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Home Businesses, Llamas and Aluminum Siding: Trends in Covenant Enforcement, 31 J. Marshall L. Rev. 443 (1998)

Katharine N. Rosenberry

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ARTICLES

HOME BUSINESSES, LLAMAS AND ALUMINUM SIDING: TRENDS IN COVENANT ENFORCEMENT

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KATHARINE N. ROSENBERRY*

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* Katharine Rosenberry is a professor at California Western School of Law in San Diego, California. She is a member of the American College of Real Estate Lawyers, the College of Community Association Lawyers, the American Law Institute and serves on the consultative group to the Restatement (Third) of the Law Property (Servitudes). She wishes to thank Wayne Hyatt for his thoughtful comments on this article.

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I. INTRODUCTION

In the past few years there have been several hundred reported decisions dealing with the enforcement of covenants.¹ These decisions have not only come from the few states that have a high concentration of housing controlled by covenants. They represent the current state of the law in the vast majority of states.

The fact that there have been so many covenant cases is less surprising when one considers that it has been estimated that there are approximately thirty-seven million people living in common interest communities, which include condominiums, planned communities and stock cooperatives.² Many millions more live in traditional housing that is controlled by covenants.³ Considering it is predicted that by the year 2000, twenty-five to thirty percent of Americans will live in common interest communities⁴ controlled by covenants, one can expect an increasing number of covenant cases to be decided.

This Article will survey recent decisions involving the enforcement of covenants and rules in community associations and identify trends courts are likely to follow in deciding future cases. The Article will discuss: 1) the courts' change of attitude regarding the moment at which covenants attach to land; 2) guidelines courts

1. The term covenant will be used throughout this article regardless of whether the remedy sought is money damages or an injunction. Historically, courts have distinguished between covenants and servitudes based upon the remedy sought. 9 RICHARD R. POWELL ET AL., POWELL ON REAL PROPERTY § 60.11 (1997). The prima facie case for enforcement was different depending on whether one was seeking a legal or equitable remedy. *Id.* Several treatises have been written dealing with the difference between the development of covenant and servitude law. This topic is beyond the scope of this article. See generally *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314 (Cal. 1995); Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179 (1982); Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1971); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (Tentative Draft No. 14, forthcoming May 1998), for a discussion of the history of covenant and servitude law.

2. The Community Associations Institute estimated that at the end of 1992, there were approximately 150,000 community associations housing 32 million people. COMMUNITY ASSOCIATIONS FACT BOOK (Clifford J. Treese ed., 1993). Based on income tax returns and U.S. Census Bureau information, Clifford Treese (the editor of the factbook) estimates that at the end of 1997, this number increased to approximately 175,000 community associations housing 37 million people. Conversation with Clifford J. Treese, Editor, *Community Associations Fact Book* (Feb. 26, 1998).

3. While this article discusses some cases involving traditional housing, most of the cases deal with homes in common interest communities. These include condominiums, planned communities and cooperatives.

4. Evan McKenzie, *Welcome Home. Do As We Say*, N.Y. TIMES, Aug. 18, 1994, at A23.

are using to determine if covenants should be enforced; 3) cases dealing with enforcement of specific covenants; and 4) cases dealing with defenses to covenant enforcement.⁵

II. COURTS ARE INCREASINGLY RECOGNIZING THE IMPORTANCE OF COVENANTS

Courts are increasingly recognizing the advantage of restrictions on land. This trend is evidenced by some courts' comments regarding the impact of covenants on land values, rulings making it easier for covenants to attach to land, and judicial modifications to the guidelines historically used to interpret covenants.

A. Courts Are Increasingly Likely to Find That Covenants Attach to Land

In the past couple of years, one of the most significant cases to address the point at which covenants attach to land has been *Citizens for Covenant Compliance v. Anderson*.⁶ This California Supreme Court decision involved owners who alleged that a residential use restriction prohibited the operation of a winery and the raising of llamas.⁷ Before discussing the merits of the case, the court noted that the law of restrictive covenants is not easy to decipher.⁸ It quoted Professor Rabin who stated:

The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.⁹

The court then noted that it had to venture into the wilderness of covenant law.¹⁰ Residents of California are fortunate the court did because first, it greatly simplified existing law even though it claimed to be following existing law,¹¹ and second, it applied its

5. Because the law of many states will be discussed, some of the trends identified may not exist in a particular jurisdiction.

6. 906 P.2d 1314 (Cal. 1995).

7. *Id.*

8. *Id.* at 1316.

9. *Id.* (quoting E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 489 (1974)).

10. *Id.*

11. This case involved covenants in a traditional subdivision. Under California law, servitude enforcement in common interest communities is controlled by the Davis Stirling Common Interest Development Act, CAL. CIV. CODE §1354(e) (West 1996 & Supp. 1997). See *Anderson*, 906 P.2d at 1329-41

ruling retroactively.

The court's decision was based on the following facts. In 1950, an owner of a parcel divided it into sixty lots.¹² In 1958, he recorded a declaration including restrictions which, among other things, purported to limit all the lots to residential use only and to limit the type of pets permitted on the lots.¹³ Then he sold the lots by conveying deeds that did not mention the restrictions.¹⁴ The defendants purchased one of these lots.¹⁵

The owner of the adjacent property also subdivided his property.¹⁶ He, too, recorded a declaration of restrictions and then sold the parcels without mentioning the restrictions in the deeds. The defendants purchased one of these lots as well.¹⁷ Thus, the defendants purchased two lots where neither the original grant deeds, nor any other deed in the chain of title, referred to the restrictions.¹⁸

The majority opinion identified the issue as follows: Is a declaration that 1) establishes a common plan for a subdivision by imposing restrictions on the lots, 2) describes the property to be bound, and 3) states that the declaration is to bind all owners, enforceable against owners in the subdivision, even if their deeds do not mention the restrictions?¹⁹ The court concluded that if the above criteria are met, the restrictions are enforceable.²⁰

Therefore, under California law if the declaration of covenants in a subdivision is recorded, the covenants are enforceable under common law.²¹ If a declaration for a common interest community is recorded, the restrictions are enforceable pursuant to statute.²² Covenants no longer need to be mentioned in every deed, or even in any deed, to be enforceable.²³ In arriving at its conclusion, the court stated that, "[m]utual restrictions on the use of property that are binding upon, and enforceable by, all units in a development are becoming ever more common and desirable."²⁴ This preference in favor of covenants is of relatively recent origin and is increasingly being recognized by courts throughout the country.

The Supreme Court of Georgia in *Timberstone Homeowners*

(Kennard, J., dissenting), for a discussion of previously existing law.

12. *Anderson*, 906 P.2d at 1316.

13. *Id.* at 1316-17.

14. *Id.* at 1317.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 1316.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Anderson*, 906 P.2d at 1316.

*Ass'n v. Summerlin*²⁵ also held that when a restrictive covenant is recorded, the purchaser is charged with legal notice of the restriction, even if it is not stated in his own deed.²⁶ Recordation implies knowledge, and knowledge implies acceptance.²⁷ Thus, an owner who challenged the association that filed a lien for delinquent assessments against his property was unable to persuade the court that he had not accepted the obligation to pay assessments.²⁸ The covenant was recorded, it related to the land because the money was used to maintain the common area and, consequently, it was enforceable.²⁹

Another case decided in 1996 by the Georgia Court of Appeals is legally consistent, but troublesome. In *Springmont Homeowners Ass'n v. Barber*,³⁰ a developer executed and delivered a security deed to a bank involving property that ultimately became a subdivision.³¹ The bank properly recorded the deed.³² Eighteen months later, the developer recorded a declaration of restrictions that required prior approval to construct a structure on the property.³³ The developer sold 302 lots and the bank foreclosed on the remaining 28 lots.³⁴ A person who purchased one of the twenty-eight lots built on it without seeking approval from the association.³⁵ When the association filed suit, the owner claimed that his property was not bound by the restrictions.³⁶ The court of appeals agreed with the owner. It reasoned that the bank took title before the restrictions in the declaration were imposed, and that the bank's *Acknowledgment and Consent* gave public notice that the Security Deed was not subject to the restrictions.³⁷

While the decision may be technically correct, it creates the very problem identified by the *Anderson* court. As a result of this decision, some of the lots in the community are bound by the restrictions while others are not. The case did not indicate if the result so frustrated the common scheme that none of the lots should be bound, but presumably this argument could be raised even by those who did agree to be bound by the covenants.

A question as to when a specific covenant, in this case one imposing assessments, attaches also was raised in *Mountain View*

25. 467 S.E.2d 330 (Ga. 1996).

26. *Id.* at 331.

27. *Id.* at 332.

28. *Id.*

29. *Id.*

30. 472 S.E.2d 695 (Ga. 1996).

31. *Id.* at 696.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

*Condominiums Homeowners Ass'n v. Scott*³⁸ and *Aluminum Industries Corp. v. Camelot Trails Condominium Corp.*³⁹ In *Mountain View*, owners of a condominium unit alleged that they were not obligated to pay assessments because their "unit" had not yet been constructed.⁴⁰ The court concluded that by accepting the deed, the owners were bound by the covenant requiring them to pay periodic assessments.⁴¹ There was nothing in the Arizona statute or the association's governing documents⁴² to suggest otherwise.⁴³

The court in *Aluminum Industries* relied on a Wisconsin statute to conclude that condominium property on which no construction has taken place is a "unit" and, thus, bound by all the covenants, including one providing for assessments for common expenses.⁴⁴ However, in this case the statute provided that assessments would be collected on unconstructed units unless the declaration provided otherwise.⁴⁵ The declaration provided that assessments would only be collected once the unit was constructed.⁴⁶ Thus, according to the declaration the covenant to pay assessments did not attach to the land prior to construction.⁴⁷

As demonstrated by the aforementioned cases, courts are more likely to find today, than in the past, that covenants attach to land. They will not make this finding, however, with respect to particular covenants if the declaration provides otherwise.

B. Courts Are Using New Guidelines Making It Easier to Enforce Covenants

Courts are not only increasingly likely to find that covenants attach to land, they are also making it easier to enforce covenants by adopting guidelines for interpretation that favor enforcement. Historically, courts have been reluctant to enforce covenants reasoning that covenants unreasonably restrain the free alienation of land. One can still find cases in which courts assert this position. For instance, one court stated that, "[w]hen interpreting a covenant, a court should strictly construe its language and all doubts and ambiguities are to be resolved in favor of natural rights and

38. 883 P.2d 453 (Ariz. 1994).

39. 535 N.W.2d 74 (Wis. 1995).

40. *Mountain View*, 883 P.2d at 455.

41. *Id.* at 458.

42. *See id.* at 456 (explaining that the governing documents of a condominium, planned community or cooperative include the Articles of Incorporation, if any, the declaration or proprietary lease, the bylaws and rules enacted by the board of directors or trustees).

43. *Id.* at 456-57.

44. *Aluminum Indus.*, 535 N.W.2d at 576-77.

45. *Id.* at 577.

46. *Id.* at 578.

47. *Id.* at 581.

against restrictions on the use of property.⁴⁸ Another court indicated that, "[v]alid covenants restricting the free use of land, although widely used, are not favored and must be strictly construed . . . [s]ubstantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property."⁴⁹ While yet another court explains that, "[a]lthough restrictive covenants are valid and will be recognized and enforced when established by contract between the parties involved . . . they are not favored in the law and will be strictly construed, with all reasonable doubts resolved in favor of the free and unrestricted use of land and against the restriction."⁵⁰

In these cases, however, the courts enforced the covenants because after they recognized that covenants are to be strictly construed, they made the following observations. "Nevertheless," said one court, "equity will enforce restrictions when they are reasonable and the intention of the parties is clear."⁵¹ Another court articulated that, "[w]here there is no inconsistency or ambiguity within a restrictive covenant, the clear and plain language of the covenant is enforceable by injunctive relief."⁵² Still another provided that, "this rule [strict construction] will not be applied to ignore or override the specific language or obvious purpose of a restriction."⁵³ Thus, while courts pay homage to history by stating that covenants are to be strictly construed, they increasingly find reasons to enforce covenants.⁵⁴

The Florida courts were among the first in the community association field to recognize the importance of enforcing covenants. In *Hidden Harbor Estates, Inc. v. Basso*,⁵⁵ the court stated that restrictions in the declaration:

[A]re clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.⁵⁶

This court's view of the importance of covenants as a land control

48. *Gerber v. Hamilton*, 659 N.E.2d 443, 445 (Ill. App. 1995).

49. *Woodward v. Morgan*, 475 S.E.2d 808, 810 (Va. 1996).

50. *Carpenter v. Davis*, 688 So. 2d 256, 258 (Ala. 1997).

51. *Woodward*, 475 S.E.2d at 810.

52. *Carpenter*, 688 So. 2d at 258.

53. *Gerber*, 659 N.E.2d at 445.

54. See James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1 (1989).

55. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).

56. *Id.* at 639-40.

device is very different from the critical way in which courts viewed covenants in the past.

The trend toward enforcing covenants in common interest communities was given additional strength by recent decisions in the Massachusetts Court of Appeals and the California Supreme Court. In *Noble v. Murphy*,⁵⁷ decided by the Massachusetts Court of Appeals in 1993, the managers of a condominium sought to remove two pet dogs from a unit owned by the defendant because the dogs were kept in violation of a bylaw restriction banning all pets.⁵⁸ In recognizing the validity of the bylaw restriction, the court reasoned that it would be inappropriate to apply close judicial scrutiny of restrictions that are fundamentally proper because it would deny the developer and owners desirable planning flexibility.⁵⁹ The court also cited *Hidden Harbor* for the proposition that restrictions in the declaration are "clothed with a strong presumption of validity."⁶⁰ As a result, even a restriction in the declaration that is, to a certain degree, unreasonable may still be upheld.⁶¹

The court also noted that efficiency favors enforcement of restrictions in the declaration and original bylaws unless they violate public policy or are unconstitutional.⁶² It prevents courts and the owners from having to engage in burdensome and expensive litigation involving the facts of each owner's unique reasons for violating the covenants.⁶³ Thus, the court affirmed the plaintiff's motion for summary judgment.⁶⁴

The California Supreme Court employed similar reasoning in *Nahrstedt v. Lakeside Village Condominium Ass'n*.⁶⁵ In *Nahrstedt*, a woman owned three cats that she never let out of her unit.⁶⁶ The declaration provided that unit owners could only keep domestic fish and birds.⁶⁷ The condominium association fined Mrs. Nahrstedt for violating the governing documents.⁶⁸ In response to the fine, Mrs. Nahrstedt filed suit alleging, among other things, that the covenant was not enforceable against indoor cats.⁶⁹

Although the court relied on California Civil Code § 1354, which provides that covenants are enforceable as equitable servi-

57. 612 N.E.2d 266 (Mass. App. Ct. 1993).

58. *Id.* at 267.

59. *Id.* at 269.

60. *Id.* at 270.

61. *Id.*

62. *Id.* at 271.

63. *Id.*

64. *Id.* at 268.

65. 878 P.2d 1275 (Cal. 1994).

66. *Id.* at 1277-78.

67. *Id.* at 1278 n.3.

68. *Id.* at 1278-79.

69. *Id.*

tudes unless unreasonable,⁷⁰ much of the reasoning the court used could have applied even if no relevant statute existed. The court began by recognizing that a stable and predictable living environment is crucial to the success of residential common interest developments.⁷¹ It further noted that covenants are the primary means of ensuring this stability and predictability.⁷² The court also acknowledged that stability of common interest communities is particularly important when one considers the large number of people living in them.⁷³

The California Supreme Court also reasoned that if the courts evaluated covenant validity according to each owner's particular facts and circumstances, there would be a proliferation of expensive and unnecessary litigation.⁷⁴ As a result, the court held that the validity of covenants contained in the declaration should only be evaluated in the context of the common interest community as a whole.⁷⁵ These cases indicate that there is a trend toward court enforcement of covenants in a declaration unless the covenant is unreasonable when viewed in the context of the common scheme as a whole.

While there is a trend toward enforcement of covenants, not all covenants will be enforced. The *Nahrstedt* court stated that covenants are unreasonable when they 1) violate public policy; 2) do not bear a rational relationship to the protection, operation or purpose of the common interest community; or 3) when the harm caused by enforcement of the restriction is so disproportionate to the benefit produced to the community that the covenant should not be enforced.⁷⁶ Restrictions that may violate public policy include restrictions that violate state and federal constitutions if state action were present, such as covenants prohibiting "for sale"⁷⁷ or political⁷⁸ signs anywhere and any time in a community.⁷⁹ In some circumstances, a constitutional covenant may violate public policy as where residential use restrictions prohibit all home businesses or home day care facilities.⁸⁰ These restrictions are discussed below in the sections dealing with specific covenants.⁸¹

The California Supreme Court's example of a covenant that

70. CAL. CIV. CODE § 1354 (West 1996 & Supp. 1997).

71. *Nahrstedt*, 878 P.2d at 1278.

72. *Id.*

73. *Id.* at 1282.

74. *Id.* at 1288.

75. *Id.* at 1290.

76. *Id.* at 1286-87.

77. *Linmark Ass'n v. Township of Willingboro*, 431 U.S. 85 (1977).

78. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

79. See *infra* Part IV for a discussion of constitutional defenses.

80. See *infra* Part III, Section A. for a discussion of use restrictions that are constitutional but may violate public policy.

81. See *infra* Part III.

bears no rational relationship to the operation or preservation of the community is *Laguna Royale v. Darger*.⁸² In this case, a covenant in the declaration required unit owners to obtain board approval of all sales or lease agreements.⁸³ The court held that the covenant was valid, but deemed the board's refusal to permit an owner to transfer his three-fourths interest to three other families to be unreasonable.⁸⁴ The court reasoned that there were no facts indicating successive ownership by four families would create problems not caused by the use of the residence by a single family.⁸⁵ Further, the declaration specifically permitted leasing for periods of ninety days or more.⁸⁶ The court explained that four families successively leasing the unit for ninety days would have no different impact than four families owning a unit and successively occupying it for ninety days.⁸⁷

It is important to note that the issue in *Laguna* did not concern whether the covenant provision requiring board approval of unit transfers was valid. Rather, the issue under examination was whether the exercise of board discretion in these particular circumstances was proper.⁸⁸ If the covenant precluded transfer of the unit to four or more people, the court probably would have enforced the covenant.

Finally, courts will not enforce covenants where the burden of enforcement substantially outweighs the benefits to the community. Assume a covenant requires owners to use a particular paint on the exterior of their homes which, as time passes, becomes extremely difficult to obtain. In these circumstances, a court is likely to conclude that it is unreasonable to require use of that particular paint and that a similar, more easily procurable paint would suffice.

Although courts do permit exceptions to the general principle favoring enforceability of covenants, it is important to emphasize the courts' insistence on covenant enforcement. The *Nahrstedt* court states that "common interest developments are a more intensive and efficient form of land use that greatly benefits society and expands opportunities for home ownership."⁸⁹ The court goes on to say that enforcing covenants is the "primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development."⁹⁰

82. 174 Cal. Rptr. 136 (Cal. Ct. App. 1981).

83. *Id.* at 138.

84. *Id.*

85. *Id.* at 146-47.

86. *Id.* at 147.

87. *Id.*

88. *Id.* at 144.

89. *Nahrstedt*, 878 P.2d at 1288.

90. *Id.* at 1287.

In 1995, the North Carolina Supreme Court continued the trend toward enforcement in *Raintree Homeowners Ass'n v. Bleimann*.⁹¹ In this case, a covenant in the declaration required owners to obtain permission from the architectural review committee prior to making changes to their property.⁹² The covenant specifically provided that the architectural committee could withhold approval for any reason, including purely aesthetic ones.⁹³ The court recognized that covenants granting architectural review committees broad discretion to approve all construction in the community are enforceable absent a showing that the committee acted in bad faith or arbitrarily.⁹⁴

The architectural review committee, in this case, refused to permit the defendant to install aluminum siding on his home even though the defendant introduced evidence that the siding was of high quality, and that it simulated the wood finishes of other houses in the neighborhood.⁹⁵ After visiting the defendant's property, the committee denied his request stating that the area was rustic and the siding would not age like the rest of the exteriors.⁹⁶ The jury concluded that the committee acted arbitrarily and the appellate court refused to permit enforcement of the board rule.⁹⁷ The North Carolina Supreme Court, however, held that because there was no evidence that the committee had acted arbitrarily or in bad faith, the case should not have gone to a jury.⁹⁸ The supreme court remanded the case to the trial court and ordered it to enter a judgment notwithstanding the verdict in favor of the association.⁹⁹

The Florida Court of Appeals faced a similar issue in *Korandovitch v. Vista Plantation Condominium Ass'n*.¹⁰⁰ Once again, the covenant at issue required unit owners to seek board approval before altering their units.¹⁰¹ When owners asked for permission to affix street numbers to the outside of their units, the board denied the requests.¹⁰² The court referred to previous Florida decisions in concluding that the restriction was clothed with a strong presumption of validity.¹⁰³ However, had the covenant specifically prohibited the owners from affixing street numbers to their units,

91. 463 S.E.2d 72 (N.C. 1995).

92. *Id.* at 73.

93. *Id.* at 74-75.

94. *Id.* at 75.

95. *Id.* at 74.

96. *Id.*

97. *Id.*

98. *Id.* at 75.

99. *Id.* at 76.

100. 634 So. 2d 273 (Fla. Dist. Ct. App. 1994).

101. *Id.* at 274.

102. *Id.*

103. *Id.* at 275.

the court probably would have upheld the board's decision. Because there was no such covenant in place, the court concluded that the board's action should be judged by the reasonableness standard and remanded the case.¹⁰⁴ While the court left the ultimate question of reasonableness for the lower courts to decide, the appellate court did question whether the association might have been overly conscientious in its "zeal for conformity."¹⁰⁵

Based on the aforementioned cases, a clear trend has developed among the courts since *Hidden Harbour*. The courts have recognized the importance of covenants in creating stability and enhancing property values. This trend not only appears in the case law, but also in the draft of the *Restatement (Third) of Property (Servitudes)*.¹⁰⁶ Section 3.1 of the preliminary draft of the Restatement provides that, "[a] servitude meeting the requirements of Chapter 2 is valid unless the arrangement it purports to implement infringes a constitutionally protected right, contravenes a statute or governmental regulation, or violates a public policy."¹⁰⁷ The Rationale of the Comment to this section states that "[t]he rule . . . recognizes the widespread acceptance and use of servitudes in modern land development by establishing the validity of servitudes as the norm, rather than the exception. This rule accords the same presumption of validity to servitude arrangements as that accorded other consensual commercial arrangements."¹⁰⁸ Thus, the trend favoring enforcement of covenants is likely to continue.

III. TRENDS IN ENFORCEMENT OF SPECIFIC COVENANTS AND RULES

As mentioned previously, since *Hidden Harbour*,¹⁰⁹ courts have distinguished between covenants appearing in the declaration or proprietary lease and rules enacted by the board. While courts increasingly presume covenant validity, they will more closely scrutinize board-enacted rules. Courts use one of two doctrines when evaluating board rules - the rule of reason and the business judgment doctrine.¹¹⁰ Because the cases in this section

104. *Id.*

105. *Id.* at 275.

106. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (Tentative Draft No. 14, forthcoming May 1998).

107. *Id.* § 3.1.

108. *Id.* § 3.1 cmt. a.

109. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).

110. See generally Wayne S. Hyatt, *The Business Judgment Rule and Community Associations: Recasting the Imperfect Analogy*, 1 CAI'S J. COMMUNITY ASS'N L. 2 (1998) (discussing the propriety of the business judgment rule "as a or the standard in common-interest community cases"); Jeffrey Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Doctrine*, 64 CHI.-KENT L. REV. 653 (1988) (explaining that the reasonableness test is used to restrict a board's discretion by permitting only those rules that

only apply the rule of reason, the business judgment doctrine will not be discussed. Under the reasonableness test, the court can invalidate a board's enforcement of a rule if it finds that: 1) the board exceeded the scope of its authority; 2) the rule was unreasonable; or 3) the board did not apply the rule in a manner consistent with the governing documents and the law.¹¹¹ Thus, when reading this section of the article, one should be conscious of the distinction between enforcement of covenants and rules and the different standards used by the courts.

A. Residential Use Restrictions

While the California Supreme Court in *Nahrstedt*¹¹² affirmed the presumption in favor of covenant enforceability, it did not extend this presumption to covenants that violate public policy.¹¹³ In the future, there are two areas in which courts may find that absolute restrictions violate public policy. Both areas involve nonresidential uses of units within the association.

1. Courts Are Likely to Find That Home Businesses with Minimal External Impact Do Not Violate Residential Use Restrictions

First, courts are likely to find that prohibitions against home businesses that have no external impact on the neighborhood violate public policy. After the 1994 earthquake in Los Angeles,¹¹⁴ businesses were encouraged to permit their workers capable of performing their jobs at home to do so.¹¹⁵ The goal was to reduce the number of drivers on the freeways, and it worked. Even in the absence of an earthquake, reducing traffic and reducing pollution associated with traffic is desirable.¹¹⁶

reasonably relate to an association's objectives while the business judgment doctrine imposes fiduciary duties upon association boards when creating and enforcing rules).

111. See *Korandovitch v. Vista Plantation Condominium Ass'n*, 634 So.2d 273, 275 (Fla. Dist. Ct. App. 1994) (stating that when a board promulgates a rule not provided for in the condominium declaration, it must meet a reasonableness requirement; arbitrary and capricious rules will not be upheld).

112. 878 P.2d 1275 (Cal. 1994).

113. See *id.* at 1287-88 (holding that although courts generally defer to the "wisdom of the agreed-to restrictions," courts will not enforce use restrictions that violate public policy).

114. See *The Magnitude 6.7 Northridge, California, Earthquake of 17 January 1994*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. 366 (Oct. 21, 1994), available in 1994 WL 12777756 (stating that the earthquake occurred in Northridge, California at 4:30 a.m. on January 17, 1994).

115. See Julian Beltrame, *Los Angeles to Pick up the Pieces; Quake's Toll at 40 Dead and 1,800 Injured; About 20,000 Still Homeless*, MONTREAL GAZETTE, Jan. 19, 1994, at A8 (noting that local officials pleaded with residents to remain in their homes).

116. See Michael Cabanatuan, *Telecommute/Traffic Provides Incentive for Working From Home*, THE SAN FRANCISCO CHRON., Sept. 11, 1997, at A15 (explaining that after incidents like earthquakes, more employers encourage

Also, considering the expense and limited supply of competent childcare providers and facilities,¹¹⁷ permitting people to work at home benefits children and society. Having a parent in the home when a child comes home from school is obviously desirable for society.¹¹⁸

At this point, whether one considers home businesses to be desirable or not may be irrelevant. It has been estimated that by the year 2014, eighty percent of Americans may work in mobile or satellite telecommuting centers, and that the vast majority of this work will be done from home office environments.¹¹⁹ Therefore, the challenge for many associations will be to create guidelines for deciding when home businesses are permitted and when they are not.

Recent cases do not offer much guidance for the creation of such guidelines. In *Houck v. Rivers*,¹²⁰ a house, carriage house and kitchen house were part of a three-unit condominium with covenants restricting the use of the units to residences, offices and studios used in connection with home occupation.¹²¹ One owner operated a bed and breakfast that the court held to be in violation of the covenant.¹²² The owner argued that the use was consistent with the zoning definition of home occupation, but the court concluded that the covenant, not zoning, controlled.¹²³ A bed and breakfast clearly has substantial external impacts, and thus is not likely to fall within even liberal guidelines for home businesses.

In *Gerber v. Hamilton*,¹²⁴ the court provided a little more guidance. In this case, a covenant in a residential subdivision prohibited commercial uses but permitted an owner to do professional work in his or her home as long as no signs or advertising

their employees to work out of the home to help reduce stress related to traffic congestion which, in turn, reduces the amount of traffic).

117. See Marian Wright Edelman, *Clinton's Child-Care Initiative Is Good News for U.S. Children*, CHI. TRIB., Feb. 1, 1998, at 9 (acknowledging the "daunting" cost and poor quality of day care facilities and providers).

118. See *id.* (observing that over five million children return to an empty home after school each day).

119. Robert Treadway, Community of the Future, Remarks Before the Community Associations Institute (May 2, 1997). In making his estimate, Treadway relied on the results of two different studies presented to the World Future Society in July 1996. *Id.* The first was from a population study conducted at George Washington University under the direction of William Halal. *Id.* The Institute for Alternative Futures did the second study in Arlington, Virginia. *Id.*

120. 450 S.E.2d 106 (S.C. Ct. App. 1994).

121. *Id.* at 107-08.

122. See *id.* at 108 (finding that "the particular use of her [the owner's] home as a bed and breakfast operation is not permitted by the Master Deed . . .").

123. *Id.*

124. 659 N.E.2d 443 (Ill. App. Ct. 1995).

announced the activity.¹²⁵ The defendants operated a beauty salon in her home three and one-half days a week resulting in thirty-five to forty customer vehicles entering and leaving the neighborhood on a weekly basis.¹²⁶ Hair dryers and clients also produced excessive noise.¹²⁷ The court concluded that the defendants went beyond merely engaging in professional work at home and, instead, set up a business in violation of the covenants.¹²⁸ It reasoned that "professional work" applied to owners bringing work home or performing certain at-home professions while preserving the residential character of the neighborhood.¹²⁹

Therefore, if the community has a residential use restriction, associations should consider creating guidelines that permit home business that preserve the residential character of the neighborhood and have limited external impact on the neighborhood. For example, if a business is conducted using computers and phone lines and has no external impact on the neighborhood, the business probably should be allowed. If a business, such as a person offering piano lessons eight hours a day, brings significantly more traffic, noise and congestion to an already densely populated condominium community, the business should be prohibited. It is important for the community to create its own home business guidelines before the matter arises in litigation where a court is likely to impose its own guidelines.

2. Courts Are Likely to Find Some Home Day Care Businesses Do Not Violate Residential Use Restrictions

A second area in which associations should at least consider guidelines, if the courts have not already imposed them, is the area of home day care. The absence of adequate day care facilities has received much attention recently.¹³⁰ When one considers this increasing publicity and the fact that several states already permit some forms of home day care, even when covenants prohibit non-residential uses,¹³¹ courts presently interpreting residential use restrictions to ban day care facilities are likely to modify their holdings.

125. *Id.* at 444.

126. *Id.*

127. *Id.*

128. *Id.* at 445.

129. *Id.* at 446.

130. See Richard Wolf, *Childcare Tested as a Solution to Welfare*, USA TODAY, Jan. 16, 1997, at A4 (discussing child care concerns with respect to quality and cost).

131. See generally Annotation, *Children's Day-Care Use as Violation of Restrictive Covenant*, 29 A.L.R. 4th 730 (1996) (observing that numerous courts have allowed home daycare facilities even where covenants restrict use of homes to residential purposes).

*Stewart v. Jackson*¹³² and *Metzner v. Wojdyla*,¹³³ both decided in 1994, demonstrate the present split of authority in many jurisdictions. In *Stewart*, one can guess the outcome of the case in the first paragraph of the decision. The court begins by stating, “[w]e are mindful of the impact of our decision on today’s society”¹³⁴ In this case, a woman operated a day care facility for four children plus her own child and her nephew.¹³⁵ Because of the small number of children for which she cared, she was not required to obtain a day care license from the state.¹³⁶

The court referred to the particular facts of the case and changes in societal conditions in concluding that home day care that did not necessitate state licensing did not violate the residential use restriction.¹³⁷ First, in this case, only three children were driven to the day care facility.¹³⁸ Although the traffic increased somewhat when the children were dropped off, the impact was slight.¹³⁹ The children only occasionally played outdoors.¹⁴⁰ Even if the children had played outside, their behavior was consistent with normal residential use.¹⁴¹ Further, four other people in the neighborhood provided day care in their homes, and the residential use restriction had previously been violated by the operation of home business involving a toy wholesaler, a part-time computer consultant and a woman giving piano lessons.¹⁴²

Based on these facts one might conclude that home day care will be limited to Indiana when facts indicate that residential use restrictions have already been violated. To so conclude, however, would be a mistake. While the *Stewart* court discussed particular facts, it also considered Indiana public policy that recognizes the advantages of children being cared for in a home setting and societal conditions that have changed since covenants were first enacted.¹⁴³ It stated:

We note that these particular restrictive covenants became effective in 1978 when many mothers did not work outside the home and cared for their children in their own homes. We believe, as did Jus-

132. 635 N.E.2d 186 (Ind. Ct. App. 1994).

133. 886 P.2d 154 (Wash. 1994).

134. *Stewart*, 635 N.E.2d at 188.

135. *Id.* at 192 (citing *Metzner*, 882 P.2d at 155).

136. *Id.* at 190.

137. *See id.* at 193 (“[w]eighing the minimal obtrusiveness and the public policy supporting home day care against the legal meaning of residential use covenant here, we find that unlicensed home daycare is a residential use and . . . did not violate the restrictive covenants”).

138. *Id.*

139. *Id.*

140. *Stewart*, 635 N.E.2d at 193.

141. *Id.*

142. *Id.* at 188.

143. *Id.* at 193.

tice *Krahulik* in *Clem II*, that covenants restricting the use of property to residential purposes and barring commercial use were not intended to prohibit unlicensed home day care. Because it could not be foreseen that day care homes would become so prevalent in light of the significant increase in the number of two working-parent households, we cannot find that these restrictive covenants contemplated the exclusion of unlicensed day care homes as commercial businesses.¹⁴⁴

Therefore, even if the residential use restriction had not been violated in the past, it is safe to conclude the court would have held that unlicensed home day care did not violate the residential use restriction.

The Washington Supreme Court in *Metzner* held that a licensed daycare facility violated a residential use restriction.¹⁴⁵ Because *Stewart* dealt with an unlicensed facility and *Metzner* with a licensed facility, one might conclude that this is the only reason the courts arrived at opposite holdings. This distinction is too superficial, however.

In *Metzner*, the defendants were required to obtain a license to provide home day care for ten or fewer children.¹⁴⁶ They generally provided home care for four children in addition to their own two children.¹⁴⁷ Thus, the defendants in both *Metzner* and *Stewart* were taking care of approximately the same number of children.¹⁴⁸ The defendants in both cases also charged for their services.¹⁴⁹ Therefore, the two cases are factually similar. The difference between the two holdings is that the *Stewart* court emphasized the public policy in favor of home day care,¹⁵⁰ while the *Metzner* court reasoned that there should be a bright line.¹⁵¹ The *Metzner* court concluded that the defendants were clearly operating a business and, therefore, violated the restriction limiting use of the property to residential uses only.¹⁵²

As courts recognize the societal problem of providing adequate child care in home settings and as the national agenda moves toward specific proposals for getting families off welfare, it is likely that courts will try to find exceptions for some home day care. The exceptions are less likely to be based on whether or not a license is required and more likely to be based on the external impact on the neighborhood. Therefore, those communities with

144. *Id.* The court left the issue of licensed home daycare to be decided by a future Indiana court. *Id.* at 190.

145. 886 P.2d 154, 158 (Wash. 1994).

146. *Id.* at 155, 156.

147. *Id.* at 155.

148. *Id.*; *Stewart*, 635 N.E.2d at 192.

149. *Stewart*, 635 N.E.2d at 193; *Metzner*, 886 P.2d at 157.

150. *Stewart*, 635 N.E.2d at 193.

151. *Metzner*, 886 P.2d at 157.

152. *Id.* at 158.

covenants prohibiting nonresidential uses should be thinking about guidelines for regulating home day care that are based on factual distinctions between traditional residences and home day care facilities.

For example, noise guidelines will be difficult to impose for home day care facilities with a small number of children. There is little difference, if any, between the noise generated by a family with four small children and a day care with four small children. This same principle should apply to use of common areas. Four children from a family using the common area are unlikely to have a substantially different impact upon the common area than four children from a day care facility.

On the other hand, operating a home day care may create unique liability in the common area for associations. If it does, it would be reasonable for the association to require the operator of home day care to pay for additional insurance.

Because the guidelines are likely to appear in the form of board rules rather than covenants, they are likely to be subject to greater scrutiny than covenants. Thus, they should be enacted in accordance with the governing documents and law. They should also be reasonable as well as reasonably applied. A court is unlikely to find a rule reasonable if it discriminates against home day care facilities unless the particular problem the rule addresses only arises as a result of the home day care arrangement.

B. Rental Restrictions Are Likely to Increase in Number and Variety

Another distinct trend involves the desire of many community associations to control the ability of owners to rent their units and to control the rights of renters. Whether a particular approach will succeed depends on the association's authority to enact the particular restriction, the reasonableness of the restriction and whether the association followed reasonable procedures in enforcing the restriction.

One approach is to control leasing by imposing an additional charge on those persons leasing units or lots. In *Miesch v. Ocean Dunes Homeowners Ass'n*,¹⁵³ the board imposed a "user fee" on tenants who rented for fewer than twenty-eight days.¹⁵⁴ The fee was used to pay association employees who registered renters and guests, dispensed orientation packets and informed renters about the facilities.¹⁵⁵ The association also used the money to provide security services to enforce the association's rules regarding use of

153. 464 S.E.2d 64 (N.C. Ct. App. 1995).

154. *Id.* at 66.

155. *Id.*

the common area.¹⁵⁶

The court found that the user fees violated two provisions of the governing documents.¹⁵⁷ First, the governing documents stated that the owners had an easement to use the common area, and the court found that the user fee interfered with the owners' easement.¹⁵⁸ Second, the governing documents provided that common expenses were to be assessed against owners in proportion to their ownership interest.¹⁵⁹ The user fee was based on short term rental, not ownership interest, so the court concluded that the board exceeded the scope of its authority in enacting the user fee and declared the user fee invalid.¹⁶⁰

The board in *Graham v. Board of Directors of Riveredge Village Condominium Ass'n*,¹⁶¹ tried a different approach in controlling renters. It passed a rule requiring minimum one month leases and fixing the monthly assessment for an owner in any rental month at \$200, rather than the normal \$100 monthly assessment.¹⁶²

The board relied on *Beachwood Villas Condominiums v. Poor*,¹⁶³ which held that the board of a condominium did have authority to enact rental restrictions.¹⁶⁴ The court, however, held that *Beachwood* was inapplicable because the declaration involved in the litigation granted the board authority to regulate the use of the units.¹⁶⁵ Because the declaration in *Graham* gave the board authority to regulate the common areas and said nothing about the units or the limited common areas, the Tennessee Court of Appeals found that the board exceeded the scope of its authority when it enacted the rule.¹⁶⁶ The court further found that even if the board had the authority to enact such a rule, the rule was unreasonable because the community was a vacation community and there was little or no demand for monthly rentals.¹⁶⁷ If the rule were enforced, it would have the practical effect of eliminating an

156. *Id.*

157. *Id.* at 67.

158. *Id.*

159. *Miesch*, 464 S.E.2d at 67.

160. *Id.* at 68.

161. No. 03A01-9404-CH-00137, 1994 WL 597009, at *1 (Tenn. Ct. App. Nov. 2, 1994).

162. *Id.* at *1.

163. 448 So. 2d 1143 (Fla. Dist. Ct. App. 1984).

164. *Id.* at 1145.

165. *Graham*, 1994 WL 597009, at *3.

166. *Id.* at *6-7.

167. *Id.* at *4. The court also noted that declaration provided that no amendment could discriminate against any unit owner or class of unit owner. *Id.* So, even if the provision restricting leasing had been adopted by amendment to the declaration and presumably not been subjected to the reasonableness test, it still would have been invalid.

owner's right to rent.¹⁶⁸

In *Breezy Point Holiday Harbor Lodge-Beachside Apartment Owners' Ass'n v. B.P. Partnership*,¹⁶⁹ however, the board was successful in controlling renters.¹⁷⁰ In this case, the owners passed an amendment to the declaration providing that owners could rent units only as permitted by the board.¹⁷¹ The board then enacted a rule prohibiting owners from leasing their units more than fourteen days per year.¹⁷² The defendants argued that the rental restriction was a restraint on alienation and, therefore, void.¹⁷³ The court disagreed.¹⁷⁴ It concluded that the restriction was a use restriction, not a restraint on alienation, and even if it was a restraint on alienation, it was a reasonable means of addressing the problems created by renters.¹⁷⁵

A restriction on leasing also appeared in the contract and by-laws of a cooperative located in Washington D.C. In *Kelley v. Broadmoor Cooperative Apartments*,¹⁷⁶ the contract prohibited apartment-leasing arrangements entered into without the written consent of the cooperative.¹⁷⁷ The bylaws provided that the board's control extended to leasing by an owner.¹⁷⁸ The board decided to impose a five percent surcharge on the monthly assessment of any owner who leased a unit.¹⁷⁹ The five-percent charge escalated to twenty-five percent over a period of five years.¹⁸⁰

The court concluded the surcharge was reasonable.¹⁸¹ The board's goal was to protect the owners' investment by encouraging owner occupancy.¹⁸² The court noted that the contract specifically gave the board authority to protect the owners' investment, and the surcharge accomplished this by protecting the homestead exemption and guaranteeing that the co-op would be eligible for Fannie Mae financing.¹⁸³

Thus, if a specific restriction on leasing appears in the declaration, the courts are likely to find it valid. This is consistent with the trend in favor of covenant enforcement. If the board, pursuant to authority in the declaration, enacts the restriction, and the

168. *Id.*

169. 531 N.W.2d 917 (Minn. Ct. App. 1995).

170. *Id.* at 918-20.

171. *Id.* at 918.

172. *Id.*

173. *Id.* at 919.

174. *Id.*

175. *Breezy Point*, 531 N.W.2d at 919.

176. 676 A.2d 453 (D.C. 1996).

177. *Id.* at 455.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 461.

182. *Kelley*, 676 A.2d at 455.

183. *Id.* at 460.

court applies the reasonableness test, it is likely to evaluate whether the rule is reasonable by considering the impact on the owners. If the declaration contemplates that the owners can lease their units, and the practical effect of a board rule is to eliminate all leasing, then the court is more likely to consider the rule unreasonable.

Yet another approach to controlling renters is found in the California case of *Liebler v. Point Loma Tennis Club*.¹⁸⁴ In this case, an owner of a condominium leased his unit, after which, both he and his tenants used the tennis courts and other common areas.¹⁸⁵ The association passed a rule providing that owners who leased their units transferred the right to use the common areas to their tenants.¹⁸⁶

The court cited *Nahrstedt*¹⁸⁷ for the proposition that covenants are presumed to be enforceable, and found that the declaration gave the board authority to enact the rule for the following reasons: 1) the declaration provided that an owner could not sever his separate interest in his unit from his interest in tenancy-in-common in the common area;¹⁸⁸ 2) it specifically gave the owners authority to delegate their rights of enjoyment to the common area to tenants who reside on the property, thereby implying those rights would be delegated;¹⁸⁹ and 3) it gave the board authority to enact rules regarding the common area.¹⁹⁰

Having found that the board had authority to enact the rule, the court next examined whether the rule was reasonable.¹⁹¹ It

184. 47 Cal. Rptr. 2d 783 (Cal. Ct. App. 1995).

185. *Id.* at 785.

186. *Id.* at 786.

187. 878 P.2d 1275, 1277 (Cal. 1994).

188. *Liebler*, 47 Cal. Rptr. 2d at 787. The court distinguished an earlier case, *MaJor v. Miraverde Homeowners Ass'n*, 9 Cal. Rptr. 2d 237 (Cal. Ct. App. 1992), a case involving an association that prohibited an owner who leased his unit from using the tennis court. The court stated that a central distinguishing point was that in *Liebler*, unlike *MaJor*, the declaration contained a prohibition on severing the interest in the unit from the interest in the common area. *Id.* at 787. California Civil Code § 1358 prohibited severance of the two interests at the time the *MaJor* case was decided. The real distinctions between the two cases were factual. *Id.* In *MaJor*, the tenant was handicapped and unable to use the tennis courts, the tenant was the owner's mother and there were facts indicating the association discriminated against the particular owner and tenant. *MaJor*, 9 Cal. Rptr. at 239, 249. *Liebler* is a better-reasoned decision.

189. *Liebler*, 47 Cal. Rptr. 2d at 787.

190. *Id.*

191. *Id.* at 788. It is interesting to note that the court used the *Nahrstedt* standard which provides that a covenant is presumed to be reasonable unless, when viewed in the context of the common interest community as a whole, it is arbitrary, against public policy or the burden is so disproportionate to the benefits that it should not be enforced in evaluating the board enacted rule. Rules are generally judged by a reasonableness standard and are not cloaked

concluded that the rule was reasonable.¹⁹² The court noted that the number of tennis courts constructed in any particular common interest community is likely to be based on the proposed number of occupants.¹⁹³ To permit both owners and tenants to use the common areas would overburden the facilities.¹⁹⁴ Finally, the court found that the board enforced the rule reasonably.¹⁹⁵ It did not single out the defendant for enforcement.¹⁹⁶ All other non-occupying owners complied with the rule and, upon request, voluntarily gave up the card that provided access to the common area.¹⁹⁷

There is every indication that associations will continue to try to place restrictions on the owners' right to lease and on the leasing tenants.¹⁹⁸ To determine if these restrictions will be upheld, one should first ascertain whether the specific restriction appears in the declaration or proprietary lease. If it does not, one should next evaluate whether the covenants give the board authority to control leasing or tenants in the particular manner the board is attempting. For example, if the board only can control the common area, and not the units, it may not be able to restrict leasing of the units.

If the declaration does authorize the board to make rules regarding leasing, then the association should next assess whether the restriction is reasonable and reasonably applied. For example, it may be unreasonable to restrict short term leasing in a vacation area, whereas it may be reasonable to totally prohibit leasing in a redevelopment project where the goal is to provide a stable community of owner-occupied units for low and moderate income persons.¹⁹⁹ Regardless of whether the court presumes the restriction to be valid or subjects it to stricter scrutiny, it is in the best interests of the community to enact reasonable rules and apply them reasonably.

Finally, the rules must be reasonably applied. If a court believes that the board enacted the restriction to harm a particular owner, the court is unlikely to enforce the restriction.²⁰⁰

with the same presumption of validity as covenants.

192. *Id.*

193. *Id.* at 789.

194. *Id.*

195. *Liebler*, 47 Cal. Rptr. at 789.

196. *Id.*

197. *Id.*

198. Some declarations give the board the same authority the owner has to evict a tenant for violation of the covenants. The author was unable to find any reported cases addressing this issue. Because the provision exists in so many declarations, it is likely to be challenged in the near future.

199. See *City of Oceanside v. McKenna*, 264 Cal. Rptr. 275, 279 (Cal. Ct. App. 1989) (holding that restrictions were reasonable in view of the city's "redevelopment goals of providing a stabilized community of owner-occupied units for low and moderate income persons").

200. *MaJor*, 9 Cal. Rptr. 2d at 242.

C. *Architectural Restrictions Are Likely to Hold Few Surprises*

1. *Courts Will Continue to Enforce Covenants That Grant Broad Discretion to Architectural Committees and Will Continue to Give Terms Their Plain Meaning*

In the past few years, the decisions involving architectural guidelines have held few surprises. Courts have continued to enforce covenants that grant broad discretionary power to architectural review committees.²⁰¹ For example, in *Raintree Homeowners Ass'n v. Bleimann*,²⁰² the North Carolina Supreme Court upheld a covenant that permitted the architectural committee to deny an owner's request to make an improvement based on any grounds, including purely aesthetic ones.²⁰³

Courts also have continued to give the covenant's words their plain meaning. For example, in *Carpenter v. Davis*,²⁰⁴ the court concluded that when a covenant uses the term "dwelling" it means those areas in which a person dwells and does not include a garage or a storage room.²⁰⁵ In *Heck v. Parkview Place Homeowners Ass'n*,²⁰⁶ the court concluded that a trellis, that was not attached to the house was not an awning or shutter.²⁰⁷ In *Zinda v. Krause*,²⁰⁸ the court concluded that a covenant which stipulated that owners could not do anything that would adversely affect the vegetation meant just that.²⁰⁹ An owner could not remove vegetation to construct a deck, place shredded bark on the vegetation thereby inhibiting its growth, or drive over the vegetation.²¹⁰

When the meaning of a covenant is unclear, a court may look to definitions in a statute or ordinance for guidance in interpreting the meaning of that covenant. In *Brown v. Perkins*,²¹¹ the court was obligated to look to the ordinances because the documents incorporated the ordinances by reference.²¹² In this case, the covenant permitted both one and two story structures, but provided

201. See generally John D. Perovich, Annotation, *Validity and Construction of Restrictive Covenant Requiring Consent to the Construction on Lot*, 40 A.L.R.3d 864 (1972 & Supp. 1997) (discussing cases dealing with restrictive covenants that require owners to seek approval of construction plan).

202. 463 S.E.2d 72 (N.C. 1995).

203. *Id.* at 75. The covenants also provided that the committee was the sole arbiter. *Id.*

204. 688 So. 2d 256 (Ala. 1997).

205. *Id.* at 258.

206. 642 So. 2d 1201 (Fla. Dist. Ct. App. 1994).

207. *Id.* at 1202.

208. 528 N.W.2d 55 (Wisc. Ct. App. 1995).

209. *Id.* at 61.

210. *Id.*

211. 923 P.2d 434 (Idaho 1996).

212. *Id.* at 438.

different set back requirements for each.²¹³ The question raised was whether a garage with a bonus room over it was a one or two story structure.²¹⁴ Although neither the covenants nor the architectural guidelines defined the term "story," the ordinance did.²¹⁵ The court concluded that because the documents did not define "story," and the definition of "story" did exist in the ordinance at the time the documents were drafted, the definition contained in the ordinance controlled.²¹⁶

2. *Modular Housing and Mobile Homes Are Less Likely to Violate Restrictions Prohibiting Trailers and Temporary Structures*

Definitions that gave courts trouble in 1995 and 1996 included the words "trailer" and "mobile home." These cases indicate that in the future, courts may be more reluctant to determine that modular homes and mobile homes that resemble permanent homes violate covenants prohibiting trailers and mobile homes.

The covenants in *Newman v. Wittmer*,²¹⁷ *Beacon Hills Homeowners Ass'n v. Palmer Properties, Inc.*²¹⁸ and *Benner v. Hammond*²¹⁹ prohibited trailers and temporary structures. In deciding whether a double-wide mobile home was prohibited, both courts looked to the characteristics of the structure, the applicable statutes and the financing arrangement.²²⁰

In *Newman*, the Montana Supreme Court reiterated the following factors set forth by the district court in concluding that the home was a mobile home which violated the covenants: 1) the owners completed a "Mobile/Manufacture Home Movement Declaration" before moving their home; 2) the home was described as a "Manufactured Home by Fleetwoods"; 3) it required a Montana Motor Vehicle Certificate of Title; 4) it was listed as a "trailer" on the Certificate of Title; 5) it was not on a permanent foundation; and 6) it was taxed as personal property.²²¹

213. *Id.* at 435.

214. *Id.* at 436.

215. *Id.* at 438.

216. *Id.*

217. 917 P.2d 926 (Mont. 1996).

218. 911 S.W.2d 736 (Tenn. Ct. App. 1995).

219. 673 N.E.2d 205 (Ohio Ct. App. 1996).

220. *See Newman*, 917 P.2d at 932 (holding that the structure was a mobile home after examining the statutory definitions of "mobile home" and the characteristics of the structure itself); *Benner*, 673 N.E.2d. at 209 (determining that the structure involved was not prohibited due to its permanence, the fact that a mortgage had been acquired to finance it and because it was taxed as real property); *Beacon*, 911 S.W.2d at 738 (finding the structure was prohibited because of its structural characteristics).

221. *Newman*, 917 P.2d at 930. It should also be noted that in *Newman*, unlike *Beacon* and *Benner*, the covenant specifically prohibited mobile homes. *See id.* at 928 (pointing out that the covenant included mobile homes among the restricted structures); *See also Benner*, 673 N.E.2d at 206 (reciting rele-

In *Beacon*, the mobile home was placed on a foundation, and the owner proposed to build a garage and porch.²²² The mobile home, however, had a vehicle identification number and could be hauled away from the site in the same manner it had been brought to the site.²²³ As a result, the Tennessee Court of Appeals concluded that a double-wide mobile home was a temporary structure.²²⁴

Although the court held that the mobile home was a trailer, it appeared reluctant to do so.²²⁵ The court noted that because manufacturing methods and terminology have changed over the past twenty years, it was difficult, using today's technology, to interpret words like "trailer," "mobile home" and "manufactured home" that were drafted many years ago.²²⁶ The court commented that it would be beneficial if the Supreme Court or legislature gave some guidance on the definition of words that have evolving meanings.²²⁷

The court in *Benner* also recognized the change in the characteristics of trailers over the years and identified the competing arguments. On the one hand, today's mobile homes still arrive on wheels that can be reattached and, therefore, technically the home remains mobile.²²⁸ On the other hand, once the structure is installed it takes on the character of a permanent structure.²²⁹ In concluding that the defendant's home was not a trailer, the Ohio Court of Appeals looked at the characteristics of the structure and the financing.²³⁰ First, it noted that the structure was a 1700 square foot ranch style double-wide mobile home.²³¹ Drywall was used throughout the interior, and the exterior was covered with vinyl siding.²³² Plumbing, electric and heating were factory installed.²³³ The owner shingled the roof, attached a garage at the site and installed landscaping.²³⁴ The owner financed the structure and lot by means of a mortgage, and it was taxed as real property.²³⁵

In interpreting the terms "trailer," "mobile-home" and

vant covenant language which restricts a number of structures but did not mention mobile homes); *Beacon*, 911 S.W.2d at 737 (indicating that the restrictive covenant failed to identify mobile homes).

222. *Beacon*, 911 S.W.2d at 738.

223. *Id.*

224. *Id.*

225. *Id.* at 739.

226. *Id.*

227. *Id.*

228. *Benner*, 673 N.E.2d at 208.

229. *Id.*

230. *Id.* at 209.

231. *Id.* at 207.

232. *Id.*

233. *Id.*

234. *Benner*, 673 N.E.2d at 207.

235. *Id.*

“manufactured home,” the court will look at the characteristics of the structure, whether the state vehicle code and tax code consider the home a vehicle and the form of financing.²³⁶ Because there is a need for low and moderate income housing in many areas of the country and because mobile homes are becoming more permanent in character, it is likely that in close cases, courts will consider a manufactured home a permanent structure (depending on the nature of the property). A court that wishes to conclude a mobile home is not a trailer can always rely on the common law which strictly construes ambiguous covenants against the drafter.

3. *Courts Will Continue to Evaluate Whether the Covenants Grant Authority to Enforce Architectural Restrictions and Whether the Enforcing Body Acted Reasonably*

Assuming the meaning of the restriction is clear, the court must next consider whether the architectural restriction appears in the declaration, proprietary lease or board-enacted rules. If the board enacts a restriction, a court must determine if the board had authority to do so. In both *Piccadilly Place Condominium Ass'n v. Frantz*²³⁷ and *Indian Hills Club Homeowner's Ass'n v. Cooper*,²³⁸ the courts found the association did not have authority to enact the particular rule at issue, and therefore, the association's actions were invalid.

In *Piccadilly*, the association prohibited the defendant from installing burglar bars on the inside of his unit.²³⁹ The court concluded that the provision of the declaration that gave the board authority to control the exterior of the units was not applicable to the installation of burglar bars on the interior of the units.²⁴⁰ Therefore, the owner could install the bars.

In *Indian Hills*, the board sought to enjoin the construction of a driveway extension because it had not given the defendant authority to make the improvement.²⁴¹ The board refused to grant permission because it said that it needed time to seek professional assistance in evaluating the proposed construction.²⁴² The declaration gave the board the right to disapprove any plans if the proposed structure would be inharmonious with other structures in the neighborhood.²⁴³ The declaration did not give the board

236. *Id.* at 209.

237. 436 S.E.2d 728 (Ga. Ct. App. 1993).

238. 240 No. 01A01-9507-CH-00319, 1995 WL 763823, at *1 (Tenn. Ct. App. Dec. 29, 1995). This case is not cited in *Southwest Reporter* and the reader is cautioned to review Court of Appeals Rules 11 and 12 prior to citing this case.

239. *Piccadilly*, 436 S.E.2d at 728.

240. *Id.* at 729.

241. *Indian Hills*, 1995 WL 763823, at *1.

242. *Id.* at *2.

243. *Id.* at *1.

authority to disapprove plans on the grounds that it needed time to seek professional assistance.²⁴⁴ While the court recognized that restrictions requiring an owner to seek board approval for new construction are generally valid, in this case, the board exceeded its scope of authority.²⁴⁵ As a result, its action was invalid.

Not only must the board have the authority to act, its actions must be reasonable. Again, the recent cases are consistent with previous holdings. In *Korandovitch v. Vista Plantation Condominium Ass'n*,²⁴⁶ the association refused to permit the owners to attach street numbers to the exterior of their units.²⁴⁷ The Florida District Court of Appeals concluded that whether the action was reasonable was a question of fact, but implied that the action was not.²⁴⁸

In *Goode v. Village of Woodgreen Homeowners Ass'n*,²⁴⁹ an owner submitted plans to the architectural committee as required by the governing documents.²⁵⁰ The committee approved the plans for a Victorian house, but the owner did not build according to the plans.²⁵¹ In evaluating whether the association was reasonable in seeking an injunction, the Mississippi Supreme Court balanced the rights of the individual owner against the rights of all other owners in the association who expected adherence to the general scheme.²⁵² The court concluded that the association acted reasonably in enforcing the general scheme.²⁵³

In *Dossey v. Hanover, Inc.*,²⁵⁴ the defendant also failed to seek architectural approval for revised plans for a home, but the Arkansas Court of Appeals refused to grant specific performance to the association.²⁵⁵ The court noted that the covenants stated that the architectural control committee was established to insure that dwellings in the subdivision would be constructed of good quality materials and workmanship and would be compatible with other dwellings.²⁵⁶ Both architects who testified said that the revised home did comply with the intent of the covenants.²⁵⁷ Because the

244. *Id.* at *5.

245. *Id.* at *3, 6. It is significant that from 1992 when the owners controlled the board until 1994 when construction began without board approval the board did not seek professional assistance. Also, there were 14 other similar driveway extensions in the neighborhood. *Id.* at *2.

246. 634 So. 2d 273 (Fla. Dist. Ct. App. 1994).

247. *Id.* at 274.

248. *Id.* at 275.

249. 662 So. 2d 1064 (Miss. 1995).

250. *Id.* at 1068.

251. *Id.* at 1069.

252. *Id.* at 1075.

253. *Id.*

254. 891 S.W.2d 67 (Ark. Ct. App. 1995).

255. *Id.* at 68, 70.

256. *Id.* at 69.

257. *Id.* at 70.

violation was a technical violation, the court would not grant specific performance forcing the owners to comply.²⁵⁸ Therefore, a court is likely to conclude the association is not acting reasonably if it is merely trying to enforce a technical or insignificant violation of the covenants.

Some boards believe that they must enforce every covenant and rule in every situation, or they will waive their right to enforce the covenant or rule. This is not the case.²⁵⁹ Under the business judgment rule, courts will not attempt to second-guess the association's judgment.²⁶⁰ Therefore, before a board strictly tries to enforce its rules, it should evaluate whether enforcement is reasonable in light of factors such as the likelihood of success and costs of litigation. If enforcement is not reasonable, the board will waste a great deal of time and money initiating and ultimately losing a lawsuit.

Thus, in determining whether the association's architectural decisions will be upheld, the court will first evaluate if the covenants pertaining to architectural approval are valid. Covenants that grant the board authority to approve plans are generally upheld even if those covenants grant the board wide discretion. The courts in *Raintree* and *Goode* indicated that the architectural control committee could refuse approval on any grounds, including purely aesthetic grounds.²⁶¹

If the covenants give the board authority to act, the court may next determine if the board's actions are reasonable. Reasonableness is generally a question of fact, and the rights of the owners that expect the common scheme to be enforced will be considered, but the board need not be inflexible. In addition to the above, the board must also follow the procedures for enforcing covenants and rules according to the governing documents. These prescribed procedures will be discussed in Section IV — Defenses.²⁶²

D. Assessments: There Are Three Clear Trends in Assessment Collection Cases, and a Fourth That May Be Surfacing

1. Affirmative Defenses to Enforcement Are Likely to Fail

First, affirmative defenses to enforcement of assessments have not been successful in recent years. The courts have made it

258. *Id.*

259. See *infra* Part IV, Section A.1. for a discussion of the defense of waiver.

260. See Goldberg, *supra* note 110 for articles discussing the business judgment rule and the rule of reason.

261. *Raintree Homeowners Ass'n v. Bleiman*, 463 S.E.2d 72, 75 (N.C. 1995); *Goode v. Village of Woodgreen Homeowners Ass'n*, 662 So. 2d 1064, 1068 (Miss. 1995).

262. See *infra* Part IV, Section B.2. for a discussion of how the failure to follow procedures can be asserted as a defense.

clear that an owner is not excused from the obligation to pay assessments established in the governing documents on the grounds that he or she does not benefit from some of the services provided by the association.²⁶³ In *Turner v. Hi-Country Homeowners Ass'n*,²⁶⁴ the Utah Supreme Court held that the owner was required to pay the special assessment for a security gate even though the owner's lot was located outside the gate.²⁶⁵ The court relied on the governing documents which provided that an owner was required to pay for services even if he did not use them.²⁶⁶

Nor may an owner withhold assessments based on the association's alleged failure to maintain and repair common areas. In *Agassiz West Condominium Ass'n v. Solum*,²⁶⁷ the owner unsuccessfully alleged that he had a right to withhold assessments because the association failed to maintain the common area.²⁶⁸ Also, in *Park Place Estates Homeowners Ass'n v. Naber*²⁶⁹ and *Rea v. Breakers Ass'n*,²⁷⁰ the defendants were not allowed to introduce evidence of the associations' alleged failure to maintain common areas.²⁷¹

2. Late Charges May Be Imposed, but They Must Be Reasonable

The clear trend is that while late charges may be imposed, they must be reasonable. In *Rea*, the association imposed a twenty-percent per month late charge on delinquent assessments or a 240% per annum fee.²⁷² The court concluded that the association could impose late fees, but that a 240% per annum late fee violated the usury laws.²⁷³ In arriving at its conclusion, the court looked to the statutory definition of "finance charge," which provided that such charges could not exceed five dollars or four percent per annum, whichever was greater.²⁷⁴ Because it is likely

263. See *Turner v. Hi-Country Homeowners Ass'n*, 910 P.2d 1223, 1226 (Utah 1996) (explaining that the covenant applies to members of the community as a whole and will terminate only if the community, as a whole, no longer benefits from the services).

264. *Id.*

265. *Id.* at 1224, 1226.

266. *Id.*

267. 527 N.W.2d 244 (N.D. 1995).

268. *Id.* at 247.

269. 35 Cal. Rptr. 2d 51 (Cal. Ct. App. 1994).

270. 674 So. 2d 496 (Miss. 1996).

271. See *Park Place*, 35 Cal. Rptr. 2d at 54 (holding that if members were allowed to introduce evidence of the association's failure to maintain common areas, it would detract from the court's power to enforce the association's rules for payment of assessment fees); *Rea*, 674 So. 2d at 497 (requiring assessment fees to be paid regardless of whether the common areas were maintained by the association).

272. 674 So. 2d at 497.

273. *Id.* at 500.

274. *Id.*

other courts will look to their respective state statutes for guidance in determining whether late charges are reasonable, one should review the covenants and rules regarding late charges in relation to the state's usury laws and statutes regarding finance charges.

3. *Courts Will Not Recognize Counterclaims and Defenses That Do Not Relate Directly to the Foreclosure of an Assessment Lien*

Third, when an association sues to foreclose on a lien imposed for failure to pay assessments, the owner may only raise defenses or assert counterclaims relating to the association's right to collect assessments and to seek foreclosure. Thus, owners could not assert a defense or counterclaim that the association was negligent in failing to repair a deck, allegedly resulting in injury to the owner,²⁷⁵ or that the association abused its discretion in purchasing a private road.²⁷⁶

4. *Courts Are Unlikely to Grant Assessment Liens Priority over the First Mortgage or Trust Deed Unless a Statute or the Covenants Specifically Provide for Priority*

Although there are too few reported decisions to be certain that a fourth trend exists, it probably does. For assessment liens to take priority over the first mortgage or trust deed, the governing documents or the statute must clearly state that they do. In *Federal National Mortgage Ass'n v. McKesson*,²⁷⁷ the Florida Court of Appeals reversed a lower court decision giving the homeowner association's assessment lien priority in a mortgage foreclosure action.²⁷⁸

Although the appellate court recognized *Bessemer v. Gersten*,²⁷⁹ an earlier case in which the Florida Supreme Court held that the creation of an assessment lien related back to the time of the filing of the declaration,²⁸⁰ the appellate court distinguished the instant case. In *McKesson*, unlike *Bessemer*, "the declaration [did] not purport to create an automatic lien" for delinquent assessments.²⁸¹ It simply created the right to a lien in the event that the

275. See *Willow Springs Condo Ass'n v. Pereira*, No. CV 95 0067067, 1995 WL 67033, at *3 (Conn. Super. Ct. Feb. 8, 1995) (discussing the court's reluctance to recognize a counterclaim based on the association's alleged failure to maintain a deck resulting in injury to the defendant).

276. See *Panther Lake Homeowner's Ass'n v. Juergensen*, 887 P.2d 465,468 (Wash. Ct. App. 1995) (holding that the alleged defect in the private road the association acquired was not a defense to the owner's obligation to pay assessments).

277. 639 So. 2d 78 (Fla. Dist. Ct. App. 1994).

278. *Id.* at 80.

279. 381 So. 2d 1344 (Fla. 1980).

280. *Id.* at 1348.

281. 639 So. 2d at 79.

owner did not pay.²⁸² The court concluded that a declaration that does not specifically state the assessment lien is a continuing lien that relates back, does not put a mortgagee on notice of the superiority of the lien.²⁸³ This holding is likely to be followed by other courts because the purpose of the recording acts is to give notice and create priorities of competing liens.

E. Fines

In the past it has been unclear whether the association could impose fines for violation of the governing documents, and whether fines, if imposed, could become a lien subject to foreclosure. With some jurisdictional exceptions, there is a clear trend in favor of allowing associations to levy fines.²⁸⁴ It is less clear whether foreclosure is an appropriate remedy when an owner fails to pay fines.

1. Courts Are Likely to Enforce Covenants and Rules Authorizing the Levying of Fines for Violations of Covenants

While it is true that some states prohibit associations from imposing fines by statute,²⁸⁵ other legislatures and courts have increasingly recognized the advantages of imposing fines to gain compliance with the governing documents. In *Liebler v. Point Loma Tennis Club*,²⁸⁶ the association imposed fines against an owner for inappropriately using the tennis courts.²⁸⁷ The owner defended by alleging that the board lacked authority to subject him to fines because the declaration did not expressly give the association the authority to levy fines.²⁸⁸ The California Court of Appeals pointed out that the declaration gave the board authority to create rules and regulations in connection with the use of the property.²⁸⁹

282. *Id.*

283. *Id.* Had the lien in *McKesson* involved a condominium instead of a homeowners association, Florida statute would limit the liability of the first mortgagee who acquires title by foreclosure or by deed to the unpaid assessments up to six months or one percent of the original mortgage debt. FLA. STAT. ANN. § 718.116(1)(b) (1997). The Uniform Common Interest Ownership Act provides for a similar limited superior lien in all types of common interest communities. Uniform Common Interest Ownership Act § 3-116 (West 1995 & Supp. 1997).

284. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.8 & cmt. (Tentative Draft No. 14, forthcoming May 1998).

285. See *Unit Owners Ass'n of BuildAmerica-1 v. Gillman*, 292 S.E.2d 378, 384 (Va. 1982) (discussing the Condominium Act of Virginia which "does not purport to grant an association the power to secure compliance with its by-laws, rules, and regulations by the imposition of a fine or the exaction of a penalty").

286. 47 Cal. Rptr. 2d 783 (Cal. Ct. App. 1995).

287. *Id.* at 785.

288. *Id.* at 784.

289. *Id.* at 790.

Rules adopted by the board provided that enforcement of the covenants could be carried out in a fair and timely manner by means of fines and other legal action.²⁹⁰ Thus, the documents, when read together, did authorize the board to impose fines.²⁹¹ Further, the board adhered to a California statute²⁹² which establishes procedures an association must follow if it chooses to impose fines.²⁹³ As a result, the court found that the fines were valid, although it did not speculate on whether the fines could be collected by imposing a lien on the property as that issue was not before the court.²⁹⁴

The Massachusetts Appeals Court also found that the authority of an association to impose fines may be reasonably implied even when a declaration does not expressly grant the association such authority. In *Glen Devin Condominium Ass'n v. Makhluf*,²⁹⁵ the declaration gave the association "all . . . the powers and duties reasonably necessary to operate the Condominium."²⁹⁶ The court concluded that fines were an expeditious and cost effective method for enforcement of the covenants in the declaration.²⁹⁷ It, therefore, found the fines were valid.

For a while, it appeared that New Jersey would not follow the trend. A New Jersey court held in *Walker v. Briarwood Condo Ass'n*,²⁹⁸ that an association could not impose fines for violation of the governing documents because in order to do so the authority would have to exist both in the condominium statute and the governing documents.²⁹⁹ At the time the case was decided there was no authority in either.³⁰⁰ Subsequently, however, the New Jersey legislature amended its statute to permit the imposition of fines.³⁰¹ Thus, if there is authority to impose fines in the governing statute, the board may do so.

2. Courts Will Continue to Require Fines to Be Reasonable in Amount and Reasonably Imposed

Assuming the board has the express or implied authority to impose fines, two additional issues must be addressed. First, are

290. *Id.*

291. *Id.*

292. CAL. CIV. CODE § 1363(g) (West 1996 & Supp. 1997).

293. *Liebler*, 47 Cal. Rptr. 2d at 790.

294. *Id.* at 790 & n.8.

295. No. 9284, 1994 WL 675253, at *1 (Mass. Dist. Ct. Nov. 25, 1994).

296. *Id.* at *2.

297. *Id.* at *3. See also MASS. ANN. LAWS Ch. 183A, § 10(b)(5) (Law. Co-op. 1996) (authorizing a condominium association "to levy reasonable fines for violations of the master deed, trust, by-laws, restrictions, rules or regulations of the organization of unit owners").

298. 644 A.2d 634 (N.J. Super. Ct. App. Div. 1994).

299. *Id.* at 637.

300. *Id.*

301. N.J. STAT. ANN. § 46:8b-15(f) (West 1996 & Supp. 1997).

the fines reasonable? Second, did the board follow proper procedures in imposing them?

In *Stewart v. Kopp*,³⁰² the North Carolina Court of Appeals held that it was not unreasonable for a board to fine a unit owner \$100 per day for continuing violations of the architectural restrictions of the governing documents.³⁰³ The court noted that the statute permitted condominium associations to levy fines not to exceed \$150 for violations of the condominium documents.³⁰⁴ It reasoned that the purpose of fines is to gain compliance with the governing documents.³⁰⁵ If the board could not continue to impose a fine for each day an owner was in violation of the governing documents, the owner could pay \$150, ignore the association and continue to violate the governing documents.³⁰⁶ Therefore, the court held that the continuing fine was valid and that the board could collect it by filing a lien on the offending owner's property pursuant to statute.³⁰⁷

The Florida appellate court also recognized the right to fine in *Kittel-Glass v. Oceans Four Condominium Ass'n*,³⁰⁸ but only if the board has complied with the appropriate procedures.³⁰⁹ In this case, the association imposed \$3,950 in fines against an owner for seventy-nine separate violations of the governing documents amounting to fifty dollars per violation.³¹⁰ The court concluded that the association had the authority to fine, and that fifty dollars per violation was a reasonable fine.³¹¹ The board, however, had only charged the owner with fourteen violations in writing, and because the governing documents required written notification of the violations the association could not charge the owner more than \$700 or fifty dollars times fourteen violations.³¹²

Although legislatures and courts are increasingly upholding the right to fine, there is one note of caution. While some cases recognize an implied authority in the association to impose fines, others, such as *Stewart*, are based in part on a statute applicable only to condominiums. It is unclear how these courts would treat fines imposed by homeowner associations. Also, while cases like *Stewart* hold that condominium associations can file liens to collect the fines, there are too few cases to determine whether there is a trend in this direction either in the courts or legislatures. Finally,

302. 454 S.E.2d 672 (N.C. Ct. App. 1995).

303. *Id.* at 675.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. 648 So. 2d 827 (Fla. Dist. Ct. App. 1995).

309. *Id.* at 829.

310. *Id.* at 828.

311. *Id.* at 829.

312. *Id.*

even in those jurisdictions recognizing the authority of the association to impose fines, fines will only be found valid if the association has followed the proper procedures. This issue will be discussed in Part IV dealing with defenses.

IV. DEFENSES

Previous sections of this Article have discussed covenants which may not be enforceable because they violate public policy or are unreasonable,³¹³ board rules which are not enforceable because they are not authorized or are unreasonable,³¹⁴ and defenses unique to assessment collection cases.³¹⁵ This portion of the Article will discuss additional defenses.

A. *Where Courts Have Discretion Defenses Are Likely to Fail*

Because there is a trend in favor of courts recognizing the importance of covenants, one would expect to find courts reluctant to hold that a defense prevents enforcement when it is within their discretion to do so. This is, in fact, the case.

1. *The Defense of Waiver Is Likely to Fail*

To successfully prove waiver, one must prove the party attempting to enforce the covenant intentionally waived a known right. Failure to enforce a covenant once, or failure to enforce unrelated covenants, will not establish the defense.

In *Mizell v. Deal*,³¹⁶ the plaintiff developed a twenty-acre community of mini-farms controlled by covenants.³¹⁷ The defendants lived in a mobile home for three and one-half years on a lot that violated a covenant prohibiting mobile homes for more than two years.³¹⁸ When the plaintiff sued to enforce the covenant, the defendant asserted that the plaintiff had waived his right to enforce the covenant.³¹⁹ The Florida Court of Appeals reasoned that for the defense of waiver to be successful, there had to be a long-term acquiescence in the violation.³²⁰ Further, the violations had

313. See *supra* Part II, Section B. (examining cases where covenants may not be enforced as where they are deemed to violate public policy or are unreasonable).

314. See *supra* Part III, Section A. (reviewing cases where board rules may not be enforceable if they are not authorized, are unreasonable or are not consistent with the governing documents and law).

315. See *supra* Part III, Section D. (discussing affirmative defenses to enforcement of assessments).

316. 654 So. 2d 659 (Fla. Dist. Ct. App. 1995).

317. *Id.* at 661.

318. *Id.*

319. *Id.*

320. *Id.* at 663.

to be persistent, obvious and widespread, which they were not.³²¹

In *Mountain Park Homeowners Ass'n v. Tydings*,³²² there were numerous violations of the covenants, but the Supreme Court of Washington still refused to find waiver.³²³ In this case, the association sued to enforce a covenant prohibiting television antennas.³²⁴ The defendant asserted that several covenants had been violated, such as the parking of illegal vehicles.³²⁵ The court held that the violation of unrelated covenants was not relevant unless there were so many violations of so many covenants that the scheme was entirely frustrated.³²⁶ This is particularly true where there is a provision in the governing documents, as there was in *Mountain Park*, providing that the invalidity of one covenant does not affect the validity of the remaining covenants.³²⁷

Even multiple violations of the same covenant may not be sufficient if those violations are of a different character. In *Kneale v. Bonds*,³²⁸ owners in a condominium community sued to stop an owner from erecting a 2,200 square foot addition which would have encroached upon the common area.³²⁹ Although the board had approved the addition, the addition violated the covenants.³³⁰ The court recognized that the board had approved various additions and alterations in violation of the covenants.³³¹ It found, however, that the previous violations were of a different size and nature in that they were predominately aesthetic and did not encroach so substantially on the common area.³³² Therefore, the court refused to find that the covenants had been waived.³³³

The Louisiana Court of Appeals in *Travazos v. Stoma*,³³⁴ also held that numerous previous violations of covenants do not automatically mean that they have been waived.³³⁵ One must consider

321. *Id.*

322. 883 P.2d 1383 (Wash. 1994).

323. *Id.* at 1387.

324. *Id.* at 1384.

325. *Id.* at 1385.

326. *Id.* at 1387. See also *Simms v. Lakewood Village Property Owners Ass'n*, 895 S.W.2d 779 (Tex. Ct. App. 1995) (noting that courts have refused to enforce restrictions "where lot owners have acquiesced in such substantial violations within the restricted areas as to amount to abandonment of the covenant or waiver of the right to enforce it").

327. *Mountain Park*, 883 P.2d at 1387. See also *Webb v. Johnson*, 671 So. 2d 1120 (La. Ct. App. 1996) (involving a covenant within a severability clause which provided that invalidation of any one of the covenants did not affect other restrictions).

328. 452 S.E.2d 840 (S.C. Ct. App. 1994).

329. *Id.* at 841.

330. *Id.* at 841-42.

331. *Id.* at 842.

332. *Id.* at 843.

333. *Id.*

334. 672 So. 2d 1070 (La. Ct. App. 1996).

335. *Id.* at 1074.

the character, number and proximity of the violations.³³⁶ Thus, even though the defendants had installed a metal roof in violation of the covenants approximately ten years prior to the filing of the lawsuit, and had signs, garbage bins and landscaping in violation of the governing documents, the covenant prohibiting metal roofs had not been waived.³³⁷ First, the covenants not related to the metal roof were not relevant.³³⁸ Second, the previously existing metal roof was not visible or adjacent to plaintiff's property.³³⁹ Therefore, the association did not waive the covenant prohibiting metal buildings, and prohibited the defendant from building a second metal building adjacent to the plaintiff's property.³⁴⁰

It is unclear if a court will refuse to recognize the defense of waiver solely because a declaration or proprietary lease contains a provision stating that failure to enforce a covenant shall not be deemed a waiver of the right to enforce it. The Texas Court of Appeals in *Simms v. Lakewood Village Property Owners Ass'n*,³⁴¹ however, cited such a provision in concluding that the owners could not successfully assert waiver.³⁴² The court noted that the provision was included to protect lot owners and the association from claims that the covenant had been waived for failure to prosecute.³⁴³

Most associations fail to prosecute covenant violations because they do not have the funds, not because they are intentionally waiving a known right. When it is clear that the association is not intentionally waiving its right to enforce the covenant, and there is a provision in the governing documents that provides failure to enforce does not constitute waiver, courts should be reluctant to find that the association or owners have waived their rights.

Thus, courts are unlikely to find waiver if there has only been one previous violation of a particular covenant, if there have been multiple violations of the covenant, but they are of a different character, or if the previous violations are of unrelated covenants. Further, if there is a provision in the declaration or proprietary lease that says that failure to enforce a covenant does not constitute waiver of the right to enforce, courts will be much more reluctant to find a waiver.

336. *Id.*

337. *Id.* at 1073-74.

338. *Id.* at 1074.

339. *Id.*

340. *Travazos*, 672 So.2d at 1075.

341. 895 S.W.2d 779 (Tex. Ct. App. 1995).

342. *Id.* at 786-87.

343. *Id.* at 787.

2. *The Defense of Changed Circumstances Is Likely to Fail*

Recent cases have reaffirmed that in order to establish the defense of changed circumstances, the party contesting enforcement must prove that there has been such a radical change in surrounding circumstances that the purpose of the covenant has been essentially destroyed. One or two minor changes will not suffice.

For example, in *Williams v. Paley*,³⁴⁴ the North Carolina Court of Appeals held that residential use restrictions could only be terminated by the substantial commercial use of multiple nearby properties.³⁴⁵ Property rentals to vacationers, operation of a bed and breakfast, use of one property for one rental transaction, leasing of a lot to store machinery and the use of a lot as a sales office for condominium units were not sufficient to defeat the essential purpose of the covenant.³⁴⁶ Therefore, defendants did not establish the defense of changed circumstances.

Similarly, the Missouri Court of Appeals in *Stolba v. Vesci*,³⁴⁷ found that a covenant restricting buildings to private homes continued to prohibit condominiums even though the size of the lots in the area had decreased, there was a trend toward higher density development and the Condominium Act had been enacted.³⁴⁸ The court noted that a change of condition in part of a restricted area does not prevent enforcement in the remaining restricted area, and that a change in the law is not the type of change contemplated by the doctrine of changed circumstances.³⁴⁹

The Florida Court of Appeals went further in *Mizell v. Dell*.³⁵⁰ It noted that even a change in the condition of the entire neighborhood will not prevent enforcement if the restriction is still of benefit and substantial value to the dominant lot.³⁵¹ The test is whether, considering the totality of the circumstances, the change is so radical as to render the restriction valueless to the parties.³⁵²

B. *Where Courts Do Not Have Discretion, Defenses Will Likely Succeed*

1. *Because Courts Have Little Discretion when Enforcing Time Limitations, Time Limitations Will Remain a Viable Defense*

Because of the courts increased respect for covenants, they are less likely to recognize defenses to enforcement when they

344. 442 S.E.2d 558 (N.C. Ct. App. 1994).

345. *Id.* at 562.

346. *Id.*

347. 909 S.W.2d 706 (Mo. App. 1995).

348. *Id.* at 710.

349. *Id.*

350. 654 So. 2d 659 (Fla. Dist. Ct. App. 1995).

351. *Id.* at 662.

352. *Id.*

have the discretion to do so. However, they generally must recognize time limitations and are likely to continue to strictly enforce them. Time limitations sometimes can be found in the governing documents. For example, if the governing documents state that the board is deemed to have approved an owner's proposed improvements if it fails to act within a specified time, the board loses its right to object if it fails to comply with the time requirements.³⁵³

Time limitations can also be found in city ordinances. In *Board of Managers v. LaMontanero*,³⁵⁴ the condominium community had a no-pet restriction. A New York City ordinance which applied to multiple dwellings, and, therefore condominiums,³⁵⁵ provided that an action to remove an animal had to be commenced within three months of the discovery of the animal.³⁵⁶ The association missed the filing deadline by one day and, thus, could not enforce the pet restriction against the owner.³⁵⁷

Time limitations, of course, also exist in statutes. Two different types of statutes of limitation can apply to violations of covenants: those relating to continuing nuisance and those relating to a violation of a written instrument or covenant. In *Cutujian v. Benedict Hills Estates Ass'n*,³⁵⁸ the California appellate court held that the statute of limitations for a homeowner association's breach of duties under the covenants begins at the time the landowner demands performance.³⁵⁹ The owner, who discovered during escrow that a surface slope occurred on his lot several years earlier, demanded that the association repair his lot as required by the covenants.³⁶⁰ The association argued that the owner's claim was barred by the applicable four-year statute of limitations for written instruments.³⁶¹ The court held that the statute began to run only when the plaintiff first demanded that the association repair the slope damage.³⁶²

This case raises several questions. The damage occurred on the plaintiff's separate lot. The court did not distinguish, however, between failure to repair damage to the common area and failure to repair damage to the owner's lot. Assume, therefore, that in 1990 the association, in violation of the governing documents, failed to maintain ten trees on the common area, and the trees

353. *Hunt v. Sharp*, 608 N.Y.S.2d 188, 189 (N.Y. App. Div. 1994).

354. 616 N.Y.S.2d 744 (N.Y. App. Div. 1994).

355. *But see* *Board of Managers of Parkchester N. Condominiums v. Quiles*, 651 N.Y.S.2d 36, 36-37 (N.Y. App. Div. 1996) (stating that a condominium should not be considered a multiple dwelling under the act).

356. *LaMontanero*, 616 N.Y.S.2d at 745.

357. *Id.*

358. 41 Cal. App. 4th 1379 (Cal. Ct. App. 1996).

359. *Id.* at 1384.

360. *Id.* at 1382.

361. *Id.*

362. *Id.* at 1384.

died. If one owner complained in 1990, another one complained in 1992 and another in 2000, when does the statute of limitations begin to run? Is this a continuing nuisance case even though the trees are dead?

The Montana Supreme Court found that the continuing nuisance doctrine, with its accompanying statute of limitations, did not apply in *Country Estates Homeowners Ass'n v. McMillan*.³⁶³ In this case the association tried to enforce a covenant that provided all construction had to be completed within one year from the date construction began.³⁶⁴ While it was unclear precisely when construction began, the latest it began was 1982 or 1983.³⁶⁵ The statute of limitations provided that an action on a written instrument had to be commenced within eight years.³⁶⁶

The association argued that failure to complete construction was a continuing nuisance and, therefore, each day was a new violation with a new statute.³⁶⁷ The court, however, rejected the association's argument because it found that the association brought an action based on breach of the restrictive covenants, not on a nuisance theory.³⁶⁸ The court distinguished the continuing nuisance cases that applied to developers' failures to perform because public policy held developers to a higher standard.³⁶⁹

It is interesting to note that the *Cutujian* court based its decision to apply the continuing nuisance statute on a fairness theory. The court determined that it would be unfair to the owner if the developer were able to bar a cause of action through its continued failure to repair the slope when it controlled the board.³⁷⁰ Perhaps, in the example above, even the California courts would apply the four-year statute based on written instruments.

A final time limitation is laches. Laches occurs when the party desiring to enforce the covenant has unreasonably delayed in filing a lawsuit causing detriment to the defendant.³⁷¹ With this defense, unlike the above, the court has more discretion because the defense is based on a factual determination.³⁷² Although courts are less likely to uphold defenses where they have discretion, that does not mean that those attempting to enforce covenants will always be successful under these circumstances.

In *Nutile Acres Ass'n v. Conroy*,³⁷³ the association brought an

363. 915 P.2d 806, 808-09 (Mont. 1996).

364. *Id.* at 807.

365. *Id.* at 808.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Country Estates*, 915 P.2d at 808.

370. 41 Cal. App. 4th 1379, 1388 (Cal. Ct. App. 1996).

371. POWELL, *supra* note 1, § 60.10[1].

372. *Id.*

373. No. CV940363624S, 1996 WL 24696, at *1 (Conn. Jan. 4, 1996).

action against an owner to foreclose on a lien based upon delinquent assessments from 1980 to 1992.³⁷⁴ The defendant purchased the unit in 1983.³⁷⁵ The association relied on the declaration that provided a continuing lien for unpaid assessments.³⁷⁶ The only actual lien that the association filed was for the years 1980-1981.³⁷⁷ This is an egregious case of an association slumbering on its rights.³⁷⁸ Therefore, the fact that the court found laches in this case does not indicate it will do so in less egregious cases.

2. Courts Are Unlikely to Enforce Covenants and Rules Where the Appropriate Procedures Have Not Been Followed

Covenants and rules usually provide procedures that must be followed when enforcing them. Courts are likely to strictly construe these provisions. This point was made by the California appellate court in *Ironwood Owners Ass'n IX v. Solomon*,³⁷⁹ when it refused to grant the association a summary judgment even though it recognized that the owner has planted trees in violation of the governing documents.³⁸⁰ The court concluded that although the owner did not apply for approval as required by the covenants, there was a material question of fact as to whether the architectural committee followed the procedures provided in the governing documents.³⁸¹ The procedures required the committee to meet to consider whether the trees violated the covenants and to make findings that the trees did not meet the standards stated in the covenants.³⁸² Thus, even though the owner failed to seek architectural approval, which was required by the covenants, the court refused to grant an injunction to have the trees removed.³⁸³

Failure to follow procedures was also an issue in two more recent cases, one decided by an appellate court in Texas and the other by an appellate court in Florida. In *Ashcreek Homeowner's Ass'n v. Smith*,³⁸⁴ the Texas appellate court refused to grant an injunction removing a basketball hoop that violated the covenants because the association failed to give the owner notice as required

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. Prior to this decision, Connecticut had adopted the Common Interest Ownership Act. Section 47-258(e) of the Act provides that an association must bring an action within two years of the assessment becoming due or the lien is extinguished. CONN. GEN. STAT. ANN. § 47-258(e) (West 1995 & Supp. 1997).

379. 178 Cal. App. 3d 766 (Cal. Ct. App. 1986).

380. *Id.* at 772.

381. *Id.*

382. *Id.* at 772-73.

383. *Id.* at 773.

384. 902 S.W.2d 586 (Tex. App. 1995).

by the declaration.³⁸⁵ Similarly, the Florida appellate court in *Kit-tel-Glass v. Oceans Four Condominium Ass'n*,³⁸⁶ refused to enforce sixty-five of an owner's seventy-nine violations because the association did not give the owner notice of sixty-five of the violations as required by the governing documents.³⁸⁷

Procedures can also be required by statute. For example, California Corporations Code § 7341³⁸⁸ requires the association to follow fair and reasonable procedures (examples of which are given in the statute) before it can suspend an owner's membership rights, even if the owner is violating the governing documents. If these procedures are not met, courts are unlikely to uphold the associations actions.

C. Courts Are Likely to Find That More Covenants and Rules Violate One of Two Federal Statutes

Obviously, both covenants and board-enacted rules must comply with both state and federal statutes. The state statutes are too numerous to discuss, but there are at least two relevant federal statutes that directly impact covenant enforcement: the Fair Housing Act³⁸⁹ and the Telecommunications Act.³⁹⁰

1. Federal District Court Judges Treat Defendants Accused of Violations of the Fair Housing Act Less Harshly Than Do Administrative Law Judges

Although a discussion of the Fair Housing Act is beyond the scope of this article, in general, it prohibits discrimination on the basis of race, color, religion, sex, national origin, handicap or familial status.³⁹¹ Recent cases have focused on covenants that discriminate against families with children³⁹² and board enacted rules that discriminate on the basis of handicap.³⁹³

385. *Id.* at 590.

386. 648 So. 2d 827 (Fla. Dist. Ct. App. 1995).

387. *Id.* at 829.

388. CAL. CORP. CODE § 7341 (West 1990 & Supp. 1997).

389. 42 U.S.C. §§ 3601-3631 (West 1994 & Supp. 1997). See Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297 (1995), for additional background information on the federal Fair Housing Act. See CURTIS G. SPROUL & KATHARINE ROSENBERRY, *ADVISING CALIFORNIA CONDOMINIUM AND HOMEOWNER ASSOCIATIONS*, Ch. 9 (Cont.Ed.Bar 1991 & Supp. 1997), for a discussion of the interrelation between the federal Fair Housing Act and California fair housing law.

390. 47 U.S.C. § 303 (West 1991 & Supp. 1997).

391. 42 U.S.C. § 3601-31 (West 1994 & Supp. 1997).

392. See 42 U.S.C. § 3607(b)(2) (West 1994 & Supp. 1997) (identifying communities exempted from the Act).

393. See *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332-36 (2d Cir. 1995) (finding a cooperative board rule to be in violation of the Act where the rule assigned parking spaces on a first come, first serve basis, thereby failing to

An aggrieved party can file a complaint with the Secretary of Housing and Urban Development (HUD) or can file a civil action in federal district court.³⁹⁴ Assuming HUD finds evidence of discrimination, and neither party wishes to file a court action, the matter will be handled by an administrative law judge.³⁹⁵

One trend that has surfaced is that defendants in housing discrimination cases fare worse in administrative hearings than they do in the courts. For example, damages for emotional distress based on violations of the Fair Housing Act were not awarded in *United States v. Lepore*³⁹⁶ or *Morgan v. Secretary of HUD*,³⁹⁷ both federal district court cases, but damages were awarded in *HUD v. TEMS Ass'n*³⁹⁸ and *HUD v. Paradise Gardens*,³⁹⁹ both administrative law cases.

Evidence of the different treatment also is found in *Morgan* where, because the court concluded that the Secretary of HUD did not conciliate in good faith, the court reversed the administrative law judge's award of damages for emotional distress and inconvenience, and reduced the penalty award from \$10,000 to \$500.⁴⁰⁰ Also, in *Pfaff v. HUD*,⁴⁰¹ the Ninth Circuit severely criticized HUD for its behavior in bringing an action against a retired couple who had reasonable occupancy standards for their rental property.⁴⁰² The court reversed an administrative law judge's award against the couple for compensatory damages, punitive damages and a civil penalty.⁴⁰³ Consequently, when HUD finds that covenants or rules violate the federal Fair Housing Act, those wishing to have the covenant or rule upheld should consider having the case heard in federal court.

2. *The Amendments to the Telecommunications Act Are Too Recent to Identify Trends but They Invalidate Many Existing Covenants*

Another federal statute that impacts covenant and rule enforcement is the Telecommunications Act of 1996 which provides the FCC will promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming through, among other things, antennas and direct broadcast satellite

make reasonable accommodations for handicapped persons living in the cooperative).

394. 42 U.S.C. §§ 3610, 3612 (West 1994 & Supp. 1997).

395. 42 U.S.C. § 3612(b) (West 1994 & Supp. 1997).

396. 816 F. Supp. 1011, 1023-24 (M.D.Pa. 1991).

397. 985 F.2d 1451, 1459-60 (10th Cir. 1993).

398. 2A Fair Housing-Fair Lending Rep. (PH) ¶ 25,028 (June 1, 1992).

399. 2A Fair Housing-Fair Lending Rep. (PH) ¶ 25,0237 (Dec. 1, 1992).

400. *Morgan*, 816 F. Supp. at 1461.

401. 88 F.3d 739 (9th Cir. 1996).

402. *Id.* at 749-50.

403. *Id.*

dishes.⁴⁰⁴ On August 6, 1996, the FCC promulgated 47 C.F.R. § 25.104.⁴⁰⁵ This regulation, which applies only to individuals who own or have exclusive use of the area in which they wish install an antenna, provides that no private covenant or homeowners' association rule may impair the installation, maintenance or use of an antenna, including those designed to receive direct broadcast satellite service, if the satellite dish is one meter or less in diameter.⁴⁰⁶

Examples of covenants or rules that unreasonably impair installation include those that 1) unreasonably delay or prevent installation, maintenance, or use; 2) unreasonably increase the cost of installation, maintenance, or use; and 3) preclude reception of an acceptable quality signal.⁴⁰⁷ A restriction that is otherwise prohibited is permitted if the restriction is necessary to accomplish a clearly defined safety objective that is stated in the restriction or described in a document as applied to that restriction.⁴⁰⁸

One may petition the FCC to determine whether a restriction is permitted or prohibited. However, "restrictions cannot require that relatively unobtrusive satellite dishes be screened by expensive landscaping. On the other hand, a requirement to paint an antenna in a fashion that will not interfere with reception so that it blends in the background against which it is mounted would likely be acceptable."⁴⁰⁹ The FCC is in the process of adopting rules regarding installation of satellite dishes and antennas on the common areas. They are expected to be adopted by the spring of 1998.

Because the amendments are less than one year old, and not all of the rules have been promulgated, it is too soon to determine with any degree of certainty, the exact impact of the statute. It is certain, however, that the statute has invalidated many existing covenants.

V. CONCLUSION

Covenants are presently controlling millions of American lives. They control important aspects of peoples' lives including what they are permitted to do in their homes, the exterior appearance of their homes, the number and types of pets they may own and their behavior toward their neighbors. Because so many people are, and will increasingly continue to be affected by covenants, and because covenants so significantly affect the way people are permitted to live, there will continue to be a large number of reported decisions in this area of law.

404. 47 U.S.C. § 303 (West 1991 & Supp. 1997).

405. 47 C.F.R. § 25.104 (1996).

406. *Id.*

407. 47 C.F.R. § 1.4000(a)(2) (1997).

408. *Id.* § 1.4000(b)(1).

409. *Id.* § 1.4000(d).

This article has surveyed cases from the past few years and identified trends in covenant enforcement to assist the practitioner and those affected by covenants in predicting which covenants and rules will be enforceable in the future and which will not be. It will be important for those affected by this field to continue to monitor the decisions because this is a rapidly evolving area of law impacting the lives of many.

