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Consumer Protection in Oklahoma Condominium Sales

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CONSUMER PROTECTION IN OKLAHOMA CONDOMINIUM SALES

I. INTRODUCTION

The condominium[1] form of home ownership has become increasingly popular in Oklahoma[2] and throughout the nation[3] in recent years. This rapid growth of the condominium market may exacerbate Oklahoma consumers' lack of awareness of the complexities of condominium ownership and open the door to "flagrant and subtle"[4] abuses by condominium developers.

Oklahoma's Unit Ownership Estate Act[5] is a "first generation"[6]

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1. Oklahoma's Unit Ownership Estate Act, OKLA. STAT. tit. 60, §§ 501-530 (1981), defines a condominium (or a "unit ownership estate") as a property interest consisting of "ownership of single units in a multi-unit building together with an undivided interest in the common elements." *Id.* § 503(g). A condominium is created when the owner or co-owners of the building file an instrument known as a "declaration" for recordation in the county clerk's office. *Id.* § 502. Bylaws, which must be filed with the declaration, govern the administration of the condominium. *Id.* § 519. The bylaws and/or declaration usually provide that the developer is to retain control of the condominium for a certain period of time, often until a specified number or percentage of units is sold. Jones, *Representing the Condominium Developer, Consumer and Lender*, 50 OKLA. B.J. 1597, 1599 (1979). Once the developer relinquishes control, decision-making power is then vested in the unit owners themselves. OKLA. STAT. tit. 60, § 520(b) (1981). Administration of the condominium may take any form provided in the bylaws, but typically a board of directors is elected from the membership of the unit owners association. *Id.* § 520(a).

2. *See* Tulsa Tribune, Nov. 10, 1981, at B1, col. 1; *see also* Foresman, *Getting involved key to condo purchase*, Tulsa Tribune, Jul. 9, 1983, at B19, col. 1 ("At the end of 1982 . . . there were 105 condominium complexes with 6,209 units. Since then, there has been a rash of construction and condos are approaching the 7,000-unit mark.").

3. This phenomenal growth is attributable to many factors, including the flexibility of the condominium concept, which makes it suitable for everything from apartment house conversions to time-sharing arrangements; the scarcity of land within commuting distance of major centers of employment; double-digit inflation in the construction field; changing American life styles, characterized by smaller, more mobile families and an expanding population of "empty nesters"; waning interest in detached homes on separate plots; and growing demand for on-site amenities and recreation facilities.

Rohan, *The "Model Condominium Code"—A Blueprint for Modernizing Condominium Legislation*, 78 COLUM. L. REV. 587, 587-88 (1978).

4. Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 U. FLA. L. REV. 350, 351 (1973) (quoting P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 4.03 (1963) [hereinafter referred to as ROHAN & RESKIN]).

5. OKLA. STAT. tit. 60, §§ 501-530 (1981).

6. The condominium statutes enacted by Puerto Rico, Hawaii, and Arkansas were the only acts available as models when the Real Property Law section of the Oklahoma Bar Association first considered a condominium act in early 1962. These early statutes are commonly referred to as "first generation" condominium acts. *See* Godfrey, *The Oklahoma Condominium Act of 1963*, 34 OKLA. B.J. 2368, 2368 (1963). *See generally* Schreiber, *The Lateral Housing Development: Con-*

condominium statute. While the Act effectively created a new concept of home ownership,[7] it was designed as a blueprint for attorneys and developers to use in forming condominiums, rather than as a consumer protection statute.[8] Although it is informational,[9] the Act nevertheless is inadequate to protect consumers because, like most other "first generation" statutes, it does not require that the information generated in compliance with the statute be passed on to the consumer.[10] In Oklahoma, as in most states, it seems that "the condominium boom is preceding adequate consumer protection laws."[11]

An increasing number of states[12] have enacted condominium laws which provide substantial consumer protection. In general, these states have taken two approaches to the problem. One statutory scheme requires the developer to make a full and comprehensible disclosure of potential problems that are likely to escape consideration by the prospective purchaser.[13] The other approach combines disclosure with the creation of a state agency to police condominium offerings.[14]

This Comment considers whether either of the approaches used in other states would serve the increasing needs of condominium purchasers in Oklahoma. As an alternative to the expense and red tape involved in the creation of a state agency, it is suggested that the Unit Ownership Estate Act be revised to require developers to disclose material information to condominium purchasers. Additionally, allowing buyers a short "cooling-off period" before sales become final would help ensure developer compliance and lead to more responsible homebuying decisions.

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dominium or Home Owners Association?, 117 U. PA. L. REV. 1104 (1969) (tracing origin of condominium statutes).

7. *See* Godfrey, *supra* note 6, at 2370.

8. Note, *Real Property: Oklahoma Condominiums—Prevention of Abuse*, 28 OKLA. L. REV. 189, 189 (1975).

9. *See infra* notes 59-65 and accompanying text.

10. Note, *supra* note 8, at 196-98. The author suggests that statutory provisions requiring full disclosure by the developer, permitting the buyer to rescind the contract or recover damages for his reasonable reliance on the developer's false or misleading statements, and establishing a regulatory board to evaluate and authorize the generation of new condominium projects would more adequately protect the consumer. *Id.*

11. H. ROTHENBERG, WHAT YOU SHOULD KNOW ABOUT CONDOMINIUMS 7 (1974); *see also* Tulsa Tribune, Nov. 10, 1981, at B1, col. 1 (several condominium associations in Tulsa, Oklahoma have formed the Condominium Association of Tulsa, for the purpose of resolving common problems and guiding future state condominium legislation).

12. *See infra* notes 86-120 and accompanying text.

13. *See infra* notes 86-101 and accompanying text.

14. *See infra* notes 110-20 and accompanying text.

II. THE NEED FOR REFORM

The rule of caveat emptor, although now disfavored by courts[15] and legal scholars[16] alike, still governs condominium transactions in most states.[17] Since the purchaser's "eyes are his bargain," he bears the risk that the terms of the offering will be unfair.[18] The application of the caveat emptor doctrine can be particularly harsh in the condominium context, as the complexity of the transactions involved[19] may hinder the buyer from adequately informing himself and protecting his rights.[20] The less the potential purchaser is aware of the financial and legal consequences of his purchase, the greater the potential for developer abuse.[21] Condominium purchasers are also generally unaware of related matters, such as risk of loss, warranties, and title insurance, which have unique applications in the context of condominium sales.[22]

A. *Developer Abuses*

The monthly condominium fee or assessment charged for maintenance of the common areas has been a recurrent item of developer abuse. Developers frequently induce buyers to purchase condominiums by "low balling"—the practice of underestimating the expected monthly assessment in representations to potential purchasers.[23] Alternatively, a developer may deliberately fail to mention the likelihood that the monthly assessments will increase.[24] Under either of these schemes, the unit owners' association may find, either when the developer relinquishes control or at some future date, that the monthly fee

15. *See* Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968) ("The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices."); *see also* Gable v. Silver, 258 So. 2d 11, 15 (Fla. Dist. Ct. App.), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1972) (extending implied warranties to condominiums, citing *Humber*).

16. *See, e.g.*, J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 264 (2d ed. 1975).

17. *See* Proxmire, *Introduction*, *Condominium Workshop*, 48 ST. JOHN'S L. REV. xi, xiv (1974).

18. This risk exists even in states which have adopted statutes requiring disclosure in condominium transactions. *See infra* notes 102-07 and accompanying text.

19. *See* Note, *supra* note 4, at 357; Comment, *The Georgia Condominium Act of 1975: A Sound Basis for Innovative Condominium Practice*, 24 EMORY L.J. 891, 908 (1975).

20. *See* Thomas, *The New Uniform Condominium Act*, 64 A.B.A. J. 1370, 1371 (1978); Blackburn & Melia, *Ohio Condominium Law Reform: A Comparative Critique*, 29 CASE W. RES. L. REV. 147, 153 (1978).

21. *See* Comment, *supra* note 19, at 905-06.

22. *See infra* notes 46-58 and accompanying text.

23. *See* Proxmire, *supra* note 17, at xiii.

24. *See* Note, *supra* note 4, at 357. While an increase in monthly assessments is a natural consequence of inflation and obsolescence, unnecessary surprise to the purchaser should be avoided.

established by the developer is inadequate. It is not unusual for the association to be forced to double or triple the monthly assessments in order to pay the necessary maintenance and management expenses.[25]

Purchasers' potential liability for special assessments may also come as an unwelcome surprise.[26] Poor workmanship or faulty design of the project may necessitate major repairs. The unit owners may be hesitant to sue the developer for such costs, as the publicity of a lawsuit could reduce sales to the detriment of present owners. Thus, the board of directors of the unit owners association may choose to pass the cost of repair to unit owners through a special assessment. This possibility is especially acute in states which allow the developer to appoint the initial board of directors.[27] As the nonpayment of a special assessment can create a lien in favor of the unit owners association,[28] unit owners may be left little choice but to pay even unreasonable assessments. A developer who still owns many unsold units at the time of transfer of control to the association may also exempt himself from paying the common expenses attributable to those units.[29] For example, the condominium documents may state that a "unit" exists for the purpose of monthly assessments only when a certificate of occupancy is issued, which in turn occurs only after the unit is sold.[30] Under such circumstances, the condominium's proposed operating budget will be meaningless if a large number of the developer's units remains unsold when the association gains control.

A second major category of abuses occurs while the association is still under the developer's control. During that time, the unscrupulous

25. Proxmire, *supra* note 17, at xiii. *See* Comment, *Legal Protection for Florida Condominium and Cooperative Buyers and Owners*, 27 U. MIAMI L. REV. 451, 456 (1973).

26. Special assessments are assessments of extraordinary expenses connected with elements. They can be voted in by the association at any time. *See* 1 ROHAN & RESKIN, *supra* note 4, § 13.03[2], at 13-20.

27. The unit owners usually elect the initial board of directors. *Id.* § 17.02, at 17-3. However, some states allow the developer to appoint the first board, with subsequent board members to be elected by popular vote among the unit owners. *E.g.* GA. CODE ANN. § 85-1633e (Supp. 1983) (expressly permits developer to appoint and remove members of the board of directors before control of the unit owners' association is surrendered). Oklahoma's Unit Ownership Estate Act is silent as to developer appointments and would therefore not preclude a developer from controlling the board of directors. *But see* FLA. STAT. ANN. § 718.301 (West Supp. 1983) (all owners, other than the developer, are allowed to elect the members of the board).

28. OKLA. STAT. tit. 60, § 524 (1981).

29. Blackburn & Melia, *supra* note 20, at 152-53.

30. Comment, *Condominium Regulation: Beyond Disclosure*, 123 U. PA. L. REV. 639, 646 (1975). This practice is apparently permissible under current Oklahoma law, as the statutory definition of "unit" provides that "[t]his act, and any deed, *declaration or plan* for a condominium project shall be liberally construed to facilitate the establishment and operation of the project." OKLA. STAT. tit. 60, § 503(b) (1981) (emphasis added).

developer may enter into self-serving "sweetheart contracts" to assure himself of continued profits at the expense of unit owners. One common type of sweetheart contract is a long-term agreement between the developer and a management company in which the developer owns an interest.[31] Such contracts usually lock the association into higher cost and lower quality management contracts than it could obtain by bargaining at arm's length.[32] The sweetheart recreational lease is a related practice by which "the developer conveys the unit in fee but retains title to certain of the recreational common facilities and leases them back to the development at inflated values and [for] excessively long tenancies."[33] It is not uncommon for a lease on a swimming pool to provide the developer with an extraordinarily lucrative rental fee, sometimes with a built-in cost-of-living escalator, which will eventually prove many times more profitable to the developer than the original investment.[34]

The buyer's deposit money is an additional source of abusive practices for which Oklahoma, like most states, makes no provision.[35] Without statutory regulation prohibiting the use of buyers' deposit monies, the developer is free to use the funds to defray the construction costs of that particular project or any other of the developer's projects.[36] Unless deposit monies are held in escrow, mechanic's liens and the building loan mortgage will have priority over the claims of buyers arising out of their deposits.[37] Purchasers "may ultimately be left with nothing but a worthless general claim if the project fails and the developer goes bankrupt."[38]

Purchasers may encounter other miscellaneous abuses. For example, developer control of the association for extended periods is a fre-

31. *See* Proxmire, *supra* note 17, at xiii.

32. *Id.*

33. Comment, *supra* note 30, at 644.

34. Proxmire, *supra* note 17, at xiii. The Florida courts once held that a developer owes no fiduciary duty to the purchasers to guarantee the fairness of the terms of recreational leases. Fountainview Ass'n v. Bell, 203 So. 2d 657 (Fla. Dist. Ct. App. 1967), *aff'd per curiam*, 214 So. 2d 609 (Fla. 1968). The Florida legislature remedied the situation by requiring that the terms of contracts entered into by the developer prior to the relinquishment of control to the unit owners association be "fair and reasonable." FLA. STAT. ANN. § 718.302(3) (West Supp. 1983). However, absent such statutory authority, Oklahoma courts might find the *Fountainhead* case persuasive authority.

35. *But see* FLA. STAT. ANN. § 718.202 (West Supp. 1983) (requiring escrow accounts for such prepayments). Control is limited, however, since the developer may use the funds so long as he clearly discloses his intended use of the funds in 20-point type. *Id.* § 718.202(3).

36. *See* Comment, *supra* note 30, at 643-44.

37. ROHAN & RESKIN, *supra* note 4, § 13.02[4] & n.14.

38. Comment, *supra* note 30, at 644.

quent complaint by condominium purchasers.[39] A related complaint is that the developer conducts association business in relative secrecy while he retains control, and does not account for association funds upon transfer of control to the unit owners.[40] The developer may also reserve the right to rent unsold units until control is turned over to the unit owners.[41] Since purchasers frequently choose condominium ownership in part due to a desire for permanency and stability, they understandably are outraged when they find themselves surrounded by tenants who remain a relatively short time.[42]

Other far-reaching powers which may be retained by the developer include the right to unilaterally amend the declaration or bylaws prior to turning over control to the association,[43] or to alter the projected layout of the buildings or amenities.[44] The developer may reserve the right to cancel the offering if a certain number of units are not "presold," causing purchasers to lose the benefits of their bargains.[45]

B. *Related Problems*

In addition to their lack of awareness of developer abuses, purchaser misunderstanding of risk of loss, warranties, and title insurance matters as they relate to condominium sales may lead to unwelcome results. Because the law is unsettled in these three areas, it is not surprising that condominium purchasers are often confused.

Absent statutory provision to the contrary, most jurisdictions hold that risk of loss of real property is assumed by the buyer when the purchase contract is signed.[46] Oklahoma and other states have reversed the majority common law rule by adopting the Uniform Vendor

39. *See* Comment, *supra* note 25, at 455; Jones, *supra* note 1, at 1599.

40. Comment, *supra* note 25, at 455.

41. Note, *Full Disclosure to Massachusetts Condominium Buyers: A Proposed Statute*, 10 NEW ENG. L. REV. 325, 328 (1974).

42. *Id.*

43. Note, *supra* note 8, at 191; *see* OKLA. STAT. tit. 60, § 503(a) (1981) (allowing amendment of declaration); ROHAN & RESKIN, *supra* note 4, § 13.02[3], at 13-11.

44. ROHAN & RESKIN, *supra* note 4, § 13.02[3], at 13-11.

45. Rohan, *Condominiums and the Consumer: A Checklist for Counseling the Unit Purchaser*, 48 ST. JOHN'S L. REV. 1028, 1044 (1974). However, "Failure of a development to come to fruition as a condominium is not disastrous, provided the builder is stable or has not made use of the purchasers' money to finance construction." Rohan, *Condominium: A Precis for Attorneys*, 39 OKLA. B.J. 939, 944 (1968). *But see* Comment, *supra* note 25, at 459 (purchasers of units from insolvent developers have lost their investments).

46. 8A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4449 (repl. volume 1963).

and Purchaser Risk Act (UVPRA),[47] which places risk of loss on the seller of real property until either legal title or possession has been transferred to the buyer.[48] The structural interdependence of condominium units and the common practice of obtaining a single master insurance policy for the project[49] complicate the application of this principle, however. The buyer may not be allowed to rescind his purchase contract or abate the price in the event of destruction of neighboring units or common elements, even if the master insurance policy is inadequate to cover repair expenses.[50] Oklahoma condominum purchasers may thus find themselves liable for special assessments for repairs in such situations.[51]

While more recently enacted statutes may spell out the duration and other limitations of implied warranties on condominiums,[52] Oklahoma's statute is silent on the issue. It appears that Oklahoma courts have not yet been faced with the problem. Thus, condominium owners must extrapolate from general equitable principles and decisions from other jurisdictions in attempting to determine the extent to which their investments are protected.[53]

The coverage of title insurance for condominiums may be weak-

47. 14 U.L.A. 554 (1980).

48. *Id.* § 1(b). The UVPRA has been enacted in only eleven states, including Oklahoma, since its promulgation in 1935. *See* CAL. CIV. CODE § 1662 (West 1983); HAWAII REV. STAT. § 508-1 (1976); ILL. ANN. STAT. ch. 29, §§ 8.1-.3 (Smith-Hurd 1983-84); MICH. COMP. LAWS ANN. §§ 565.701-.703 (West 1983-84); NEV. REV. STAT. §§ 113.030-.050 (1979); N.Y. GEN. OBLIG. LAW § 5-1311 (McKinney 1978); N.C. GEN. STAT. §§ 39-37 to -39 (1976); OKLA. STAT. tit. 16, §§ 201-203 (1981); OR. REV. STAT. §§ 93.290-.300 (1979-80); S.D. CODIFIED LAWS ANN. §§ 43-26-5 to -8 (1982); WIS. STAT. ANN. § 706.12 (West 1981).

49. Rohan, *Condominium: A Precis for Attorneys*, 39 OKLA. B.J. 939, 944 (1968).

50. The UVPRA applies only when the "subject matter of the contract" is destroyed prior to the buyer's acquiring possession or title. OKLA. STAT. tit. 16, § 202(a) (1981). It is uncertain whether destruction of a neighboring unit or a common element would be considered destruction of the subject matter of a contract to purchase an individual unit.

51. *See* Galton, *Condominiums: The Experience of the Past Decade*, 42 OKLA. B.J. q-98, q-108 (1971) (the buyer's liability would be measured as his unit's share of total repair costs, not the amount of damage to his own unit); see also Rohan, *supra* note 3, at 589-99 (noting that for this reason the proposed Model Condominium Code would leave risk of loss on the seller until title passes or the buyer takes possession).

52. *See, e.g.*, FLA. STAT. ANN. § 718.203 (West Supp. 1983), which provides that implied warranties of fitness attach to various components of new condominiums for one to five years after they are built, regardless of whether the claimant is the initial or a subsequent purchaser; VA. CODE § 55-79.79(b) (Supp. 1983), which imposes a two-year warranty that the unit is free from structural defects, fit for habitation, and constructed in a workmanlike manner.

53. The court in Gable v. Silver, 258 So. 2d 11, 15 (Fla. Dist. Ct. App. 1972), *aff'd per curiam*, 264 So. 2d 418 (Fla. 1973), held that under Florida common law an implied warranty of fitness attached to a new condominium purchased from the builder. The court did not, however, address the issue of whether implied warranties were enforceable by more remote purchasers. 258 So. 2d at 15.

ened by exclusions.[54] For example, a typical policy exempts provisions in the declaration and bylaws from coverage.[55] Thus, the policy may not warrant that provisions such as restrictions upon alienation are valid and enforceable,[56] or that the project is a legally constituted condominium.[57] Because even "veteran" home buyers may not recognize these limitations, clear and understandable disclosure in pre-sale literature of the extent of title insurance should be required to forewarn the purchaser that a title opinion by a competent attorney may be necessary to assure the buyer that the development will come to fruition as a condominium.[58]

III. Existing Consumer Protection Measures

The prospective condominium purchaser is not wholly unprotected under existing law against developer abuses. Oklahoma's current condominium statute, as well as certain federal laws, may provide assistance in certain situations.

A. *Oklahoma Condominium Law*

The Oklahoma Unit Ownership Estate Act requires a developer to make the condominium declaration a matter of public record.[59] The declaration is required to include basic information about the project, including a description of the land, building, units, and common elements.[60] Plans of the building and common elements, certified by a licensed engineer or architect, must be attached to the declaration for recordation.[61] A copy of the bylaws must also be attached to the recorded declaration, as well as to the first deed of each unit.[62] The bylaws must describe the form of administration of the condominium, the mechanics of unit owners' meetings, the manner of collecting assess-

54. Rohan, *supra* note 45, at 943-44.

55. *Id.* at 943.

56. A common restriction on alienation is the association's reservation of a "first right of refusal" to purchase the unit to prevent the sale of the unit to "undesirables." These restrictions appear to be limited only by constitutional prohibitions on discrimination. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (racial restrictive covenants are unconstitutional and will not be enforced by the courts).

57. Rohan, *Condominium: A Precis for Attorneys*, 39 OKLA. B.J. 939, 943 (1968).

58. It has also been suggested that condominium buyers obtain separate riders which insure them against any loss resulting from a holding that the project was not duly constituted. Rohan & Berger, *Condominium Workshop*, 48 ST. JOHN'S L. REV. 677, 731 (1974).

59. OKLA. STAT. tit. 60, § 502 (1981).

60. *Id.* § 514.

61. *Id.* § 516.

62. *Id.* § 519.

ments for common expenses, and various provisions relating to the maintenance and use of the common facilities.[63] Finally, the project's manager is required to keep records of expenses and receipts, and make the records available for unit owners' inspection.[64] These requirements give the purchaser a modest amount of basic information, and may provide some reassurance that the design of the facilities themselves is sound. However, they do not inform the buyer of potential areas of abuse, nor do they prevent any such abuses from occurring.[65]

B. *Federal Law*

1. Securities Regulation

The Securities and Exchange Commission (SEC) has acted on a number of condominium complaints where the condominium offering has been shown to be a security.[66] Under present SEC criteria, a condominium offering is within the agency's jurisdiction if it involves an arrangement such as a "rental pool"—a required rental agreement commonly employed in resort areas, under which absentee owners contribute their unit to an inventory which is to be rented by a managing agent to third parties on a revolving basis.[67] Most residential condominium offerings, however, are outside the purview of the SEC,[68] thus rendering the consumer protection afforded by federal securities law limited at best. Further, even in areas over which the agency has jurisdiction, "SEC officials freely admit that they are uncomfortable with condominium regulation and that their expertise is not particularly well suited to the special problems of real property interests."[69] Considering that compliance with securities regulation is also often unnecessarily burdensome for developers,[70] laws more precisely tailored to the condominium situation would serve all parties' interests more effectively.

63. *Id.* § 520.

64. *Id.* § 521.

65. *See* Note, *supra* note 8, at 190-95 (detailing Oklahoma Act's failure to prevent abuses).

66. Proxmire, *supra* note 17, at xvii.

67. *See* ROHAN & RESKIN, *supra* note 4, § 18.01. For a general discussion of the securities law implications of condominium marketing programs which feature a rental agency or rental pool, see *id.* § 18.01-.07.

68. Comment, *supra* note 30, at 652.

69. Proxmire, *supra* note 17, at xvii; *see also* H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 2.15 (1982).

70. Comment, *supra* note 30, at 653.

2. Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act[71] was primarily designed to protect purchasers[72] of unimproved "lots" of land[73] in a way the securities laws could not.[74] Regulations by the Department of Housing and Urban Development have since interpreted the Act's definition of "lot" expansively to include condominiums.[75] This Act, however, like the Securities Act, has limited application in the condominium context, as projects that the developer is not contractually bound to complete within two years are exempt from coverage.[76] Since two years is usually sufficient time to complete a project, developers can easily contract around the Act, rendering the statute's application more the exception than the rule.[77]

3. National Housing Act

The Federal Housing Authority (FHA) has significant power to regulate those condominium developers who seek the agency's aid under section 234 of the National Housing Act mortgage insurance program.[78] Again, however, the Act seldom applies in practice, as few developers presently attempt to obtain FHA approval,[79] and those developers wishing to avoid the Act's requirements can simply forego FHA mortgage financing.

IV. CONDOMINIUM LAW REFORM IN OTHER JURISDICTIONS

The inadequacy of "first generation" statutes and federal laws has led several states, especially those that have experienced rapid growth

71. 15 U.S.C. §§ 1701-1720 (1982).

72. *Id.* § 1703(a)(1).

73. Comment, *supra* note 30, at 658.

74. Note, *S.275—The Interstate Land Sales Full Disclosure Act*, 21 RUTGERS L. REV. 714, 724 (1967).

75. 24 C.F.R. § 1710.1 (1983) provides that any "undivided interest in land" is within the Act's scope.

76. 15 U.S.C. § 1702(a)(3) (1982).

77. Comment, *supra* note 30, at 662 ("All in all, the Interstate Land Sales Full Disclosure Act offers little protection to the condominium purchaser.").

78. 12 U.S.C. § 1715(y) (1982). The FHA has developed model condominium organizational documents which it requires developers to follow, allowing only those changes necessary to conform to the requirements of the individual project or local law. Note, *Real Property—Condominiums—Developer Self-Dealing*, 1975 B.Y.U. L. REV. 295, 304 n.57.

79. Note, *supra* note 78, at 304. It should be noted, however, that while condominium sales were originally in price ranges above the maximum insurance coverage of the FHA, an increasing number of condominiums are being built in the middle- and lower-income price ranges. In the future, therefore, FHA regulation may play a more important part in protecting the very consumers who need protection most. *See* ROHAN & RESKIN, *supra* note 4, § 9.02[2] at 9-7, 9.02[2][b][v].

in condominium ownership, to enact statutes more closely tailored to the needs of the market. Most of these "second generation" statutes[80] incorporate greatly increased disclosure requirements.[81] Some states also have established regulatory agencies to oversee condominium projects.[82]

A. *Disclosure*

The principle of disclosure, as applied to condominium transactions, is an adaptation and refinement of the doctrine of caveat emptor.[83] While disclosure does not shift the risk of a bad bargain from buyer to developer, it is intended to make the purchase decision a more enlightened one by providing the consumer with full and understandable information about the condominium offering.[84] In addition, disclosure is presumed to have a preventive effect on developer abuses.[85]

The legislature's task in drafting an effective disclosure statute is to determine which matters should be required to be disclosed and how such disclosure should best be made. Most modern disclosure statutes are founded on the requirement that the developer provide potential purchasers with all material information about the condominium prior to closing the sale.[86] Disclosure laws vary widely, however, in the types of information that must be disclosed. For instance, many states require the developer to furnish a detailed one-year projected budget for the association;[87] to provide copies of management, maintenance or op-

80. *See* UNIF. CONDOMINIUM ACT commissioners' prefatory note, 7 U.L.A. 125 (West Supp. 1983).

81. *See infra* notes 86-100 and accompanying text.

82. *See infra* notes 110-20 and accompanying text.

83. *See supra* notes 15-21 and accompanying text.

84. Proxmire, *supra* note 17, at xv; Blackburn & Melia, *supra* note 20, at 157.

85. Blackburn & Melia, *supra* note 20, at 157.

86. *See, e.g.*, CAL. BUS. & PROF. CODE § 718.504 (West Supp. 1982); GA. CODE ANN. § 85-1643e(b) (Supp. 1983); HAWAII REV. STAT. § 514A-62 (Supp. 1982); MICH. COMP. LAWS ANN. § 559.184a(1) (West Supp. 1983-84); VA. CODE § 55-79.90 (1981). *See also* UNIF. CONDOMINIUM ACT § 4-103(a), 7 U.L.A. 201 (Supp. 1983). The Uniform Condominium Act has been enacted, at least in part, in four states. *See* ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (Supp. 1982-83); MINN. STAT. ANN. §§ 515A.1-101 to .4-117 (West Supp. 1982); PA. STAT. ANN. tit. 68, §§ 3101-3414 (Purdon Supp. 1980); W. VA. CODE §§ 36B-1-101 to -4-115 (Supp. 1983).

87. *E.g.*, FLA. STAT. ANN. § 718.504(20) (West Supp. 1983); GA. CODE ANN. § 85-1643e(b)(6) (Supp. 1983); MICH. COMP. LAWS ANN. § 559.184a(1)(d)(iii) (Supp. 1983-84); VA. CODE § 55-79.90(a)(3) (1981); UNIF. CONDOMINIUM ACT § 4-103(a)(5), 7 U.L.A. 202 (Supp. 1983).

erating contracts,[88] or to disclose the existence of liens against the condominium.[89] Other provisions may compel disclosure of the developer's interest in entities with which the association has contracted,[90] or the time period in which the developer retains control.[91] Many states require the developer to call to purchasers' attention such problem areas as warranties,[92] restraints on alienation,[93] and insurance coverage.[94]

Statutes also differ significantly in the degree to which they prescribe the method of presentation of the disclosed material. Some states merely require that the developer provide the information.[95] Others specify the precise format to be used, including indexes and summaries,[96] or require the use of bold-faced type to highlight certain features of the transaction deemed important by the legislature.[97]

Compliance with disclosure provisions is made more certain by allowing the condominium purchaser a "cooling-off period" in which to rescind his sales contract. One type of statute gives the purchaser an absolute right to rescind within a certain time period before closing, regardless of whether the developer has complied with the disclosure laws.[98] Another approach conditions the availability of rescission on

88. *E.g.*, FLA. STAT. ANN. § 718.503(2)(e) (West Supp. 1983); GA. CODE ANN. § 85-1643e(b)(5) (Supp. 1983); UNIF. CONDOMINIUM ACT § 4-103(a)(4), 7 U.L.A. 201 (Supp. 1983).

89. *E.g.*, CAL. BUS. & PROF. CODE § 11010 (West Supp. 1982); FLA. STAT. ANN. § 718.504(8)(d) (West Supp. 1983); VA. CODE § 55-79.90(a)(6) (1981); UNIF. CONDOMINIUM ACT § 4-103(a)(8), 7 U.L.A. 202 (Supp. 1983).

90. VA. CODE § 55-79.90(a)(4) (1981).

91. *E.g.*, FLA. STAT. ANN. § 718.504(12) (West Supp. 1983); VA. CODE § 55-79.90(a)(3) (1981).

92. *E.g.*, HAWAII REV. STAT. § 514A-61(a)(3) (Supp. 1982); MICH. COMP. LAWS ANN. § 559.184a(1)(d)(v) (Supp. 1983-84); VA. CODE § 55-79.90(a)(8) (1981); UNIF. CONDOMINIUM ACT § 4-103(a)(10), 7 U.L.A. 202 (Supp. 1983).

93. *E.g.*, FLA. STAT. ANN. § 718.504(13) (West Supp. 1983); VA. CODE § 55-79.90(a)(3) (1981).

94. *E.g.*, UNIF. CONDOMINIUM ACT § 4-103(a)(15), 7 U.L.A. 202 (Supp. 1983).

95. *E.g.*, MICH. COMP. LAWS ANN. § 559.184a(1) (Supp. 1983-84); UNIF. CONDOMINIUM ACT § 4-103(a), 7 U.L.A. 201 (Supp. 1983).

96. *E.g.*, FLA. STAT. ANN. §§ 718.504(1), 718.504(3) (West Supp. 1983); GA. CODE ANN. § 85-1643e(b) (Supp. 1983) (also requiring that materials be bound or stapled together).

97. *E.g.*, FLA. STAT. ANN. § 718.504 (West Supp. 1983); GA. CODE ANN. § 85-1643e (Supp. 1983). In contrast, Virginia forbids the use of such "flagged" statements in disclosed documents unless the agency administering its condominium statute requires it. VA. CODE § 55-79.90(b) (1981).

98. *E.g.*, FLA. STAT. ANN. § 718.503(2) (West Supp. 1983) (fifteen day period); GA. CODE ANN. § 85-1643e(b) (Supp. 1983) (seven day period); HAWAII REV. STAT. § 514A-62 (Supp. 1982) (contract not binding until purchaser "has been given an opportunity to read the reports"); MICH. COMP. LAWS ANN. § 559.184(2) (Supp. 1983-84) (nine business days). VA. CODE § 55-79.90(a)(9) (1981) (ten day period); UNIF. CONDOMINIUM ACT § 4-108, 7 U.L.A. 208 (Supp. 1982) (fifteen days).

the developer's failure to make full and timely disclosure.[99] Many statutes require the developer to disclose the purchaser's right of rescission as well.[100]

As a remedy, disclosure is designed to be simple. The purpose of disclosure is to make the buyer aware of dealings that may affect his interests and help him in making a selection of the offerings on the market. Carefully designed disclosure requirements thus will disclose pertinent information in comprehensible fashion.[101] However, disclosure does the purchaser little good if the materials disclosed are as long and complicated as the condominium instruments.[102] Since under the caveat emptor doctrine the purchaser still bears the risk that the condominium will be a poor investment,[103] the utility of disclosure, particularly as the sole method of protecting the buyer, has been questioned.[104] The effectiveness of disclosure may be especially doubtful[105] in the sale of condominiums, as many buyers may be of middle or lower income and thus may be less able to afford professional assistance.[106] Taken to its logical conclusion, the harshness of the caveat emptor influence on disclosure may even lead to the conclusion that there is nothing intrinsically wrong in selling, for example, a condominium unit with exorbitant and complex developer "self dealings" provided the facts are "disclosed" in the condominium documents.[107]

Despite its limitations, disclosure remains a valid method to help

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99. *E.g.*, ILL. ANN. STAT. ch. 30, § 322.1 (Smith-Hurd 1981).

100. *E.g.*, GA. CODE ANN. § 85-1643e(c) (Supp. 1982); VA. CODE § 55-79.90(a)(9) (1981); UNIF. CONDOMINIUM ACT § 4-103(a)(11), 7 U.L.A. 202 (Supp. 1982).

101. Note, *supra* note 78, at 306 ("Disclosure should be simple and brief enough that the average purchaser, without benefit of counsel, will not be discouraged from reading it, yet clear and complete enough that he will be warned of potential pitfalls.").

102. See Rosenstein, *Inadequacies of Current Condominium Legislation—A Critical Look at the Pennsylvania Unit Property Act*, 47 TEMP. L.Q. 655 (1974).

> [S]tatutory requirements which merely provide that a prospective purchaser is entitled to receive a copy of all the condominium documents and an extensive prospectus almost certainly do not achieve the purpose of turning the average uninformed or misinformed purchaser into a knowledgeable one. The length and complexity of these documents is a virtual guarantee that they will go unread.

Id. at 692-93.

103. *See supra* notes 15-21 and accompanying text.

104. *See* Blackburn & Melia, *supra* note 20, at 157.

105. *See* Comment, *supra* note 30, at 667-68.

106. *See* Comment, *supra* note 30, at 649 & n.51 (noting that disclosure may be less effective in condominium sales than in securities transactions because security investors are more likely to rely on professional advice).

107. *See, e.g.*, Wechsler v. Goldman, 214 So. 2d 741 (Fla. Dist. Ct. App. 1968), in which plaintiff condominium owners sought to cancel or reform their leases, alleging that an exorbitant land lease in favor of the developer had been imposed on them. The court denied relief but recognized the need for legislation to prevent similar inequitable results. *Id.* at 744.

reduce the purchase of a condominium to a simple, more understandable transaction.[108] Extensive disclosure requirements can at least provide potential purchasers with more accurate and complete information, thus perhaps encouraging comparison shopping and leading to a degree of developer self-regulation.[109]

B. *State Regulatory Agencies*

A lack of confidence in the effectiveness of disclosure as the sole method of protection of condominium purchasers has led several states, most after experiencing rapid condominium expansion or widespread developer abuse,[110] to regulate condominium offerings through state agencies.[111]

In New York, condominiums fall within the scope of state securities laws as cooperative interests in realty.[112] A New York condominium developer must compile a mass of information to comply with the state's securities-like condominium disclosure requirements.[113] Two other states, Florida and Michigan, require developers to file documents with a government agency,[114] but do not call for active agency involvement in the condominium sales process.

By contrast, two states provide that a developer cannot offer units for sale until a state agency approves the offering.[115] Hawaii requires developers to submit a questionnaire disclosing "all material facts

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108. *But see* J. CRIBBET, *supra* note 16, at 258 ("Just as the sale of realty can never be made as simple as the transfer of personalty, neither can the sale of a condominium unit be reduced to the simplicity of the deed, mortgage, and closing statement to which individual homeowners are accustomed.").

109. Note, *supra* note 78, at 307.

110. ROHAN & RESKIN, *supra* note 4, § 3.05, at 3-9.

111. *See* CAL. BUS. & PROF. CODE § 11018.2 (West Supp. 1982); FLA. STAT. ANN. § 718.502 (West Supp. 1983); HAWAII REV. STAT. § 514A-31 (Supp. 1981); MICH. COMP. LAWS ANN. § 559.188 (Supp. 1982-83). N.Y. REAL PROP. LAW § 339ee (McKinney Supp. 1981-82). For a general discussion of state regulations, see ROHAN & RESKIN, *supra* note 4, §§ 3.05 (regulations governing condominium offerings), 8A.02 (statutory requirements for selling and marketing condominium projects); Minahan, *State and Federal Regulation of Condominiums*, 58 MARQ. L. REV. 55 (1975).

112. N.Y. REAL PROP. LAW § 339-ee (McKinney Supp. 1981-82).

113. *See* Comment, *supra* note 30, at 647-48 (author advocates agency regulation but notes that "much of the information contained in [New York's] offering statement is of marginal use at best.").

114. *See* FLA. STAT. ANN. § 718.501(1) (West Supp. 1983); MICH. COMP. LAWS ANN. § 559.242 (Supp. 1983-84).

115. *See* CAL. BUS. & PROF. CODE § 11018 (West Supp. 1982); HAWAII REV. STAT. § 514A-31 (Supp. 1981). *See also* UNIF. CONDOMINIUM ACT §§ 5-101 to 5-110, 7 U.L.A. 220 (Supp. 1982), an optional chapter for states desiring to establish similar agency systems. To date, no state has enacted these provisions.

available" concerning their condominium projects to the state Real Estate Commission.[116] The Commission investigates the project and issues a "public report" if it is satisfied that the project meets statutory requirements.[117]

The second state, California, uses a permit regulatory system which allows an administrative agency specific grounds for denial,[118] including inability to deliver good title, inability to demonstrate adequate financing, failure to show that the parcels are fit to be used as intended, and a showing that the sale would constitute misrepresentation, deceit or fraud.[119] Because a developer is subject to a possible fine of up to five thousand dollars and/or one year of imprisonment upon an attempt to offer condominiums without a permit,[120] the incentive for developer compliance is considerable.

V. A PROPOSAL FOR CONDOMINIUM LAW REFORM IN OKLAHOMA

Because Oklahoma does not yet have a great deal of condominium law, in contrast with such states as California, Florida, Hawaii, and New York, it may be premature to advocate that Oklahoma create a state agency to regulate condominiums. Other states have revised their condominium statutes to include greater disclosure requirements, while declining to impose on their taxpayers the burden of administrative procedure.[121]

Agency regulation, in addition to or as an alternative to disclosure, would offer some advantages. An agency could more rapidly adapt its regulations to deal with unforeseen problems which arise as condominium sales increase or with novel abuses by developers.[122] Agency powers could be extended to include the adjudication or arbitration of disputes, thus relieving purchasers from having to initiate lawsuits to enforce their rights.[123] Such agency powers can be justified, as they

116. HAWAII REV. STAT. §§ 514A-31, 514A-32 (Supp. 1981).

117. *Id.* § 514A-40. *But see* Comment, *supra* note 30, at 649 ("[T]here is no provision that the underlying project be fair and equitable. . . . Presumably, developers can continue to exploit unwary and unsophisticated purchasers so long as they do not misinform them as to material facts which are often buried within a mountain of incomprehensible legal documents.")

118. CAL. BUS. & PROF. CODE § 11018.2 (West Supp. 1982).

119. *Id.* § 11018.

120. *Id.* § 11023.

121. *See, e.g.*, GA. CODE ANN. § 85-1643e (Supp. 1983); ILL. ANN. STAT. ch. 30, § 322 (Smith-Hurd Supp. 1981).

122. Comment, *Missouri's Condominium Property Act: A Time For Change*, 42 MO. L. REV. 271, 283 (1977).

123. *See* Note, *supra* note 8, at 193.

have been in the securities field, as "an exercise of the power to enjoin inherently abusive practices."[124]

On the other hand, the agency alternative has many disadvantages. It would impose another layer of government with additional red tape. The added expenses of running such a bureaucratic office,[125] along with the costs of filing fees[126] and inspections,[127] would no doubt be passed along to taxpayers and consumers.

While the agency concept has support among scholars,[128] others argue that its major function of controlling developer abuses "can be handled as well by proper statutory safeguards."[129] An agency report supplementing disclosure by the developer would provide little consumer protection, as the buyer would still have to read and comprehend all materials to insure that the terms of the condominium project were acceptable. The ultimate decision, though possibly a more informed one, would still rest with the purchaser. Revision of the Unit Ownership Estate Act to require developers to disclose material information to prospective purchasers, coupled with the creation of an appropriate remedy for violations of the Act, should adequately serve the needs of consumers.[130]

In addition to revising the Unit Ownership Estate Act to require disclosure, it is suggested that the Oklahoma legislature consider making certain substantive changes in the law which may reduce the incidence of unethical developer practices. Such provisions might include:

1) requiring the developer to keep the buyer's deposit monies in an inviolate escrow;[131]

2) imposing specific warranties of habitability and workmanship;[132]

3) limiting the length and breadth of developer control before

124. *See* Comment, *supra* note 30, at 669.

125. Comment, *supra* note 122, at 283.

126. *See* CAL. BUS. & PROF. CODE § 11011 (West Supp. 1982) (not to exceed five hundred dollars, plus ten dollars for each lot in the subdivision).

127. *See* HAWAII REV. STAT. § 514A-34 (Supp. 1981) (not to exceed twenty dollars a day for each day consumed in the examination of the project plus reasonable first-class transportation expenses).

128. Comment, *supra* note 30, at 458-59; Rohan, *supra* note 3, at 595.

129. Comment, *supra* note 122, at 284 (recommending a combination of developer disclosure and buyer remedies).

130. *See id.* (similar proposal made for revision of Missouri Act).

131. *See, e.g.*, UNIF. CONDOMINIUM ACT § 4-110, 7 U.L.A. 211 (West Supp. 1983).

132. *See, e.g.*, FLA. STAT. ANN. § 718.203 (West Supp. 1983) (five year warranty of fitness); VA. CODE § 55-79.79(b) (Supp. 1983) (two year warranties).

power is turned over to the association;[133]

4) defining the parameters of risk of loss and the buyer's right to rescission of the purchase contract or abatement of the purchase price when condominium property other than the buyer's own individual unit is damaged or destroyed;[134]

5) as an alternative to merely requiring disclosure of all developer "sweetheart" contracts, specifically precluding the developer from leasing property or amenities to the association without approval of the unit owners;[135]

6) allowing the buyer a "cooling-off" period in which to rescind the contract, regardless of the developer's compliance with disclosure requirements, to provide the buyer valuable time to read and digest the information, perhaps with the advice of an attorney.[136]

A "cooling-off" period is strongly recommended, as it would help to impress upon the purchaser the importance of reading the materials disclosed. An increased likelihood that the condominium documents would be read might also help to discourage developers from attempting to conceal self-dealing provisions within the disclosed materials. Without a "cooling-off" period, even if the developer complies with all applicable statutes, the purchaser may be pressured to "sign on the dotted line" before he has time to read and understand the material. In such situations, disclosure laws would be useless.

VI. CONCLUSION

It is clear that Oklahoma's Unit Ownership Estate Act provides inadequate protection for condominium purchasers. Amending the Act to require full disclosure of all material facets of the transaction, to outlaw some of the ways in which purchasers have been taken advantage of in the past, and to allow the purchaser a grace period after disclosure in which to rescind the sales contract, will greatly increase consumer protection. Such an approach will also avoid for the present

133. *See, e.g.*, GA. CODE ANN. § 85-1633e (Supp. 1982) (enumerates four events after which the developer must surrender control of the condominium to the association).

134. A similar effect may be achieved by requiring the association to obtain adequate insurance against destruction of all condominium structures. *See* GA. CODE ANN. § 85-1639e(1) (Supp. 1982) (requiring association to obtain casualty insurance covering the "full replacement value" of all structures).

135. *See, e.g.*, FLA. STAT. ANN. § 718.122 (West Supp. 1982) (certain such recreational leases are presumptively unconscionable); *id.* § 718.302(3) (leases must be "fair and reasonable").

136. *See, e.g.*, GA. CODE ANN. § 85-1643e (Supp. 1982) (seven day period); UNIF. CONDOMINIUM ACT § 4-108, 7 U.L.A. 208 (West Supp. 1983) (fifteen day period).

the cumbersome and expensive process of agency regulation. As the condominium form of home ownership increases in popularity in the future, Oklahoma may be forced to reconsider the need for a regulatory agency.

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