Dooley*, 147 S.E.2d at 686. While this case was reversed in *Holmes v. Worthey*, the court apparently did so on the basis of changed circumstances, arguing that current policy reasons dictated modification of the doctrine. A Virginia court would not have that prerogative. See VA. CODE § 1-10 (1979).

160. See *Bruce Farms*, 247 S.E.2d at 402; see also *Commonwealth v. Holland*, 211 Va. 530, 532, 178 S.E.2d 506, 507 (1971).



Virginia Code sections 55-70.1 and 55-79.79 not covered by the 1984 amendment to Virginia Code Section 55-79.79. Additionally, it would create a cause of action for both initial and subsequent purchasers in negligence against a builder or vendor in the case of a dwelling, or a declarant in the case of a condominium, for latent defects actually known or which should have been known by the builder, vendor, or declarant, and which could not reasonably have been discovered by the purchaser. Such a rule in Virginia is long overdue.

The proposed statute would provide:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the builder or vendor in the case of a new dwelling, or a declarant, in the case of a condominium unit, to recover damages for breach of warranty, express or statutory, or for negligence, although the plaintiff did not purchase the dwelling or condominium from the defendant, where the dwelling or condominium is sold containing latent defects which the builder, vendor, or declarant, in the exercise of ordinary care knew or should have known and which the buyer could not have reasonably discovered in the exercise of ordinary care on his own part.<sup>161</sup>

### C. "Economic Loss" Defense to Negligence Suits

Often in condominium litigation, plaintiffs attempt to recover "economic loss" under a negligence theory. Economic loss includes damages for inadequate value, cost of repair and replacement of the defective product, consequent lost profits as well as the diminution in value of the product because of its inferior quality.<sup>162</sup> The majority of cases and commentators which have addressed the issue support the view *against* allowing recovery in negligence for economic loss.<sup>163</sup>

Pursuant to the majority rule, a plaintiff may recover in tort for:

(a) Accidental or sudden physical injury to the product itself due to a defect in the product, for example, a hot water heater explodes due to a defective leak and gas explosion; or

(b) Accidental or sudden injury to other property due to a defect in the product, for example, a dishwasher is destroyed by explosion of the hot

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161. The adoption of this statute would require amendments of Virginia Code §§ 8.01-223, 55-70.1 and 55-79.79 to add conforming language. Virginia Code § 55-79.79 would not require amendment.

162. See *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 177, 441 N.E.2d 324, 327 (1982); Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).

163. See, e.g., *Seeley v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965); *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); *TWA v. Curtis-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y. Supp. 2d 284, *aff'd*, 2 A.D.2d 666 (1955); *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982). *Contra* *Thompson v. Nebraska Mobil Homes Corp.*, 647 P.2d 334 (Mont. 1982); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). See Note, *supra* note 155; Comment, *Manufacturers' Liability to Remote Purchases for "Economic Loss"—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966). See also *Wattson & Bland, Economic Loss: A Subrogated Insurer's Kiss of Death*, 18 FORUM 649 (1983).

water heater.

Pursuant to the majority rule, a plaintiff may not recover in tort for:

(a) Diminished value of the product due to inherent defect, for example, diminished value of the hot water heater because of the leaky valve and the risk of explosion;

(b) Cost of repairing or replacing the product in the absence of accidental or sudden mishap, for example, cost to repair the leak or replace the defective hot water heater; or

(c) Consequential lost profits, for example, a restaurant is closed and loses profits because of inoperative hot water heater and the inability to wash dishes.

Pursuant to the minority rule, plaintiff may recover all reasonable, foreseeable damages including economic loss.

Although the cases holding that an original or subsequent purchaser may sue a developer for housing defects and negligence generally have not addressed the economic loss issue, it is clear that a suit for construction deficiencies will generally be one for economic loss.<sup>164</sup>

On the subject of construction defects in a house, the Missouri Supreme Court recently declared:

Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a duty in negligence has been readily found. Property interests also have generally been found to merit protection from physical harm. However, where mere deterioration or loss of bargain is claimed, the concern is with a failure to meet some standard of *quality*. This standard of quality must be defined by reference to that which the parties have agreed upon. In the absence of some express agreement to the contrary, the standard of quality will be presumed to be that of the implied warranty term—reasonable fitness for use as a residence.<sup>165</sup>

In one case involving condominiums, *Herlihy v. Dunbar Builders Corp.*,<sup>166</sup> the Appellate Court of Illinois addressed the economic loss issue at length. In *Herlihy*, original purchasers of units in the condominium brought a class action on behalf of only original purchasers against the contractor and

164. With respect to economic loss generally, Dean Prosser has written:

There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes...[b]ut where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule...that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.

W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 101, at 665 (4th ed. 1971).

165. *Crowder v. Vandendeale*, 564 S.W.2d 879, 882 (Mo. 1978) (emphasis original). *Accord Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1980); *Sands v. R. G. McKelvey Building Co.*, 571 S.W.2d 726 (Mo. App. 1978) (dismissing action for negligence per se).

166. 92 Ill. App. 2d 310, 415 N.E.2d 1224 (1980).

developer-vendor of the units for breach of contract, breach of express and implied warranty and negligence.<sup>167</sup> Among the construction defects alleged were:

[C]orroding balcony concrete; cracking driveway pavement; crumbling retaining walls; unsafe anchoring of balcony railings; structurally defective concrete pedestrian ramp, loading dock and stairs; improper and deficient caulking of windows, frames, sills, and balcony doors to control water leaking; improper tuck-pointing to eliminate water seepage; and inadequate heating, cooling and ventilation systems in the laundry room and other common elements.<sup>168</sup>

Count III of the complaint alleged that the defects were the result of the defendant's negligence.<sup>169</sup>

The court noted that the plaintiffs were seeking to recover purely economic losses without alleging any property damage or personal injury.<sup>170</sup> *Alfred N. Koplín & Co. v. Chrysler Corp.*<sup>171</sup> was relied upon for the rule that "tort theory does not extend to permit recovery against a manufacturer for solely 'economic losses' absent property damage or personal injury resulting from the use of the product."<sup>172</sup> In denying plaintiffs the right to recover economic losses under a tort theory of liability, the court held that "where the parties are in privity and no personal injury is involved, recovery of economic losses should be governed by the law of warranty, not tort."<sup>173</sup> On the other hand, Florida has adopted the minority rule and permitted the recovery of damages for "economic loss" in negligence actions.<sup>174</sup> The court's holding in *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*,<sup>175</sup>

167. See 415 N.E.2d at 1225.

168. *Id.* at 1226.

169. *Id.*

170. *Id.* at 1229.

171. 49 Ill. App. 3d 194, 364 N.E.2d 100 (1977).

172. 415 N.E.2d at 1229.

173. *Id.* The Court of Appeals of North Carolina in *Quail Hollow East Condominium Association v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12, *cert. denied*, 301 N.C. 527, 273 S.E.2d 454 (1980), partially addressed this issue, although the opinion is less than a paradigm of clarity. In *Quail Hollow*, the condominium association sued the architect and contractor for economic injury allegedly resulting from the substandard condition of the underground water pipe system serving the condominium complex. 268 S.E.2d at 14. At issue before the court was the lower court's granting of the architect's motion for summary judgment.

The architect argued that plaintiff's suit was barred because the action involved economic loss rather than damage to property, relying on *McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E.2d 444 (1978). See 268 S.E.2d at 17. The court dismissed the architect's argument and relying on *Shoffner Industries, Inc. v. W. B. Lloyd Constr. Co.*, 42 N.C. App. 259, 257 S.E.2d 50, *discretionary review denied*, 298 N.C. 296, 259 S.E.2d 301 (1979), held that the cause of action in *Quail Hollow* was for economic loss as a result of alleged *property damage*. See 268 S.E.2d at 17.

174. See *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981).

175. *Id.*

however, was devoid of legal foundation and was based solely upon policy grounds.<sup>176</sup>

In Virginia, the economic loss issue has not been addressed, but the issue necessarily arises in interpreting Virginia's anti-privity statute, Virginia Code section 8.01-223.<sup>177</sup> If this section is interpreted as applying to the traditional negligence area, that of physical harm to person or property, then lack of privity remains a viable defense to negligence claims for recovery of economic loss, including construction deficiencies in a condominium or other housing.<sup>178</sup>

The basis of the majority rule against recovery of economic loss is that the loss of benefit of the bargain is a contractual—not a tort—risk. The Virginia Supreme Court may be sensitive to this distinction:

Damages are awarded in tort actions to compensate the plaintiff for all losses suffered by reason of the defendant's breach of some duty imposed by law to protect the broad interests of social policy.... Damages for breach of contract, on the other hand, are subject to the overriding principal of compensation. They are within the contemplation and control of the parties in framing their agreement. They are limited to those losses which are reasonably foreseeable when the contract is made. These limitations have led to the 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort.'<sup>179</sup>

Although the question remains unanswered in Virginia, a strong argument can be made that the analysis adopted in *Herlihy* is in keeping with the probable approach the Virginia court would take. Under such a rule, subsequent purchasers of condominiums would probably not be able to recover for construction defects as such defects constitute economic loss. With the exception of a limited remedy for breach of statutory warranty in the case

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176. *See id.* at 519. The court merely held:

We hold that there can be recovery for economic loss. Why should a buyer have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects? In the final analysis, the cost to the developer for a resulting tragedy could be far greater than the cost of remedying the condition. We conclude that a cause of action for negligent construction exists in favor of both original and subsequent purchasers.

*Id.*

177. *See supra* text accompanying note 144.

178. *See McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E.2d 444 (1978). In *McKinney*, the court noted that controlling North Carolina precedent adheres to the privity requirement in cases outside the scope of products liability or in cases not involving personal injury or property damage. 248 S.E.2d at 447. In *McKinney*, the plaintiff sought the recovery of additional expenses incurred in excavating foundation caissons beyond the specifications based upon the alleged negligence in supervision of the architect. *See id.* at 445. The court held that the damages sought were for "economic loss" and absent privity of contract the action could not be maintained. *See id.* at 447.

179. *Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983).

of structural defects, it appears that a subsequent purchasers' sole cause of action would lie against developers only in the event that he could show personal injury or direct property damage resulting from the developer's alleged negligence.

#### *D. Damages Recoverable by Original Purchasers*

With the 1984 amendment to Virginia Code Section 55-79.79, it appears that any owner of a condominium unit can recover for structural defects in the common elements provided such a suit is brought within the applicable statute of limitations.<sup>180</sup> Thus, to the extent that all unit owners join in a suit against the developer/declarant alleging breach of statutory warranty for structural defects in the common elements, no legal issues arise. However, where less than all owners join in the suit, or where the suit alleges defects that are nonstructural or is based on a theory of negligence, the determination of what damages are recoverable, and by whom, is unsettled.

In general, there are three ways of measuring damages for construction deficiencies. Under the "cost" rule, the owner is entitled to money damages which will permit him completion of the structure in accordance with the contract so long as the correction is (i) possible, and (ii) does not involve unreasonable economic waste.<sup>181</sup> Under the "value" rule, if the deficiency is not remediable in the absence of unreasonable economic waste, the owner is entitled to the difference in value between the structure as contracted for and as actually constructed.<sup>182</sup> The "dwelling" rule provides that, even if economic waste results by application of the cost rule, the cost rule will be applied if a dwelling, as opposed to a commercial building, is involved.<sup>183</sup> The "dwelling" rule has not been adopted in Virginia, while both the "cost" and "value" rules have been applied by our courts.

Once damages are calculated, some courts have held that less than all of the condominium unit owners may recover the entire cost of repair of construction deficiencies.<sup>184</sup> This result is reached by emphasizing that each unit owner owns an undivided interest in the condominium common elements as tenants-in-common, and accordingly, one co-tenant can recover the entire cost of repair.<sup>185</sup> In order for a party to receive the benefit of his bargain and be made whole, the amount of damages awarded must equal the sum necessary to correct the defective condition.<sup>186</sup> These cases argue that each

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180. Virginia Code Section 55-79.79(c) establishes this period as six years from the date the cause of action accrues unless the parties agree to reduce the period to no less than two years.

181. *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950) (cost rule applied to faulty foundations).

182. *Kirk Reid Co. v. Fine*, 205 Va. 778, 139 S.E.2d 829 (1965) (value rule applied as to deficient HVAC system).

183. *Edenfield v. Woodlawn Manor, Inc.*, 62 Tenn. App. 280, 462 S.W.2d 237 (1970).

184. See *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981); *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1980); *Starfish Condominium Ass'n v. Yorkridge Service Corp.*, 458 A.2d 805 (Md. 1983); *Stony Ridge Hill Condominium Owners Ass'n v. Auerbach*, 64 Ohio App. 2d 40, 410 N.E.2d 782 (1979).

185. See *Tassan*, 410 N.E.2d at 912.

person who purchased a condominium unit has a right to have the entire damage to the entire common area of the building remedied and correctly satisfied.<sup>187</sup>

There is an illogic, however, in these decisions. First, they are based upon the assumption that the recovery will be utilized to repair the construction deficiencies, and secondly, the possibilities of multiple recoveries against the developer exist, along with the preclusion of valid claims by other original owners not made parties to the first lawsuit.<sup>188</sup> The Supreme Court of New Jersey, in *Siller v. Hartz Mountain Associates*,<sup>189</sup> recognizing the association's statutory standing to sue, noted the problem:

It would be impracticable indeed to sanction lawsuits by individual unit owners in which their damages would represent but a fraction of the whole. If the individual owner were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for repairs and replacements.<sup>190</sup>

Where less than all of the owners of a condominium are entitled to recovery, other courts hold that they may only recover a pro rata portion of the cost of correction or diminution in value attributable to construction deficiencies.<sup>191</sup> In *Goldenfarb v. Land Design, Inc.*,<sup>192</sup> the Supreme Judicial Court of Maine held that for a condominium developer's failure to provide adequate parking, suing unit owners were only entitled to their aliquot share of the entire loss. The aliquot share was determined with reference to the declaration of condominium. It provided that the owners' interests in the common areas were calculated by determining the proportion which the fair market value of each unit had to the total value of all the units.<sup>193</sup> Such a

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186. *Drexel*, 406 So.2d at 520. *Drexel* is one of the few cases which have permitted recovery by subsequent purchasers. The court, recognizing that subsequent purchasers would be benefitted by recovery of the entire damages, merely noted: "to conclude otherwise and apportion the damages would penalize the original purchasers." *Id.*

187. See *Stony Ridge Hill Condominium Owners Ass'n v. Auerbach*, 64 Ohio App. 2d 40, 43, 410 N.E.2d 782, 785 (1979); see also *20 East Cedar Condominium Ass'n v. Luster*, 39 Ill. App. 3d 532, 349 N.E.2d 586 (1976); *Tassan*, 410 N.E.2d at 913. In *Stony Ridge*, the court in permitting full recovery, noted:

[Otherwise], payment by defendants of only one-sixth of the roof damage, representing the share of four unit owners, and the consequent repair of only one-sixth of the roof would still leave the roof in the same leaky condition, and would be the equivalent of giving plaintiff no legal remedy or relief whatever.

410 N.E.2d at 786.

188. *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568, 574 (1983).

189. 93 N.J. 370, 461 A.2d 568 (1983).

190. 461 A.2d at 573.

191. See *Goldenfarb v. Land Design, Inc.*, 409 A.2d 662 (Me. 1979); *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535 (Utah 1983); see also *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 380-81, 461 A.2d 568, 573 (1983) (for proposition that absence of statute granting the association standing to sue for common element deficiencies by unit owners would result in a proration of damages).

192. 409 A.2d 662 (Me. 1979).

193. *Id.* at 665-66.

calculation in Virginia would be easy in light of Virginia Code section 55-79.55, whereby the condominium declaration may allocate the unit owners interest in the common elements numerically, by size, or by par value.<sup>194</sup>

The majority rule for recovery of damages for injury to co-tenancy property by some but less than all co-tenants is that the suing co-tenants may recover only their pro rata share of the damages.<sup>195</sup> While there are no

194. This section provides:

Allocation of interests in the common elements.

(a) The declaration may allocate to each unit depicted on plats and plans that comply with § 55-79.58(a) and (b) an undivided interest in the common elements proportionate to either the size or par value of each unit.

(b) Otherwise, the declaration shall allocate to each such unit an equal undivided interest in the common elements, subject to the following exception: Each convertible space so depicted shall be allocated an undivided interest in the common elements proportionate to the size of each such space, vis-a-vis the aggregate size of all units so depicted, while the remaining undivided interest in the common elements shall be allocated equally to the other units so depicted.

(c) The undivided interests in the common elements allocated in accordance with subsection (a) or (b) hereof shall add up to one if stated as fractions or one hundred per centum if stated as percentages.

(d) If, in accordance with subsection (a) or (b) hereof, an equal undivided interest in the common elements is allocated to each unit, the declaration may simply state that fact and need not express the fraction or percentage so allocated.

(e) Otherwise, the undivided interest allocated to each unit in accordance with subsection (a) or (b) hereof shall be reflected by a table in the declaration, or by an exhibit or schedule accompanying the declaration and recorded simultaneously therewith, containing three columns. The first column shall identify the units listing them serially or grouping them together in the case of units to which identical undivided interests are allocated. Corresponding figures in the second and third columns shall set forth the respective areas or par values of those units and the fraction or percentage of undivided interest in the common elements allocated thereto.

(f) Except to the extent otherwise expressly provided by this chapter, the undivided interest in the common elements allocated to any unit shall not be altered, and any purported transfer, encumbrance, or other disposition of that interest without the unit to which it appertains shall be void.

(g) The common elements shall not be subject to any suit for partition until and unless the condominium is terminated. (1974, c.416).

VA. CODE § 55-79.55 (1981).

195. See *Young v. Garrett*, 149 F.2d 223 (8th Cir. 1945); *Ruffin v. Crowell*, 253 Ala. 653, 46 So.2d 218 (1950); *Jefferson Lumber Co. v. Berry*, 247 Ala. 164, 23 So.2d 7 (1945); *Louisville N. O. & T. R. Co. v. Jackson*, 123 Ark. 1, 184 S.W. 450 (1916); *Razzano v. Kent*, 78 Cal. App. 2d 254, 177 P.2d 612 (1947); *Lance v. Cogdill*, 238 N.C. 500, 78 S.E.2d 319 (1953); *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902); *Hicks v. Southwestern Settlement Dev. Corp.*, 188 S.W.2d 915 (Tex. Civ. App. 1945); *Myers v. Shapiro Broze Factors Corp.*, 154 S.W.2d 875 (Tex. Civ. App. 1941); *Kelley v. Rainelle Coal Co.*, 135 W. Va. 594, 64 S.E.2d 606 (1951), *overruled*, *Kimball v. Walden*, 301 S.E.2d 210 (W. Va. App. 1983). See also POWELL, *THE LAW OF REAL PROPERTY* § 606, at 627 (1982); 86 C.J.S. *Tenancy in Common* § 138 (1954); Annot., 80 A.L.R. 992 (1932).

In *Jefferson Lumber Co. v. Berry*, 247 Ala. 164, 23 So.2d 7 (1945), the Alabama court held that one tenant in common can sue and recover his proportionate share of damages suffered as a result of the defendant's negligence in allowing a fire to spread to complainant's land. See 23 So.2d at 10. Notably, in this instance, the court would not permit the plaintiff to

recorded cases in Virginia discussing the rights of co-tenants to recover damages for injury to property, there are several cases in a closely analogous area of the law dealing with co-tenants rights in ejectment actions. In *Marshall v. Palmer*,<sup>196</sup> a suit in ejectment, the court held that “[a cotenant] cannot, in his own name, as sole plaintiff, recover the respective interests of his cotenants.... The plaintiff can only recover such interest in the premises

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recover damage done to the other co-tenant’s interest when that co-tenant was the plaintiff’s wife. *See id.*

Where land was permanently damaged by the rising of a railroad embankment which changed the flow of water and caused it to accumulate on the property, it was held by the Arkansas court in *Louisville N. O. & T. R. Co. v. Jackson*, 123 Ark. 1, 184 S.W. 450 (1916), that a tenant in common suing alone to recover, therefore, might not recover more than his proportionate share of the damages sustained.

In *Razzano v. Kent*, 78 Cal. App. 2d 254, 177 P.2d 612 (1947), the California court permitted a tenant in common to recover only his proportionate interest in a suit for damages to plaintiff’s land which prevented plaintiff from carrying on his business.

In *Winborne v. Elizabeth City Lumber Co.*, 130 N.C. 32, 40 S.E. 825 (1902), a North Carolina court held that a tenant in common of a tract of land suing alone to recover damages for wrongful cutting of timber thereon was entitled to recover only a proportion of the entire damage equivalent to the fractional part of the whole estate owned by him. The court added that the judgment would not be a bar to a recovery by the other tenants in common of their pro rata part of the damages. *See id.*

In a suit to enjoin the defendant from blasting at a quarry and to recover damages for injury to livestock and damage to plaintiff’s automobile resulting from blast of limestone falling on plaintiff’s property, the North Carolina court in *Lance v. Cogdill*, 238 N.C. 500, 78 S.E.2d 319 (1953), followed *Winborne* in holding that plaintiff could not recover damages for trespass against the defendants in excess of his pro rata interest in the common property.

In a Texas action, *Hicks v. Southwestern Settlement & Development Corp.*, 188 S.W.2d 915 (Tex. Civ. App. 1945), plaintiff sued for disseizin and damages resulting from the wrongful production from the land and appropriation by defendants of oil and gas. The court held that each tenant in common was only entitled to the possession of his own share of the damages, that the presence of all tenants in common was not indispensable to rendition of judgment for damages in favor of one or less than all, and that the determination of the plaintiff’s proportionate share of damages in the judgment thereof to him despite the absence of his tenant in common was relief which could be granted. *See id.* at 921.

In *Kelly v. Rainelle Coal Co.*, 135 W. Va. 594, 64 S.E.2d 606 (1951), *overruled on other grounds*, *Kimball v. Walden*, 301 S.E.2d 210 (W. Va. App. 1983); a West Virginia case, plaintiff sued to recover damages for the mining and removal of coal allegedly belonging to plaintiffs. The court failed to award damages to plaintiff for other reasons, but held that another tenant in common was not a necessary party and that plaintiffs would have the right to recover for damages done to only their portion of the estate. *See* 64 S.E.2d at 613.

A corollary to the majority rule—as applied to condominiums—would seem to be that the original owners who had sold their units might recover their share of damages, but only if they are able to demonstrate that they had in fact suffered a loss in the resale of their units. *See Orebaugh v. Antonious*, 190 Va. 829, 58 S.E.2d 873 (1950).

A third possibility by analogy to the minority rule applicable to damages to co-tenancy property is that the owners might recover the entire damages due to construction deficiencies, but would hold the pro rata share of the nonsuing original owners in trust for those owners. *See Hurwitz v. C.G.J. Corp.*, 168 So.2d 84 (Fla. Dist. Ct. App. 1964); *Pfannensteil v. Central Kansas Power Co.*, 186 Kan. 628, 352 P.2d 51 (1960); *Bigelow v. Rising*, 42 Vt. 678 (1870).

196. 91 Va. 344, 21 S.E. 672 (1895).



as he may prove that *he himself is entitled to.*" (emphasis added).<sup>197</sup> In *Nye v. Lovitt*,<sup>198</sup> the court again dealt with this issue and noted:

One joint tenant, co-parcener, or tenant in common, although he has a right to the possession of the whole against strangers, cannot make a valid lease for more than his own part of the land; and therefore no more can be recovered in ejectment than the part to which the lessor, who is a joint tenant, tenant in common, or parcener, is entitled.<sup>199</sup>

The court relied upon the opinion of Chief Justice Parker in *Dewey v. Brown*<sup>200</sup> for the principle that a co-tenant will have entire justice done to himself if he is allowed to recover his pro rata interest in the property.<sup>201</sup>

Given this rule in Virginia as to the rights of co-tenants in ejectment actions, and the majority rule as previously stated as to the recovery of damages by co-tenants, it is unlikely that the Virginia Supreme Court would expand the co-tenants' rights of recovery for injury to real property and award unit owners damages in excess of their proportionate share merely because the real property was recorded as a condominium. Thus, with the exception of the cases involving breach of statutory warranty for structural defects in the common elements, it is probable that damages for common element deficiencies would only be recoverable by original owners, and then only in the amount of their proportional share.

#### CONCLUSION

As the foregoing analysis recognizes, suits for common element deficiencies in Virginia can involve some complex issues, the resolution of which is unclear. Particularly, the impact of the doctrine of *caveat emptor* on the rights of original and subsequent purchasers to assert claims against declarants for breach of implied warranty and negligence is problematic. Certainly the few cases to have come before the Supreme Court of Virginia interpreting the Virginia Condominium Act offer no guidance. Whether *caveat emptor* bars certain types of claims and types of damage recovery are issues yet unresolved.

This article has attempted to set forth the law regarding issues that most frequently arise in condominium litigation involving common element deficiencies. The intent was to be thorough and offer some analysis of the law in Virginia with recommendations for statutory modifications. To the extent that the Virginia Code needs revision and clarification, it is recommended that the General Assembly consider the proposed changes in an effort to bring Virginia in line with the majority of jurisdictions which afford some protection to purchasers of real property.

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197. 21 S.E. at 672.

198. 92 Va. 710, 24 S.E. 345 (1896).

199. 24 S.E. at 348.

200. 20 Mass. (2 Pick.) 388 (1824).

201. *Nye*, 24 S.E. at 348.

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