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CONDOMINIUM LAW: A COMPARISON OF THE UNIFORM ACT WITH THE ILLINOIS ACT

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INTRODUCTION

The difference between the Uniform Condominium Act (UCA)¹ and the Illinois Condominium Property Act (ICPA)² is substantial and should be carefully studied by every lawyer, banker, broker, builder, developer, and anyone else actively involved in the condominium industry. This newly proposed Act, the UCA, is truly a "second generation" statute possessing the built-in flexibility to allow those subject to the statute to move into the future with innovative ideas, while at the same time protecting consumer interests.

In August, 1977, the National Conference of Commissioners on State Laws approved the UCA. In February, 1978, the American Bar Association endorsed the UCA, noting:

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1. Uniform Condominium Act [hereinafter cited as UCA] drafted by the National Conference of Commissioners on Uniform State Laws, and by it approved and recommended for enactment in all the states at its 86th annual conference meeting in Vail, Colorado, July 29-Aug. 5, 1977 and approved by the American Bar Association at its meeting in New Orleans, La., Feb. 14, 1978.

2. Illinois Condominium Property Act, ILL. REV. STAT. ch. 30, §§ 301-31 (1979) [hereinafter cited as ICPA].

A major accomplishment of the UCA will be to relieve condominium development from outmoded constraints imposed by the common law of real property, and from unintended constraints imposed by inartful first generation condominium legislation. These constraints have, without logical basis, interfered with the flexibility needed by developers to phase their projects, and even interfere with the flexibility needed by unit owners to make desirable arrangements of project areas after expiration of developer control.³

The ICPA, with its numerous amendatory sections, has created a patchwork of isolated changes which do not provide a comprehensive solution to the many complex problems involved in condominium ownership. Furthermore, recent experience has proven that additional state and municipal legislation will only provide ad hoc amendments which add yet another layer to the crazy-quilt of existing legislation, and therefore will create additional confusion and ambiguity in our condominium laws.

There is a need to improve the ICPA so that Illinois will have a truly "second generation" condominium statute which will reflect the most progressive thinking in this field. Uniformity is essential to the stability of real property law. The authors believe that the UCA represents a sound approach to the special problems which are not considered by "first generation" condominium statutes.

An Overview

The UCA is comprised of four articles with provisions for an optional fifth article. Article 1 contains general provisions and definitions which are applicable throughout the Act. The article deals with matters such as taxation, eminent domain, and the applicability of other statutes.

Article 2 provides for creation, alteration, and termination of the condominium. This article allows a developer much flexibility in creating a condominium project. At the same time it imposes reasonable restraints on developers' practices, which in the past have proven potentially harmful to unit purchasers.

Article 3 concerns administration of the unit owners' association, which has received very limited attention in "first generation" condominium statutes. For example, the UCA permits unit owners to participate with the declarant as members of the executive board in the early stages of the project development. Article 3 also allows for the elimination of much of the boilerplate language in declarations and bylaws, thereby simplifying the basic condominium documents.

3. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW MEMO 15 (Winter, 1977).

Article 4 deals with consumer protection, a matter on which existing legislation and ordinances have focused in the past several years. In addition to treating specific abuses which have developed in the condominium industry, Article 4 requires that substantial declarant disclosure be made available to consumers before the conveyance of a unit.

Article 5 is an optional article which provides for an administrative agency to supervise the declarant's activities. The authors believe that most states will favor deleting this section because the cost of funding the agency will overtax existing resources and such an agency would duplicate the work of existing governmental units.

Applicability

Two conflicting policies are encountered when considering the applicability of the UCA to "old" and "new" condominiums.⁴ On the one hand, uniformity is desirable, and thus it would seem appropriate for the Act to apply to all condominiums in the state regardless of the date when they were created. However, to make all provisions of the Act automatically applicable to "old" condominiums might violate the constitutional prohibition of impairment of contracts. Moreover, automatic applicability of the entire UCA would unduly alter the legitimate expectations of unit owners, mortgagees, developers, insurers, and others with interests in existing condominiums.

Section 1-102 therefore provides that the UCA applies prospectively to all condominiums created after the effective date of its enactment into state law.⁵ Conversely, it is clear that the provisions of existing statutes do not apply to condominiums created after the effective date of the UCA. The section, as it would be applied to Illinois, adopts a unique three-step approach.

First, certain sections of the UCA which deal with statutory construction would automatically displace some provisions of the ICPA that are applicable to "old" condominiums, but would do so only prospectively.⁶ However, these sections of the Illinois version of the UCA would not invalidate provisions of condominium declarations, bylaws, and plats and plans already existing

4. UCA § 1-102. As used herein, "old" refers to condominiums created before the effective date of the enactment of the Illinois version of the UCA. "New" refers to condominiums created on or after the effective date of the Illinois version of the UCA.

5. UCA § 1-102(a).

6. See UCA § 1-102(a) (displacement will apply to events and circumstances occurring on or after the effective date of enactment of the Illinois version of the UCA).

under the ICPA.⁷ Second, the sections of the ICPA would remain applicable to condominiums created under the ICPA, where it is not automatically displaced by the UCA.⁸ Third, owners of condominiums created under the ICPA may amend any provision of their declaration or bylaws, even if the amendment would not be permitted under the ICPA, so long as the amendment is adopted in accordance with the procedure required by the ICPA and the existing declaration and bylaws, and the substance of the amendment does not violate the UCA.⁹ Finally, the amendment as stated must conform procedurally to the requirements specified by the constituent documents. If the amendment grants to any person the rights, powers, or privileges of the UCA, all correlative obligations, liabilities, and restrictions in the Illinois version of the UCA would apply to that person. The Illinois version of the UCA would not apply to condominiums or units located outside the state unless the disposition was made within the state.¹⁰

ARTICLE 1

Definitions

Terms used in the Act may be defined differently in the declaration than in the bylaws, but no matter how they are used in the constituent documents, the terms have an unvarying mean-

7. For example, the Illinois version of the UCA would apply, and the ICPA would not apply (given the constraints) to resales of units. The documents would be construed under the Illinois version of the UCA and not the ICPA, but the Illinois version of the UCA would be subject to the provisions of the "old" condominium documents. UCA § 1-102(a).

8. For example, ILL. REV. STAT. ch. 30, § 327 (1979) (amendment of condominium interest) would not automatically be displaced by UCA § 2-119 (amendment of declaration); ILL. REV. STAT. ch. 30, § 322.1 (1979) (resales) would be displaced by UCA § 4-107 (resales).

9. UCA § 1-102(b). For example, if the ICPA declaration required 100% of the unit owners to approve amendments to the declaration and the unit owners wished to have the percentage reduced to 75% as permitted by the Illinois version of the UCA, the amendment to the declaration would first have to be approved by 100% of the unit owners, and thereafter the declaration could be amended by 75% of the unit owners. However, the amendment could not contain any matter which is impermissible under the Illinois version of the UCA, such as lessening the substantive requirements of § 4-107 of the Illinois version of the UCA relating to the resales of units. This presumes that the substance of the Illinois version of the UCA relating to resales of units would be adopted in the identical form proposed by the uniform draft of the UCA.

10. UCA § 1-102(c). Disposition is defined as a voluntary transfer of any legal or equitable interest in a unit, other than as security for an obligation. UCA § 1-103(11). But other dispositions are specifically excluded by specific sections for certain purposes, such as those excluded from the requirement of preparing and delivering a public offering statement under UCA § 4-101(b) (1980 version).

ing in the Act. Any restricted practice which depends on the definition of a term is not affected by the definition of terms in the constituent documents.¹¹

Flexible Condominium

The term flexible condominium means a condominium containing withdrawable or convertible real estate, a condominium to which additional real estate may be added, or a combination thereof.¹² The ICPA already includes some of the elements of a flexible condominium, as that term is used in the UCA, except that the ICPA does not have a contractable condominium concept.¹³ Neither does Illinois have the convertible condominium concept, wherein real estate which is already part of the condominium remains a part of the common elements until converted to additional units, limited common elements, or both.

In Illinois the declaration must describe by recorded instruments the general plan and the real estate which might be developed, and reserve to the developer the right to add all or part of the property to the condominium, by making reference to particular portions, if less than all the property is being presently developed.¹⁴ Under the UCA, it is obligatory to make reservations of options with respect to additional, convertible, or withdrawable real estate (flexible condominium) within the declaration.¹⁵ These options must be exercised not later than seven years after recording the declaration.¹⁶ Illinois limits the right of add-on to ten years from the recording of the declaration.¹⁷

There is flexibility in the UCA's use and definition of certain key terms. As noted in the committee comments,

the terms "units" and "common elements" may mean anything which the developer chooses them to mean; the definition of "unit" is not limited to "apartment." It would be possible, for example, for a condominium to be composed of a high rise building, all of which was designated as a single unit which could subsequently be subdivided or converted by the declarant under § 2-115 into units and common elements.¹⁸

11. UCA § 1-103, Comment 1.

12. UCA § 1-103(13).

13. *Id.* This concept is referred to as "withdrawable real estate" in the UCA. UCA § 1-103(24).

14. ILL. REV. STAT. ch. 30, § 325 (1979).

15. UCA § 2-106(1).

16. UCA § 2-106(2).

17. ILL. REV. STAT. ch. 30, § 325(d) (1979).

18. UCA § 1-103 Comment 9.

This flexibility is not presently possible under the ICPA, which narrowly defines "unit" and "common elements."¹⁹

Flexibility also results from the fact that noncontiguous parcels of real estate may be included in one condominium. Several apartment buildings in a city, or on a block in a city, could be combined as one condominium even though they were not contiguous. Alternatively, each of the apartment buildings could constitute a separate condominium but still be subject to an "umbrella" association for certain purposes. Flexibility is further enhanced by lessening the traditional restrictions on the bases for allocating common element interests, common expenses liabilities, and votes in the association.²⁰

As previously noted, convertible real estate means a portion of a UCA flexible condominium, not within a building containing a unit, in which additional units or limited common elements, or both, may be created.²¹ Withdrawable real estate is real estate which may be withdrawn from a flexible condominium.²² Additional real estate is real estate that may be added to a flexible condominium.²³

Special Declarant Rights

Special declarant rights are reserved to the declarant, but also affect transferees or successors to the rights of the developer. The following are examples of some declarant rights: (a) to convert convertible real estate in a flexible condominium; (b) to add additional real estate to a flexible condominium; (c) to withdraw withdrawable real estate from a flexible condominium; (d) to convert a unit into two or more units and common elements; (e) to maintain sales offices, management offices, signs, and models; and (f) to use easements through the common elements for the purpose of making improvements within the condominium or within any convertible or additional real estate.²⁴ The concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Those obligations are discussed below in connection with the transfer of special declarant rights.²⁵

19. ILL. REV. STAT. ch. 30, §§ 302(d)(e) (1979) define "unit" to mean "a part of the property designed and intended for any type of independent use," and define "common elements" to mean "all portions of the property except the units, including limited common elements unless otherwise specified."

20. UCA § 2-108.

21. UCA § 1-103(9).

22. UCA § 1-103(24).

23. UCA § 1-103(1). See also UCA § 2-111.

24. UCA § 1-103(21).

25. See notes 238-40 and accompanying text *infra*.

The ICPA does not provide for special declarant rights. Under the ICPA, the developer performs all the duties and has all the rights of the board of managers until the election of the initial board of managers at the first meeting of the unit owners.²⁶

Declarant/Developer

The UCA uses the term "declarant" in three contexts.²⁷ If a condominium has already been created, the UCA defines declarant to mean any person who executed a declaration, or an amendment to the declaration to add real estate, or any person who succeeds to special declarant rights. If a condominium has not yet been created, a declarant is any person who disposes or offers to dispose of a unit not previously disposed of. If a declaration has been executed by a trustee of a land trust, the beneficiary of the trust is a declarant.²⁸ The UCA excludes from its definition of declarant those who are holding interests in the real estate solely as security for an obligation, those whose interest in the real estate will not be conveyed to unit owners, or, in the case of a leasehold condominium, a lessor who possesses no special declarant rights and who is not an affiliate of a declarant who possesses special declarant rights.²⁹

The ICPA uses the term "developer" instead of "declarant." A developer is any person who submits property that he legally or equitably owns to the ICPA, or any person who offers units that he legally or equitably owns for sale in the ordinary course of business, including any successor[s] to a developer's entire interest in the property, other than a purchaser of an individual unit.³⁰

Affiliates of a Declarant

An affiliate of a declarant under the UCA is any person who controls, is controlled by, or is under common control with, a declarant.³¹ A person controls the declarant if he is an employer or partner of the declarant, or if he controls, finances, or owns a specified amount of the declarant.³² A person is controlled by

26. ILL. REV. STAT. ch. 30, § 318.2 (1979).

27. UCA § 1-103(10). A UCA declarant is the equivalent of an ICPA developer.

28. UCA § 1-103(10)(iii).

29. UCA § 1-103(10)(i).

30. ILL. REV. STAT. ch. 30, § 302(q) (1979).

31. UCA § 1-103(2).

32. A person controls the declarant if the person

(i) is a general partner, officer, director, or employer of the declarant;
(ii) directly or indirectly or acting in concert with one or more other

the declarant if the declarant is an employer or partner of the person, or controls the [legal] person.³³ The purpose of the interlocking definitions of declarant, special declarant rights, and affiliates of a declarant is obvious: they free the courts from complications in pinpointing responsibilities, duties, and obligations which might arise if a unit owner³⁴ asserts that he is entitled to relief against the declarant or certain defined affiliates or successors of the declarant under the UCA, or under the constituent documents which create the condominium regime.³⁵

The UCA goes further than the ICPA in placing continuing obligations upon declarants, who might otherwise avoid liabilities while in control of the development, through its definitions of declarant, special declarant, and affiliate of declarant. The UCA places responsibilities on those parties who, through the devices of horizontal or vertical relationships with the declarant, might otherwise be able to avoid any responsibility. Developers might otherwise create a declarant who is not liable to respond in damages to the injured parties. Yet these sections of the UCA in no way inhibit the flexibility of the declarant to develop the concept in any way he chooses.³⁶

Variation

Section 1-104 of the UCA concerns variation by agreement.³⁷ This section takes on new significance when viewed in light of the UCA's approach, which is to take the confusion out of the

persons or, through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interests of the declarant;

(iii) controls in any manner the election of a majority of the directors of the declarant; or

(iv) has contributed more than 20 percent of the capital of the declarant.

UCA § 1-103(2).

33. A person is controlled by the declarant if the declarant

(i) is a general partner, officer, director, or employe of the person;

(ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing more than 20 percent of the voting interests of the person;

(iii) controls in any manner the election of a majority of the directors of the person; or

(iv) has contributed more than 20 percent of the capital of the person.

UCA § 1-103(2).

34. Both existing unit owners and those who become unit owners in the future are included in the meaning of the term.

35. See UCA § 3-104.

36. For instance, the UCA permits the declarant to place any other matters the declarant deems desirable into the declaration. UCA § 2-105(11).

37. See notes 55-57 and accompanying text *infra*.

relationships of the parties during and after completion of the project. The UCA also is intended to simplify the parties' relationships as the total economic, political, financial, and social concept of the condominium regime is developed over the life of the project. This section permits variation of rights and duties under the UCA only when the UCA provides for variation by agreement.³⁸ Section 1-112 on unconscionable agreements or terms of contracts establishes and enlarges the rights and liabilities of the parties in the light of these concrete definitions which make the conceptual framework of the relationships of the parties susceptible to clear interpretation.³⁹

Under either the UCA or ICPA, the successor developer/declarant is enmeshed in duties and responsibilities with those other parties involved in the condominium undertaking. However, under the UCA, the declarant is required to include in any condominium declaration, whether flexible or not, any specific reservations or special provisions if he wishes to develop the project in a particular manner.⁴⁰

In summary, lawyers may argue that the UCA makes the regime more complicated. The authors believe the UCA protects the parties, giving explicit meaning to the terms used and direction for understanding these terms. The UCA also corrects the deficiencies of first generation statutes with respect to clarity of terminology.

Condominium Types

The UCA, as the reader has seen, not only defines condominium, but distinguishes and defines the different kinds of condominiums. The requirements of the UCA condominium and the UCA flexible condominium are discussed more thoroughly below.⁴¹

The ICPA does not define condominium, although it does define conversion and add-on condominiums.⁴² Similarly, the UCA defines a conversion condominium.⁴³ Formerly, the ICPA

38. UCA § 1-104.

39. UCA § 1-112 is similar to U.C.C. § 2-302 (unconscionability), but provides specific examples of evidence which may be presented to prove unconscionability.

40. For example, a flexible condominium declaration must include statements about withdrawable real estate. UCA § 2-106(1), (3)-(7).

41. See notes 119-33 and accompanying text *infra*.

42. ILL. REV. STAT. ch. 30, § 302(k), (r) (1979).

43. Compare UCA § 1-103(8) ("conversion condominium means a condominium containing any building that at any time before recording of the declaration was occupied wholly or partially by persons other than purchasers. . . .") with ILL. REV. STAT. ch. 30, § 302(k) (1979) ("conversion condominium means a property which contains structures, excepting those newly

section on conversion condominiums provided only a right of first refusal. However, a recent amendment to the ICPA, effective January 1, 1981, provides current tenants with an option to purchase their units which runs for a period of thirty days after receipt of the developer's offer to purchase. This offer must now be delivered along with the notice of intent to convert in the form of a schedule of selling prices for all units in the building (except for units which will be vacated for rehabilitation subsequent to the notice of intent).⁴⁴ The UCA specifically provides the tenant with an option to purchase in addition to a right of first refusal.⁴⁵

Real Estate

The term real estate under the UCA includes: (1) a "leasehold interest" or any other estate or interest in, over, or under the land;⁴⁶ (2) parcels with or without upper or lower boundaries; and (3) spaces that may be filled with air or water.⁴⁷ The UCA does not include personal property in the definition of real estate.

The ICPA gives its broadest definition to the term property.⁴⁸ Property means all the land, property, and space comprising the parcel; all structures erected, constructed, or contained therein or thereon, including the building and all easements, rights, and appurtenances belonging thereto; and all fixtures and equipment intended for the mutual use, benefit or enjoyment of the unit owners submitted to the provisions of the ICPA. The ICPA makes it possible for real and personal property to be included in the condominium.

Real estate or property is not a condominium under the UCA or the ICPA unless the undivided interests are vested in the unit owners.⁴⁹ Convertible real estate under the UCA, until conversion, is part of the common elements and is vested in the unit owners.⁵⁰ Additional real estate under the UCA is not part

constructed and intended for condominium ownership, which are, or have previously been, wholly or partially occupied before recording of condominium instruments by persons other than those who have contracted for the purchase of condominiums").

44. Pub. Act 81-1469, 1980 Ill. Legis. Serv. 1500 (West).

45. Compare ILL. REV. STAT. ch. 30, § 330 (1979) with UCA § 4-110.

46. UCA § 1-103(20). Included are structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance.

47. UCA § 1-103(20).

48. ILL. REV. STAT. ch. 30, § 302(c) (1979).

49. UCA § 1-103(7); ILL. REV. STAT. ch. 30, §§ 304(e), 305-06 (1979).

50. UCA §§ 1-103(7) (9).

of the condominium until added.⁵¹ Withdrawable real estate is a part of the condominium, and is owned as a common element by all of the unit owners.⁵² Both the UCA and the ICPA make provision for subdivision or conversion of units,⁵³ and subdivision or combination of units.⁵⁴ The reader is cautioned to distinguish carefully all the terms so as not to confuse conversion condominiums with conversion of units or convertible real estate.

Other Provisions

Variation by Agreement

If the UCA as enacted does not expressly provide in any section that the section may be varied by agreement of the parties, the section may not be varied and rights may not be waived.⁵⁵ The use of powers of attorney or other devices to evade the limitations or prohibitions of the UCA is void.⁵⁶ The comments to UCA section 1-104, as proposed, inform the reader of the many sections which permit variation, but are beyond the scope of this paper. This section of the UCA seeks to permit flexibility while avoiding unfairness to developers, lenders, and purchasers. Suffice it to say that any drafters of statutes contemplating the enactment of the UCA, as proposed, will have to keep in mind any changes they wish to make with respect to the rights of the parties to make variations under any section of the UCA which does not already provide for variation.⁵⁷ Such flexibility is not so generally provided for, and may even be nonexistent, under the ICPA. Since both the UCA and the ICPA provide for amendment, the uniqueness of the variation section of the UCA is apparent.

Applicability of Local Ordinances, Regulations, and Building Codes

Section 1-106 provides an important concept regarding the applicability of the entire UCA by prohibiting discrimination against condominiums by local law-making authorities.⁵⁸ It also prohibits local or state governmental bodies from imposing a re-

51. UCA § 1-103(1) (7).

52. UCA § 1-103(7) (24), Comment 15.

53. UCA § 2-115.

54. ILL. REV. STAT. ch. 30, § 331 (1979).

55. UCA § 1-104.

56. *Id.*

57. For example, the ICPA makes provisions for the amendment of the condominium instruments and bylaws. ILL. REV. STAT. ch. 30 §§ 317, 327 (1979).

58. UCA § 1-106.

quirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership.⁵⁹ Aside from this, the UCA does not invalidate or modify any provision of state or local laws. The Act should go one step further and preempt state and local authorities from enacting laws or promulgating ordinances which conflict with the UCA.⁶⁰

However, Minnesota's recent enactment of the UCA takes the opposite approach, and significantly waters down the pre-emption concept.⁶¹ Specifically, Minnesota provides that a home rule city, pursuant to an ordinance establishing uniform standards within the municipality, *may prohibit* or impose reasonable conditions upon the conversion of buildings to condominiums.⁶² Thus, Minnesota has chosen not to preclude the adoption of laws or policies in conflict with the UCA as enacted by the Minnesota legislature.⁶³ The authors believe that this omission by the Minnesota legislature defeats the purpose of uniformity and the concept must be rejected by the Illinois legislature. Unless the Illinois legislature adopts the pre-emption concept, the "condominium" will continue to be the football of local politicians.

Eminent Domain

Eminent domain is the power of the sovereign to take private property for a public purpose;⁶⁴ usually just compensation is awarded to the owner whose property is taken. Early condominium acts either did not try to deal with the concept, or did not deal with the concept adequately. It was easier to propose legislation without going into details, and assume that there would be some equitable division. The UCA and ICPA do not

59. *Id.*

60. In fact, the Colorado Bar Association has suggested a modification to UCA § 1-106 providing in boldface type that "no county, municipality or other political subdivision, whether or not vested with home rule powers . . . shall adopt or enforce any ordinance, rule, regulation or policy which conflicts with the provisions of this Act." Uniform Condominium Act (official text with modifications recommended by Colorado Bar Association, pursuant to action of the Executive Counsel of its Board of Governors, Mar. 10, 1979).

61. Minnesota Uniform Condominium Act, ch. 582, 1980 Minn. Sess. Law Serv. 893 (West).

62. There must be a "significant shortage of suitable rental dwellings available to low and moderate income individuals," or the conditions must operate to "maintain the city's eligibility" for state or federal financial assistance. *Id.* at § 515A.1-106(c), 1980 Minn. Sess. Law Serv. at 896.

63. *Quaere*: Can there be pure uniformity under UCA § 1-106 without an expression of preemption, regardless of home rule?

64. The mechanism by which the sovereign exercises that power is called condemnation.

leave the concept of eminent domain to such fortuitous circumstances.⁶⁵

Mortgagees may be less than pleased that they have to rely on their mortgage provisions, or statutes and case law, for protection against the association or unit owner.⁶⁶ It is common knowledge that some secondary market investors do not care how the proceeds of condemnation awards are distributed, *unless* the distribution is to the owner of the unit to do with as he pleases, and the award compensates for a diminution in the value of the security under mortgage. The Federal Housing Administration and the Veterans Administration have spelled out regulations covering the subject.⁶⁷ In the private mortgage insurance sector, Mortgage Guaranty Insurance Corporation, for example, would have to be consulted concerning its contract of insurance. At present, neither the UCA nor the ICPA takes the mortgage holder into consideration when dividing the award, but the UCA allows the drafters some discretion in the matter.⁶⁸

The acts appear to presume that if the problem of eminent domain gets beyond the jurisdictional offer and settlement, a court proceeding and a decree will settle the matter of the mortgagee's interest. The UCA requires the unit owner to be paid if the unit is acquired by eminent domain, whether in part or in whole, and regardless of whether any common element interest is acquired in the eminent domain proceeding.⁶⁹ If part is taken, and the balance left is a remnant,⁷⁰ the unit owner must be compensated for the unit and common element interest.⁷¹ Thereafter, the unit's entire common element interest, votes in the association, and common expense liability are automatically re-allocated to the remaining units in proportion to the respective interests, votes, and liabilities of those units before the taking. The declaration must be amended, and the remnant becomes a common element.⁷²

65. See UCA § 1-107; ILL. REV. STAT. ch. 30, § 314.1 (1979).

66. The holder of a mortgage on property is a necessary party to condemnation proceedings. *St. Louis & Cairo R.R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N.E. 382 (1898); *Calumet River Ry. Co. v. Brown*, 136 Ill. 322, 26 N.E. 501 (1891). ILL. REV. STAT. ch. 47, § 2 (1979).

67. 24 C.F.R. § 203.389 (1980); VA Reg. 4324, (VA), FED. BANKING L. REP. (CCH) ¶ 78791.

68. See UCA § 2-121.

69. UCA § 1-107(a).

70. A remnant is not practically or lawfully usable for any purpose.

71. UCA § 1-107(a).

72. Neither the UCA nor the ICPA explains how or why a unit would be taken without a taking of the unit's common element interest. However, we suggest that an outdoor parking unit located next to an expanding school playground may be a factual situation giving rise to such a "taking."

The UCA also provides for the situation in which only the common elements are taken in eminent domain: the award is paid to the association.⁷³ If the common elements are not restored or repaired, the award is distributed among the unit owners according to the respective interests in the common elements.⁷⁴ If the common elements are limited common elements, the award is shared among the unit owners to which those limited common elements were allocated, or as provided in the declaration.⁷⁵ The court decree must be recorded in every county in which the condominium is located.⁷⁶

Section 14.1 of the ICPA discusses what must happen when the unit or common elements become the subject of a proceeding in eminent domain.⁷⁷ The declaration will control, but if any unit is taken in eminent domain, the common element interest of that unit will be divided among the remaining unit owners according to the common element interests of those units. If the taking is of the ICPA common elements, the award must be shared among all unit owners in proportion to their common element interests.⁷⁸ Additionally, the ICPA requires that the condominium documents specify the cessation of responsibility for payment of assessments for any unit or portion thereof taken in eminent domain.⁷⁹

Supplemental General Principles of Law Are Applicable

The UCA provides that:

The principles of law and equity, including the laws of corporations and *unincorporated associations*, the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this Act, except to the extent inconsistent with this Act.⁸⁰

At present, it is clear from section 18.1 of the ICPA that Illinois law does not require the owners or board of managers to incor-

73. UCA § 1-107(c).

74. *Id.*

75. *Id.* The comments to UCA § 1-107 give good examples of how the division works in practice, and the reader is urged to consult those comments.

76. UCA § 1-107(d), Comments.

77. ILL. REV. STAT. ch. 30, § 314.1 (1979).

78. The ICPA declaration may provide that limited common element awards may be shared by those units entitled to the use of the limited common elements. If it does not, it appears that under the ICPA a limited common elements award would be shared as though the limited common elements were general common elements.

79. This situation is automatically covered by the UCA, as previously discussed. See notes 64-76 and accompanying text *supra*.

80. UCA § 1-108 (emphasis added).

porate.⁸¹ Similarly, the UCA provides that an enacting state has the option specifically to permit unincorporated associations. However, the authors believe that the management body of the condominium will find it advisable to incorporate, in the absence of an adequate provision in the state statutes giving unincorporated associations entity status.⁸²

One of the problems of allowing an unincorporated association relates to the possibility of title to a portion of a property being transferred by foreclosure proceedings, or perhaps by the association's right of first refusal. Because in such an event title cannot be held in abeyance, and the association does not exist as a separate legal entity, all unit owners would have to join in the conveyance of title in the absence of a statute to the contrary. As all practitioners in the field should agree, this requirement is a practical impossibility.

UCA section 2-103 makes it clear that the rule against perpetuities may not be applied to defeat any provision of the declaration or the Act, or any instrument executed pursuant to the declaration or the Act.⁸³ The ICPA provides only that the rule of property known as the rule against perpetuities and the rule of property known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any of the provisions of the ICPA.⁸⁴ Thus, under the UCA and ICPA, the drafter of documents need not worry about the rules with respect to unreasonable restraints on alienation, but drafters under the ICPA should be concerned about any provision of their documents concerning a matter not covered by the ICPA. Common law rights are retained unless specifically displaced by the UCA. The ICPA contains no similar section, but the effect is the same unless some law outside the ICPA is expressly displaced.⁸⁵

Uniformity of Application and Construction

Many lawyers and legislators object to uniform acts. They say the acts are not really uniform since each state enacts

81. ILL. REV. STAT. ch. 30, § 318.1 (1979).

82. Failure to incorporate could and does create a number of problems unless the statute and declaration are drawn carefully to, *inter alia*, give the entity the right to hold real estate and standing to sue, to provide for the distribution of eminent domain awards and insurance proceeds to the association, and to give the association power to make binding contracts on behalf of the unit owners, etc. Jackson, *Why You Should Incorporate a Homeowners' Association*, 3 REAL EST. L.J. 311 (1975).

83. UCA § 2-103(b).

84. ILL. REV. STAT. ch. 30, § 320 (1979).

85. For instance, the ICPA depends on independent statutes of limitations, whereas the UCA sometimes includes the same. UCA § 4-114. The ICPA depends on statute and case law for implied and express warranties, whereas the UCA makes express provisions therefor. UCA §§ 4-111, 4-112, 4-113.

changes, real and cosmetic. Such changes are enough to permit enactment of discrete laws on the same subject, which have to be carefully read and interpreted without consideration of other states' "uniform" acts on the same subject.⁸⁶

Some lawyers and lenders will object to the unknown. They will say they knew, under existing case law, as well as custom and usage, the meaning of terms with which they feel comfortable. Now they must await new cases to determine the constitutionality, meaning, and effect of the UCA.⁸⁷ However, none of these objections should work as a road block to the adoption of this "second generation" statute in Illinois.

Unconscionable Agreement or Term of Contract

Stated simply, under this section of the UCA the courts may enforce the contract, enforce part and not the remainder, or enforce the contract in such a way as to avoid an unconscionable result. All the facts and circumstances as well as the application of an "effects" test will be used to determine whether the contract was unconscionable at the time it was made.⁸⁸

UCA section 1-112, which has no corresponding section in the ICPA, will warn the parties to a contract to look forward to the lawsuits which often follow creation of a condominium involving unconscionable contract clauses.⁸⁹ Commentators point out that analogous sections exist in the Uniform Commercial Code and the Uniform Land Transactions Act.⁹⁰ Developers will want to examine this section carefully, and consider its ramifications in the light of present case law.⁹¹

Obligation of Good Faith

Consider the unstable application of UCA section 1-112 concerning unconscionable contracts to UCA section 1-113 concern-

86. For example, Minnesota emasculates § 1-106 of its version of the UCA by carving out home rule exceptions to the otherwise preemptive language. Minnesota Uniform Condominium Act, ch. 582, § 515A.1-106, 1980 Minn. Sess. Law Serv. 896 (West).

87. See UCA § 1-110. (provides that the Act shall be so construed as to make uniform the law among states enacting it). Consider the reaction of some lawyers and lenders concerning the concept of flexibility as it relates to established condominium concepts of their states. By way of example, this article will later discuss the bases for voting and for allocating common expenses, whose existing treatment may be creatively modified under UCA § 2-108.

88. While the developer is acting in the capacity of the board, he is governed by the same rule.

89. UCA § 1-112.

90. Uniform Land Transactions Act § 1-311; U.C.C. § 2-302; see note 40 and accompanying text *supra*.

91. See UCA § 1-112(b).

ing the obligation of good faith.⁹² The UCA imposes an obligation of good faith in the performance or enforcement of every contract or duty. The ICPA does not have a similar provision. It has been the practice of some drafters to include a provision which causes the unit owners to be liable, and to exonerate the board of managers for every action taken by them, unless the action or inaction of the board is due to gross negligence. The standard of care, therefore, would shift under the UCA from one of malfeasance, nonfeasance, or misfeasance, to one of good faith. Good faith would seem to imply that the board could not, with impunity, ignore the importance of acting in a businesslike manner, nor fail to make reasonable inquiries and investigations about contemplated actions on behalf of the unit owners.⁹³

The term good faith, according to the UCA commentators, is not defined, but appears in the Uniform Simplification of Land Transfer Act, and in the Uniform Commercial Code.⁹⁴ There are two standards to be applied: one is honesty in fact, the other is observance of reasonable standards of fair dealing.⁹⁵

Remedies to Be Liberally Administered

UCA section 1-114 requires that the aggrieved party be put in as good a position as if the other party had fully performed;⁹⁶ however, consequential, special, or punitive damages may not be awarded except as specifically provided in the UCA or by another rule of law.⁹⁷ Any right or obligation under the UCA is enforceable by a judicial proceeding.⁹⁸

The ICPA, unlike the UCA, does not provide a remedy to aggrieved parties. Under the ICPA, an aggrieved party, other than the board of managers, would have to plead and prove his standing to sue if he could not persuade the board of managers to sue on his behalf.⁹⁹ This problem is particularly difficult when the aggrieved party, the board, and the developer performing in a fiduciary capacity on behalf of the board have differing interests to protect.¹⁰⁰ If only the board of managers has the

92. UCA § 1-113.

93. See U.C.C. §§ 2-103(1)(b), 7-404.

94. See UCA § 1-113, Comment.

95. UCA § 1-113, Comment.

96. UCA § 1-114.

97. UCA § 1-114(a).

98. UCA § 1-114(b).

99. ILL. REV. STAT. ch. 30, §§ 309.1-309.2 (1979).

100. A case in point is *Mitchell v. Stetson Mgmt. Co.*, Gen. No. 79 MN 31493 (3d Municipal District, Cook County, Illinois, 1980) which held that a condominium unit owner lacks standing to bring a legal action directly

standing to sue, does the board also have a duty to sue at the request of an aggrieved party? The UCA provides a remedy for any person.

ARTICLE 2

Creation, Alteration and Termination of Condominiums

This section introduces the concept of "substantial completion" to the law of condominiums by requiring that significant construction take place before the condominium may be lawfully created.¹⁰¹ The conveyance of an interest in any unit prior to substantial completion is prohibited.¹⁰²

The rationale of this section is to prohibit the early closing of a few units in a development at a time when serious problems may arise thereafter.¹⁰³ Accordingly, this section reduces the possibility that a failure to complete construction will upset the expectations of purchasers or harm their interests if the developer becomes insolvent. The drafters of the UCA feared that sales would be consummated before substantial completion of the entire project. The comments explain that the UCA drafters meant to describe terms that are well understood in the construction field, rather than provide a "laundry list" of specific items.¹⁰⁴ This section departs materially from the ICPA, which merely requires a recordation of a declaration to create a condominium regime.¹⁰⁵

The ICPA requires a plat to be recorded as part of the declaration which must be supported by factual particulars,¹⁰⁶ and it

against the management company since the right lies exclusively with the association. The trial court held that (i) there could be no breach of contract between the unit owner and the management company since the contract was executed with the association and, therefore, the unit owner lacked privity of contract; (ii) there could be no negligent breach of duty (to manage properly) since the duty was owed to the association and not the unit owner.

101. UCA § 2-101(b). The section provides that the declaration or an amendment to the declaration may not be recorded unless all structural buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent (registered) engineer, surveyor, or architect.

102. UCA § 2-101(c).

103. A typical problem arises when an insolvent developer is unable to complete construction and pay his common expense assessments as the owner of the unsold and/or unbuilt units. See UCA § 2-101, Comment.

104. See UCA § 2-101, Comment 4.

105. ILL. REV. STAT. ch. 30, §§ 303, 306 (1979).

106. ILL. REV. STAT. ch. 30, § 305 (1979). Such particulars include the description of the parcel; a description of buildings, structures, and improvements located on the parcel; units; statutory requirements concerning

requires an amendment of the plat if the surveyor does not certify, at the time of recording the plat, all particulars in description of the units inside or outside the building. Any such amendment must be recorded before conveyance of the unit.¹⁰⁷

Under the UCA, the declarant cannot create the unit which would become the subject of sale, because the declaration *cannot be recorded* until substantial completion has taken place. UCA section 201(b) contemplates that two different stages of construction must be reached before (i) a condominium regime may be created, or (ii) an individual unit may be conveyed. The drafters suggest that this requirement of substantial completion will reduce the possibility that a failure to complete the project will upset the expectations of purchasers, or will otherwise hurt them in case the developer becomes insolvent. Under both the UCA and the ICPA, a certificate of occupancy usually precedes the possibility of conveyance of a unit.

Pragmatically, of course, the developer without a deep pocket will be restrained from recording a declaration before construction has proceeded to a certain point. Under the ICPA, the developer's construction lender usually controls the process, generally requires substantial completion and a certificate of occupancy, and imposes a presale requirement before the project is submitted to the ICPA. However, under the UCA, if the development is flexible, the developer may record the declaration although the optional units to be created in convertible, withdrawable, or additional real estate may never be created.¹⁰⁸

Under the ICPA, the condominium would be treated as incomplete in the event that the surveyor was unable to set the actual boundaries of, for example, the elevations of every unit. However, Illinois title insurance companies do allow a projection of the entire regime, if recording is to occur prior to completion of all units. In such an event, amendments are later recorded showing the completed units.¹⁰⁹ The authors believe that the title insurance companies will have to modify their present practices drastically if the UCA is enacted in Illinois.

Construction and Validity of Declaration and Bylaws

This section refers to the severability of all provisions of the declaration and bylaws.¹¹⁰ The UCA establishes the ground

add-on condominiums and conversion condominiums; plat requirements; and the like.

107. ILL. REV. STAT. ch. 30, § 305 (1979).

108. UCA § 2-106(1).

109. ILL. REV. STAT. ch. 30, § 305 (1979).

110. UCA § 2-103(a). An earlier section referred to severability as it re-

rules for determining which of the constituent documents is superior when construing incongruent provisions.¹¹¹ Whenever there is any recitation of rights and duties in two or more of the constituent documents, there is always a possibility of either a conceptual or a scrivener's error. This UCA section solves that problem. However, the ICPA has no similar provision, and document drafters must delineate which of the constituent documents will control if the declaration, bylaws, and other documents are found to contain conflicting provisions.

Under the UCA, as opposed to the ICPA, there is no requirement that the bylaws be recorded.¹¹² Under the UCA, title is not either rendered unmarketable or otherwise affected by any provision of the unrecorded bylaws, or by an insubstantial failure of the declaration to comply with the Act.¹¹³

Contents of Declaration: All Condominiums

The UCA provides separate lists of declaration requirements for all condominiums, including flexible condominiums.¹¹⁴ The ICPA provides additional requirements for add-on condominiums.¹¹⁵ Both the UCA and the ICPA provide additional requirements for conversion condominiums.¹¹⁶

The UCA declaration must include, among other things, the basic information now required under the ICPA. The ICPA requires the words "condominium" or "a condominium" to appear in the declaration.¹¹⁷ In addition, the UCA requires, *inter alia*, (i) information on the units that may be created, and (ii) the description of any common elements not within the boundaries of any convertible real estate, which must subsequently be allocated as limited common elements, together with a description of the manner in which the allocations are to be made.¹¹⁸ Generally, both the UCA and ICPA prescribe language similar in

lates to provisions of the UCA. UCA § 1-111 (1980 version). A similar section of the ICPA applies to the severability of any part of the ICPA. ILL. REV. STAT. ch. 30, § 321 (1979).

111. UCA § 2-103(c).

112. UCA § 2-103(d); ILL. REV. STAT. ch. 30, § 317 (1979). The ICPA requires the bylaws to be recorded in order to establish the condominium regime. ILL. REV. STAT. ch. 30, § 317 (1979).

113. UCA § 2-103(d).

114. UCA § 2-106.

115. ILL. REV. STAT. ch. 30, § 325 (1979).

116. UCA § 4-110; ILL. REV. STAT. ch. 30, § 330 (1979).

117. ILL. REV. STAT. ch. 30, § 304(c) (1979). Failure to use the term "condominium" in the declaration is an example of an insubstantial failure which would not prevent the condominium regime from being created. *See* UCA § 2-103(d), Comment 2.

118. UCA § 2-105.

meaning in describing the contents of the declaration required for all condominiums.

Contents of Declaration: Flexible Condominiums

The UCA allows for the creation of a condominium regime in which the amount of real estate submitted may be increased by adding, or reduced by withdrawing, real estate previously submitted, or real estate upon which new units or limited common elements may be built. The new building may be built either on additional real estate, or on real estate which is already a part of the regime but is designated as convertible real estate.¹¹⁹ This is the concept of the UCA flexible condominium.

The ICPA contemplates condominiums, add-on condominiums, conversion condominiums, and subdivision or combination of units.¹²⁰ Under the UCA, to create a flexible condominium, the declaration must reserve to the declarant the option to create units, limited common elements, or both within convertible real estate, and to add additional real estate or withdraw withdrawable real estate.¹²¹ The ICPA also requires the developer to reserve the right to add on,¹²² and places limitations on a developer's right to create conversion condominiums.¹²³

All the UCA options are limited to a period of seven years after the recording of the declaration, or to circumstances that will cause an earlier termination.¹²⁴ The ICPA requires that the declaration reserve the option to add on additional property, with a time limit of ten years to exercise that option.¹²⁵

The UCA makes a number of specific references to residential uses, and also requires reservations of additional or convertible options to describe any nonresidential uses.¹²⁶ This is in contrast with the ICPA, which only requires the developer to state the extent to which the structural improvements, buildings, and units in the add-on condominium will be compatible with the configuration of the property.¹²⁷

Under the UCA, the declarant may obligate himself to develop, to build, or to limit locations of buildings and other im-

119. UCA § 2-106(1).

120. ILL. REV. STAT. ch. 30, §§ 325, 330, 331 (1979).

121. UCA § 2-106.

122. ILL. REV. STAT. ch. 30, § 325 (1979).

123. ILL. REV. STAT. ch. 30, § 330 (1979). The UCA terms "convertible" and "conversion" condominiums should not be confused by the reader. UCA §§ 1-103(8), (9), 2-106, 2-115, 4-110.

124. UCA § 2-106(2).

125. ILL. REV. STAT. ch. 30, § 325(d) (1979).

126. *E.g.*, UCA § 2-106(7), (8).

127. ILL. REV. STAT. ch. 30, § 325(h) (1979).

provements or uses on convertible or additional real estate. The declarant can avoid such obligations if he makes a statement as to limitation,¹²⁸ makes a statement as to what must be done or whether development need not be done, or makes a statement that no assurances are made in that regard.¹²⁹ The same is true with respect to limited common elements within convertible or additional real estate, the proportion of limited common elements in convertible or additional real estate, and any assurances that apply to convertible or additional land. There are requirements for disclosures about development of additional, convertible, and withdrawable real estate, which do not permit any statement of limitations or a statement that no assurances are made.¹³⁰ The ICPA clearly states that if the developer does not bind himself with respect to his option concerning add-on property, he will be under no obligation to make additions to the condominium.¹³¹

The UCA requires that in the event the developer only describes the plan and does not wish to bind himself expressly to develop flexible real estate, he must state in the declaration whether or not he reserves options with respect to flexible condominiums.¹³² The developer's documents should make it clear that he is not bound to exercise his options because, unlike the ICPA, the UCA is silent on this matter. Two unfortunate consequences could result from a developer's silence under the UCA: (1) the developer may be held not to have reserved any options, or (2) he may be held by other statements to have bound himself to develop convertible, additional, or withdrawable real estate.

Most condominium developers are sensitive to the legal, underwriting, and marketing considerations involved in undertaking too large an obligation at the initial stages of development. The UCA provides for certain additional matters to be addressed in the case of a "flexible condominium" including, *inter alia*, the following:

1. Detailed explanations of all development options reserved by the declarant.
2. A time limit on the exercise of those development options (not exceeding seven years after the recording of the declaration) and any circumstances which would take away an option before this time limit expires.

128. UCA § 2-106(3).

129. UCA § 2-106(6).

130. See, e.g., UCA § 2-106(4), (7), (8).

131. ILL. REV. STAT. ch. 30, § 325 (1979).

132. UCA § 2-106(1).

3. A description of how the exercise of these options would affect voting rights, common element interests, or common element liabilities for each unit.
4. A description of how compatible possible additional buildings would be with those already under construction, including such factors as architectural style, quality, materials, or size.
5. Options for change in use and occupancy.
6. Descriptions of common elements and limited common elements which might be created in additional phases.¹³³

Allocation of Common Element Interests, Votes, and Common Expense Liabilities

The ICPA establishes the basis on which a unit owner's percentage of ownership interest in the common elements is allocated—by taking the value of each unit in relation to the value of the property as a whole.¹³⁴ The UCA departs radically from the "value" approach to allocation of (1) common element interests, (2) votes in the association, and (3) common expense liabilities. It permits each of these allocations to be made on different bases, and permits allocations which are unrelated to value.¹³⁵

When a UCA declaration limits further development of the condominium to consistent units or application of formulas in a consistent way, or states the differences and how common interests and expense liabilities will be allowed or reallocated, a developer has almost complete flexibility.¹³⁶ However, complete flexibility is not allowed in voting. There are three bases for determining voting rights: equality, proportion to common expense liability, or common element interest. The declaration must state which formula shall be applied.¹³⁷ If equality is used, and the units or common elements may be divided or converted, each unit capable of being so produced must be allocated a certain number of votes based on the size of the unit relative to the size of all units.¹³⁸ The remaining votes must be allocated

133. UCA § 2-106.

134. ILL. REV. STAT. ch. 30, § 304(e) (1979).

135. UCA § 2-108. For example, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant/developer may select, regardless of the values of those units. Moreover, "size" might be used in allocating expenses and common element interests, while "equality" is used for allocating votes in the association. UCA § 2-108(b). Justification for the formula used is not required so long as the formula is explained to the unit purchasers. UCA § 2-108, Comment 1.

136. UCA § 2-108(b).

137. UCA § 2-108(c).

138. *Id.*

equally to the other units.¹³⁹ The declaration may specify that different allocations of votes may be made to units on particular matters specified in the declaration.¹⁴⁰

The drafters of the UCA believed that flexibility to develop projects would be enhanced by allowing different bases to be used to allocate common element interests, voting rights, and common expense liabilities.¹⁴¹ In addition to the value approach, such bases might include par value, size of the unit by area or volume, height of the unit in a vertical condominium, or equality. The drafters believed that no one basis can be applicable to all the problems presented by the UCA, which permits flexible condominiums. The drafters of the ICPA have continued the value approach through various recent amendments.¹⁴²

Under the UCA, expansion or conversion of a flexible condominium, withdrawal of withdrawable real estate, relocation of boundaries between adjoining units and subdivision of units, the common element interest, votes, and common expense liability allocated to any unit may not be altered without unanimous consent of all unit owners, except in the case of eminent domain proceedings.¹⁴³ The ICPA, in contrast, permits subdivision and combination of units unless the constituent documents expressly forbid it.¹⁴⁴ The ICPA also provides for a reallocation of the common element interest.¹⁴⁵ Consequently, since the common element interest determines the common expense liability and voting, these items also will be reallocated.

Limited Common Elements

With the exception of a limited common element serving only one particular unit,¹⁴⁶ the UCA provides that the declaration may specify to which unit limited common elements are allocated. That allocation may not be changed without the consent of all unit owners.¹⁴⁷ The mechanics for reallocation, when permitted, are much the same under the ICPA¹⁴⁸ and the

139. *Id.*

140. *Id.*

141. See UCA § 2-108, Comment 1.

142. For example, the ICPA uses the value approach in the distribution of eminent domain awards, and in the formula applied to add-on condominiums and to subdivision and combination of units.

143. UCA § 2-108(d).

144. ILL. REV. STAT. ch. 30, § 331 (1979).

145. *Id.*

146. See UCA § 2-102(2), (4). Limited common elements include, but are not limited to, chutes, flues, ducts, balconies, and patios.

147. UCA § 2-109(a).

148. ILL. REV. STAT. ch. 30, § 326 (1979).

UCA.¹⁴⁹ However, under the UCA the declaration must spell out the right to allocate, as limited common elements, a common element not previously so described, and such common element must not be located within the boundaries of any convertible real estate.¹⁵⁰

The UCA permits unit owners to reallocate limited common elements by deed, assignment, or by amendments to the declaration,¹⁵¹ whereas the ICPA allows the transfer of limited common elements between unit owners only by amendment to the declaration executed by all unit owners who have the right to the use of such common elements.¹⁵²

The ICPA permits the transfer of limited common elements in accordance with the constituent documents.¹⁵³ Since limited common elements are designed for use by fewer than all units, no change in the common element interest is necessary. However, the ICPA does provide for a reapportionment of the use by particular units of the limited common elements.¹⁵⁴ The ICPA also permits add-on condominiums with the right to reallocation of percentage interests in the common elements in add-on condominiums,¹⁵⁵ made in accordance with the ICPA and the constituent documents.¹⁵⁶

Partition of Common Elements Prohibited

Buried in the allocation section of the UCA is a provision which prevents the partition of an undivided interest in the common elements, and which makes void any attempt to partition the common elements without partitioning the unit to which they are allocated.¹⁵⁷ This language apparently does not really mean what it says in purporting to include involuntary transfers, inasmuch as the appropriate sections relating to eminent domain and insurance provide for the taking of common elements separately from the units to which the common elements formerly were allocated.¹⁵⁸ By definition, limited common elements are covered by the same rules. The ICPA prevents much the same thing, except that it makes partition possible when it

149. UCA § 2-109(b).

150. UCA § 2-109(c).

151. UCA § 2-109(b).

152. ILL. REV. STAT. ch. 30, § 326 (1979).

153. *Id.*

154. *Id.*

155. *See* ILL. REV. STAT. ch. 30, § 325 (1979). Common elements by definition include limited common elements.

156. ILL. REV. STAT. ch. 30, § 326 (1979).

157. UCA § 2-108(d).

158. *See* UCA §§ 2-108(d), 1-107, 3-112.

occurs as the result of a casualty loss, or in the event of eminent domain.¹⁵⁹

Plats and Plans

This section of the UCA sets forth the information which must be contained in the plats and plans. Included, *inter alia*, are the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium, labeled as either "must be built" or "need not be built," as well as the location and dimensions of any convertible real estate and/or withdrawable real estate.¹⁶⁰ Both plats and plans are not required if the information required by the UCA is contained in one or the other.¹⁶¹

The difference between plats and plans under the UCA is not spelled out in the definition section,¹⁶² but is distinguished in the plats and plans section itself.¹⁶³ "Plat" is the broader term, meant to include a description of the condominium, including all the real estate in the development, whether flexible or not. The "plan" section of the UCA applies to buildings that comprise all or any part of a unit which is located within, or must be built within, any part of the condominium. The plat section of the UCA, on the other hand, includes real estate that either may not be located in, or need not be built in, any part of the condominium.¹⁶⁴ The UCA plan section contains the additional requirement that the declarant show "any units that may be converted by the declarant to create additional units or common elements. . . ."¹⁶⁵ Neither the plan nor the plat section requires that contemplated or existing improvements within convertible real estate be shown. Of course, when convertible or additional real estate is converted or added, new plats and plans must be recorded.¹⁶⁶

The UCA introduces a concept which requires the declarant to state on the face of the plat whether any contemplated improvement within the development "must be built" or "need not be built."¹⁶⁷ If any improvement which "need not be built" is required to be marked on a plat or plan, or is located within convertible real estate, no promotional material can be shown to

159. ILL. REV. STAT. ch. 30, § 308 (1979).

160. UCA § 2-110(a).

161. *Id.*

162. UCA § 1-103.

163. UCA § 2-109.

164. *See* UCA § 2-109(b).

165. UCA § 2-109(d)(3).

166. UCA § 2-109(f).

167. UCA § 2-109(c).

prospective purchasers without labeling the improvement "need not be built."¹⁶⁸ If the improvement is labeled "must be built," the declarant is required to complete that improvement.¹⁶⁹

Apart from the foregoing provision, the ICPA and the UCA appear to have similar requirements for plats. The ICPA does not require plans, nor does it use the term, except insofar as site and floor plan drawings may be required.¹⁷⁰

Conversion and Expansion of Flexible Condominiums

As stated earlier in this article,¹⁷¹ convertible real estate means a portion of a flexible condominium not within a building containing a unit, within which additional units or limited common elements, or both, may be created.¹⁷² Note that convertible real estate, until conversion, is part of the common elements and is owned by the unit owners.¹⁷³ Additional real estate, by definition, is not part of the condominium, but is real estate which may be added to the condominium.¹⁷⁴ Units and their proportionate share of common elements are initially owned by the declarant.¹⁷⁵

When converting or adding real estate, reallocation of common element interests, votes, and common expense liabilities is necessary. Limited common elements must be allocated.¹⁷⁶ The time limit for converting or adding real estate under the UCA is a period not exceeding seven years after the recording of the original declaration.¹⁷⁷ The declarant has all the benefits, burdens, and liabilities of ownership of convertible real estate until conversion.¹⁷⁸

The ICPA provides for add-on condominiums; no unit owner approval is required so long as the developer complies with the

168. UCA § 4-116.

169. UCA § 4-117. Interestingly, the drafters have also included the concept that a condominium unit may consist of unenclosed ground and/or airspace, with no building involved. UCA § 2-110, Comment 2. The unit treatment appears to be possible for unenclosed space under the ICPA. See ILL. REV. STAT. ch. 30, §§ 302(d), 305(4) (1979). The UCA permits the plats and plans to be made by an independent surveyor, architect, or engineer. UCA § 2-110(h). The ICPA requires a registered Illinois land surveyor. ILL. REV. STAT. ch. 30, § 305 (1979).

170. See ILL. REV. STAT. ch. 30, § 322(d) (1979).

171. See notes 12-23 and accompanying text *supra*.

172. UCA § 1-103(9).

173. UCA § 1-103, Comment 6.

174. *Id.* By amendment to the declaration and plat of record, convertible real estate is converted and additional real estate is added. UCA § 2-111(a).

175. By definition, limited common elements are included in common elements. See UCA § 1-103(4).

176. UCA § 2-109(a).

177. UCA § 2-111(b). See also UCA § 2-106(2).

178. UCA § 2-111(c).

requirements of the ICPA.¹⁷⁹ Under the ICPA, the developer must have reserved the right to add property in his original condominium declaration.¹⁸⁰ The covenants, conditions, and restrictions of the original condominium declaration remain in full force and effect as to property already subject to the declaration, but the amendment may modify the provisions of the declaration as to the add-on property. Any attempt to make a prohibited type of revocation, modification, or addition is of no effect.¹⁸¹ The ICPA does not provide for convertible property.

Withdrawal of Withdrawable Real Estate

The UCA requires that an amendment to the declaration containing a legally sufficient description of the real estate being withdrawn from the condominium must be prepared, executed, and recorded.¹⁸² The amendment must reallocate common element interests, votes in the association, and common expense liabilities to the remaining units in the condominium.¹⁸³ The ICPA has no similar provision except insofar as the condominium regime may be terminated, or terminated as to a part, by damage, destruction, or eminent domain.¹⁸⁴

The UCA contemplates that until one unit in withdrawable real estate is owned by a person other than the declarant, the declarant may withdraw real estate by recording an amendment reallocating common element interests, votes in the association, and common expense liabilities.¹⁸⁵ Once again, as in convertible real estate, all benefits and burdens upon real estate inure to and against the declarant until withdrawal amendments are recorded.¹⁸⁶

179. To add on property to the condominium, the developer must reallocate common elements and record amendments to the declaration and plat. ILL. REV. STAT. ch. 30, § 325 (1979).

180. Other limitations and conditions relating to add-on property are similar to those of the UCA for declarations which include the rights of the declarant to add additional real estate.

181. See, e.g. ILL. REV. STAT. ch. 30, § 325(a) (1979).

182. UCA § 2-112(a). The fact of withdrawal must also be stated.

183. *Id.* Reallocation is done in proportion to the remaining units' respective interests, votes, and liabilities before withdrawal.

184. ILL. REV. STAT. ch. 30, §§ 316, 314.1, 314 (1979). Voluntary termination by election to sell the property under the ICPA is the broadest definition, and includes the entire condominium. *Id.* § 315. There is also a provision for removal, but that also speaks of property and would result not in diminution of the condominium but in extinguishment of the entire condominium regime. ILL. REV. STAT. ch. 30, § 316 (1979).

185. UCA § 2-112(b).

186. UCA § 2-112(c). Withdrawable real estate is part of the condominium owned by all of the unit owners as common elements. UCA § 1-103, Comment 15.

Subdivision or Conversion of Units

The UCA and ICPA sections which deal with subdivision and conversion of units are similar.¹⁸⁷ To comply with the ICPA, the board of managers must record an amendment to the declaration, plats, or plans reallocating or adjusting the common interest.¹⁸⁸ The ICPA declaration need not provide for the subdivision or combination of units, but it must not prohibit subdivision or combination if the declarant intends to do so at a later time.¹⁸⁹ The UCA declaration must expressly reserve subdivision or conversion rights.

ICPA unit owners must apply to the board of managers requesting an amendment to reallocate common element interests to the new units.¹⁹⁰ The UCA permits a nondeclarant unit owner to subdivide his unit into two or more units,¹⁹¹ a UCA declarant is permitted to subdivide or convert his units into two or more units, common elements, or a combination of the two.¹⁹²

The same requirement as that for expansion and withdrawal applies to subdivision and conversion: an amendment to the UCA declaration and to the plats and/or plans must be prepared, executed, and recorded by the association.¹⁹³ Once again, a reallocation of common element interests, votes, and common expense liability to the new units is required.¹⁹⁴

Easement for Encroachments

The UCA provides for two alternative approaches to the problem of easements for encroachments. On the one hand, the UCA allows the encroachment to exist by providing for an easement without relieving the unit owners of their responsibility in case of willful misconduct, and without relieving the declarant or any contractor, subcontractor, or materialman of liability for failure to follow the plats and plans.¹⁹⁵ The UCA allows an alter-

187. UCA § 2-115; ILL. REV. STAT. ch. 30, § 331 (1979).

188. ILL. REV. STAT. ch. 30, § 331 (1979).

189. *Id.*

190. *Id.* As under the UCA, the ICPA subdivision or combination of units is effective when the amendment approved by the board is recorded. UCA § 2-115; ILL. REV. STAT. ch. 30, § 331 (1979).

191. UCA § 2-115(a).

192. *Id.*

193. *Id.*

194. UCA § 2-115(c). The ICPA contains a little-known provision relative to reallocation and adjustment of the percentage of ownership in the common elements appertaining to a unit or units in case of an add-on, condemnation, damage, or destruction of all or a portion of the property. This provision also applies to subdivision or combination of units as provided for in the constituent documents. ILL. REV. STAT. ch. 30, § 306 (1979).

195. UCA § 2-116 [Alternative A].

nate approach to the problems of encroachments by allowing the boundaries of the structure to become its actual boundaries. The structure must have been built in substantial accord with the plats and plans to become the boundaries, rather than in accord with the metes and bounds as originally expressed in any deed, plats, or plans.¹⁹⁶

The ICPA gives an encroachment easement on behalf of unit owners on other units, and for common elements on units.¹⁹⁷ Again, no easement exists in favor of any owner who creates an encroachment by his intentional, willful, or negligent conduct, or that of his agent.

Amendment of Declaration and Other Constituent Documents

The ICPA permits an amendment to the declaration in several situations: changing the percentage of ownership interest;¹⁹⁸ changes to allow an add-on condominium;¹⁹⁹ amending the plat or certificate attached to the plat;²⁰⁰ condemnation, damage, or destruction of all or a portion of the property;²⁰¹ subdivision or combination of units;²⁰² and transferring limited common elements.²⁰³ Additionally, the ICPA permits amendment of the bylaws, which must be attached to and recorded with the declaration.²⁰⁴ The ICPA also permits the rules and regulations of the condominium to be amended.²⁰⁵

In a condominium conversion the ICPA prohibits amendment, without approval of a minimum of seventy-five percent of the buyers then owning an interest, of any of the constituent documents which formed a part of the pre-sale disclosure required for condominium conversion.²⁰⁶ This prohibition is in a separate section relating to comparing and contrasting the pub-

196. UCA § 2-116 [Alternative B].

197. ILL. REV. STAT. ch. 30, § 323 (1979).

198. ILL. REV. STAT. ch. 30, § 327 (1979).

199. ILL. REV. STAT. ch. 30, § 325 (1979).

200. ILL. REV. STAT. ch. 30, § 305 (1979).

201. ILL. REV. STAT. ch. 30, § 314.1 (1979).

202. ILL. REV. STAT. ch. 30, § 331 (1979).

203. ILL. REV. STAT. ch. 30, § 326 (1979).

204. Certain matters, such as voting, must be included in the bylaws. Others must be included with certain content, such as the number of meetings. Section 325 states that when no amendment is permitted as to certain matters, no changes are possible. As to those matters which must be covered generally in the bylaws, an amendment to change discretionary matter included in the bylaws is absolutely required and authorized by the ICPA. ILL. REV. STAT. ch. 30, §§ 318, 325 (1979).

205. ILL. REV. STAT. ch. 30, § 318.4(h) (1979).

206. ILL. REV. STAT. ch. 30, § 322(e)(4) (1979). There are exceptions to this rule under certain conditions.

lic reports required by the UCA and the ICPA.²⁰⁷ The ICPA places general conditions and limitations upon the amendment of the condominium instrument when the owner is anyone other than the developer.²⁰⁸

The declarant under the UCA is permitted unilaterally to amend the declaration upon converting convertible real estate or adding additional real estate. He is permitted to change plats and plans when converting any unit into two or more units, limited common elements, or both; when converting convertible real estate or adding additional real estate; and when withdrawing withdrawable real estate.²⁰⁹ The UCA association is subject to a voting percentage limitation when amending the declaration except: when units or common elements are taken in eminent domain; when a lease in a leasehold condominium terminates or expires; when allocating a common element to the status of a limited common element; and when subdividing or converting units.²¹⁰

Under some circumstances, the UCA permits unit owners to amend the declaration without adhering to any percentage of unit owner's rule when reallocating limited common elements; when reallocating boundaries between units; and when subdividing or converting a unit.²¹¹ Under the UCA, no action to challenge the validity of any amendment adopted by the association may be brought more than one year after the amendment is recorded.²¹² Presumably, declarant's and unit owners' amendments may be attacked at any time. No such time limitation is provided under the ICPA.

Under the UCA, the association, if required to record an amendment, may be represented by the president of the association in fulfilling all requirements.²¹³ Another aspect of the UCA is bound to please mortgage holders: this is a section which permits the declaration to require that a specified number of mortgagees, or beneficiaries of deeds of trust encumbering the units, must approve specified actions of the unit owners or association as a condition to the effectiveness of those actions. At the same time, neither administrative control nor the power to interfere in any litigation or settlement of insurance matters is given to mortgagees.²¹⁴

207. UCA § 4-110; ILL. REV. STAT. ch. 30, §§ 322, 330 (1979).

208. ILL. REV. STAT. ch. 30, § 327 (1979).

209. UCA § 2-119.

210. UCA § 2-119(a).

211. UCA § 2-119(d).

212. UCA § 2-119(b).

213. UCA § 2-119(e).

214. UCA § 2-121. The ICPA permits a similar right to the mortgagees,

The UCA requires the unanimous consent of unit owners for any amendment which would increase the special declarant rights, increase the number of units, or change the boundaries of any unit or the common element interest. Unanimous consent is also required to change common expense liability, voting strength in the association allocated to a unit, or the uses to which any unit is restricted.²¹⁵ The ICPA prohibits amendment of the condominium instrument, except to the extent that it allows changing the boundaries of any unit or the common element interest votes, or changing common expense liability.²¹⁶

Generally, if any unit is owned by a person other than the developer, the ICPA requires two-thirds of those entitled to do so to vote together with the mortgagees, if the condominium instruments so require.²¹⁷ The UCA specifies a minimum vote of sixty-seven percent of the unit owners, including the declarant, unless a different number or percentage is required under another section, a larger number is specified under the declaration, or the declarant is permitted unilaterally to amend.²¹⁸

The UCA makes a distinction between those condominiums which are to be used for residential purposes and those which are not. For the latter, the declaration may specify that a smaller number must vote for amendment.²¹⁹ Although a condominium could be created for any lawful purpose under the ICPA, the ICPA does not make such a distinction.²²⁰

ARTICLE 3

Management of the Condominium

Article 3 deals with the management of the condominium association. It expresses an intent to encourage the developer to maintain separate records for the association *and* to involve unit owners in the governing of the condominium, even during a period of declarant control. The UCA envisions creation of the unit owners' association at the time the condominium regime is created.²²¹ The members are unit owners as well as the developer. The ICPA requires the developer to administer the prop-

but only if it is required in the declaration or bylaws. ILL. REV. STAT. ch. 30, § 327 (1979).

215. UCA § 2-119(d).

216. ILL. REV. STAT. ch. 30, § 327 (1979).

217. *Id.* There is an exception to this rule where the ICPA requires a different percentage to vote.

218. UCA § 2-119(a).

219. *Id.*

220. *Cf.* ILL. REV. STAT. ch. 30, § 302(d) (1979) ("Unit" means a part of the property designed and intended for any type of independent use).

221. UCA § 3-101.

erty, prior to the election of the initial board of managers, for the benefit of the association.²²²

Both the ICPA and the UCA give the enacting state the option of allowing incorporated or unincorporated associations.²²³ Under the ICPA, the unincorporated association has all the powers the association would have if it were incorporated. The powers of the unincorporated unit owners' association specified under the UCA do not require comment, except to say that the UCA makes it clear the declarant has no right to include any provision which would make the association less powerful in dealing with the declarant than the association is in dealing with any other person. The declarant or developer cannot insulate himself from responsibility for his misfeasance, nonfeasance, or malfeasance under either Act.²²⁴

The unit owners' involvement is reserved, in the UCA, by providing that declarant control extends for not more than five years from the date of the first conveyance of a unit to a person other than the declarant. This five-year limit applies to a flexible condominium containing convertible real estate or to which additional real estate may be added; the period is three years in the case of any other type of condominium. In either event, the unit owners assume control once the declarant has conveyed three-quarters of the units to them.²²⁵

The UCA provides for what is sometimes referred to as an "interim board." Within sixty days after the conveyance of twenty-five percent of the units, at least twenty-five percent of the members of the executive board are to be elected by unit owners other than the declarant. After half of the units have been conveyed, at least one-third of the executive board members are to be elected by unit owners other than the declarant. This is the control provision.²²⁶ The UCA makes it clear that officers and members of the executive board appointed by the declarant are fiduciaries of the unit owners.²²⁷ There is no way other than by appointing executive board members, or by declarant's votes, that the declarant can direct the affairs of the association.

Limitations of the UCA prevent members of the executive board from amending the declaration, terminating the condo-

222. ILL. REV. STAT. ch. 30, §§ 318.1, 318.2 (1979).

223. The drafters of the UCA did not believe it desirable to mandate incorporation. UCA § 3-101; ILL. REV. STAT. ch. 30, § 318.1 (1979).

224. UCA § 3-102(b); ILL. REV. STAT. ch. 30, § 318.2 (1979).

225. "Regardless of the period provided in the declaration, a period of declarant control terminates no later than 60 days after conveyance of 75 percent of the units to unit owners other than a declarant." UCA § 3-103(c).

226. UCA § 3-103(d).

227. UCA § 3-103(a).

minium, or electing members of the board;²²⁸ the declarant under the UCA is free to exercise any power granted to him under the Act, declaration, or bylaws, but his acts are traceable at all times. The declarant is deprived of any alter ego protection by means of affiliates or successors.

The ICPA gives the powers and duties of the board of managers to the developer until the election of the initial board of managers.²²⁹ Traditionally, first generation statutes have not addressed the issue of turnover of association control from the developer to the unit owners. The ICPA limits the time after which an initial meeting must be called to sixty days after the conveyance by the developer of seventy-five percent of the units, or three years after the recording of the declaration, whichever occurs first.²³⁰ This limitation puts the burden on the developer to determine how much time he will need to complete the condominium project. However, concerning matters controlled by votes of unit owners, the developer may retain a degree of control because he is the owner of all the unsold units. The developer may reserve easements, rights, and privileges necessary to construction, development, and sale throughout the development and sales period.²³¹ If fairly drafted, these reservations are absolutely necessary and reasonable under both acts.

The ICPA requires voting to be based on the percentage of the common element interest owned by the voter.²³² Under the UCA, voting is conducted as though all units had been included in the project, even though the project is flexible, as long as substantial construction has taken place; votes may then be cast as though the units were completed.²³³ Under the ICPA, voting control could be reserved through phasing additional portions of the land described into the condominium. But the ICPA places an additional control upon the right of the developer to retain voting control of the board of managers. It requires that the voting be based on the number of units (rather than on the percentage of interest in the common elements) whenever thirty percent or fewer of the units possess over fifty percent in the

228. UCA § 3-103(b). They also are not permitted to determine the qualifications, powers and duties, or terms of office of executive board members.

229. ILL. REV. STAT. ch. 30, § 318.2 (1979). The section goes on to limit the time during which the developer can retain control to 30 days after the initial meeting, if no board of managers is elected at the initial meeting.

230. *Id.*

231. *See* ILL. REV. STAT. ch. 30, § 304(i) (1979).

232. ILL. REV. STAT. ch. 30, § 318(b) (1979).

233. *See* UCA § 2-101, Comment 3; *cf.* UCA § 3-103(f).

aggregate of the votes in the association.²³⁴ As already noted, the developer must plan to turn over control to the board of managers when the first of these events occurs: (1) sixty days have passed after conveyance by the developer of seventy-five percent of the units; (2) three years have passed after recording of the declaration; or (3) the thirty/fifty percent rule on voting control comes into effect. Presumably the unit owners, other than the developer, could vote to call the initial meeting, at which time they could elect the board of managers of their own choosing. These time limitations are absolutely critical to the determination of the turnover date. The question of timely turnover is also vital to the investments of the unit owners.

Under the UCA, the executive board's power to amend the declaration to enlarge the right of the declarant in the case of a turnover provision is denied.²³⁵ No amendment of the control section of the ICPA is permitted.²³⁶ These limitations in no way diminish other rights reserved to the developer which may be permitted by either the ICPA, the UCA, or the declaration. The developer or declarant needs freedom to develop the physical and conceptual structure of the condominium; during the development sales period, he should have these powers. He should also have easements of access, voting, and the like. Thereafter, the only status he may properly have is that of unit owner, and he should not be permitted to retain any right other than those accorded to a unit owner. Surely, the developer should not be permitted to retain a lifetime annuity from any insider arrangement.²³⁷

Transfer of Special Declarant Rights

Special declarant rights are rights reserved for the benefit of the declarant: (1) to complete improvements pursuant to the plats and plans; (2) to add additional real estate; (3) to withdraw withdrawable real estate; (4) to convert a unit; (5) to maintain sales offices, management offices, signs and models; (6) to use easements; or (7) to appoint or remove officers of the association or members of the executive board during the period of executive control.²³⁸ No existing condominium statute adequately addresses the issues of which obligations and liabilities to unit owners a declarant should retain, and which may fairly be imposed upon his successor in interest. The UCA strikes a balance

234. ILL. REV. STAT. ch. 30, § 318(m) (1979).

235. UCA §§ 3-103(b), *cf.* 2-119.

236. ILL. REV. STAT. ch. 30, § 318.2 (1979).

237. *See* UCA §§ 2-117, 2-118; ILL. REV. STAT. ch. 30, § 325(i) (1979).

238. UCA § 3-104.

between protecting the interests of unit owners, and the equally important need to protect innocent successors to a declarant's rights, especially mortgage lenders whose only interest in the project is to protect their debt security.

Generally, the UCA imposes upon a declarant continuing obligations and liabilities for promises, acts, or omissions during the period when he was in control. At the same time it relieves a declarant who transfers his entire interest in the project of responsibility for promises, acts, or omissions of a successor over whom he has no control. By the same token, a third party successor to a declarant's interest retains the transferor's obligations and liabilities, but is absolved from transferee liability for promises of the transferor. The UCA provides broad protection and leeway for mortgagees or creditors to avoid or assume special declarant rights when taking title through foreclosure, "deed in lieu of foreclosure," and bankruptcy. In this respect, the UCA gives the financial community a greater incentive to continue to finance condominium ownership.²³⁹

The ICPA includes in its definition of developer successors to the entire interest of the developer, and also any person other than a purchaser of an individual unit who offers units legally or equitably owned by him for sale in the ordinary course of business.²⁴⁰ This definition arguably includes the construction lender as a "person" who achieves ownership of units through foreclosure, deed in lieu of foreclosure, or bankruptcy deed if the construction lender or other person disposes of the units in the ordinary course of his business. Construction lenders and investors dispose of liquidated units in the ordinary course of their businesses. Thus, it is an open question whether the construction lender or investor is a developer under the ICPA, and succeeds to all the rights and obligations of the developer.

Do these obligations include duties and liabilities beginning from and after transfer of equitable title when the mortgage is made, from foreclosure judgment or sale, from confirmation of sale, or from actual acquisition of title after all right to redemption has expired? Do these duties and liabilities "relate back?" Is the person who offers units in the usual course of business jointly and severally liable with the developer who originally submitted the property to the ICPA? Even if the construction lender and investor acquired their title, equitable or legal, after the developer ceased control and sold the last unit, could the construction lender or investor be sued jointly and severally along with the original developer for failure to observe duties

239. See UCA § 3-104.

240. ILL. REV. STAT. ch. 30, § 302(q) (1979).

and for liabilities which accrued prior to acquisition of title? None of these questions is answered in the ICPA. The UCA addresses them by providing the legal structure for supplying answers to these questions.

Termination of Contract and Leases of Declarant

Section 3-105 of the UCA imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Certain contracts and leases made during a period of declarant control may be terminated upon not less than ninety days' notice to the other party to the contract.²⁴¹

The ICPA permits the board of managers to cancel any contract, lease or other agreement made before the election by unit owners other than the developer, if the agreement was made by or on behalf of the unit owners.²⁴² The contract, lease, or agreement must be one which extends for more than two years from the recording of the declaration, and must be cancelled by a vote of more than half of the unit owners, other than the developer, within ninety days after expiration of the two-year period.²⁴³ The other party has the right to cancel during the same period.²⁴⁴

Bylaws

The UCA provides far fewer mandatory provisions concerning the bylaws than does the ICPA. The UCA leaves to the discretion of the drafters all provisions except the number of executive board members, election and removal of officers, qualifications of board members and officers, delegations, and provisions about who can execute amendments to the declaration on behalf of the association. All other provisions which are deemed necessary and proper may be added by the association.²⁴⁵

The UCA does not require the bylaws to be recorded,²⁴⁶ whereas the ICPA requires the bylaws to be recorded as part of the declaration.²⁴⁷ Although the UCA requires that many specifics be included in the declaration, title to a unit is not rendered

241. UCA § 3-105.

242. ILL. REV. STAT. ch. 30, § 318.2 (1979). Cancellation is also permitted if the contract, lease, or other agreement was made on behalf of the unit owners' association or the board of managers.

243. *Id.*

244. *Id.*

245. UCA § 3-106(b).

246. *See* UCA § 3-106, Comment 1.

247. ILL. REV. STAT. ch. 30, § 317 (1979).

unmarketable by failure of the bylaws to conform to the UCA.²⁴⁸ Under the ICPA, however, the bylaws must conform to the ICPA and be recorded as a condition precedent to creating a condominium regime.²⁴⁹

Tort and Contract Liability

The UCA places a separate responsibility on a declarant to respond to actions sounding in tort for any wrong allegedly done by a declarant or his agent with respect to convertible or withdrawable real estate, or any other portion of the condominium which the declarant has an obligation to maintain.²⁵⁰ Such an action may not be brought against any unit owner or against the association.²⁵¹ Otherwise, an action in tort or contract may be brought against the association, but the declarant is liable to the association for all unreimbursed losses which occurred during the period of declarant control.²⁵²

In contrast, the ICPA allows an action in tort or contract only against the board of managers or the association.²⁵³ As a practical matter the same result is probably achieved under the ICPA as under the UCA by the board of managers' suit against the developer for any claims, damages, and judgments relating to action or inaction during the period within which the developer is charged with the duties of the board of managers. The owners of units are not liable for any claim, damage, or judgment brought or entered against the board of managers, except for mechanics' liens.²⁵⁴

The UCA's approach to losses caused during the period of declarant control is clearly preferable. Depending upon the circumstances, it either prevents a cause of action against the association, or states the declarant's responsibility to respond to actions sounding in tort or contract by giving a clear cause of action to the association against the declarant. The UCA also provides that any statute of limitations is tolled until declarant's control is terminated.²⁵⁵ The UCA is also superior to the ICPA in that it settles the question of whether a unit owner can sue the association or other unit owners for torts and contracts. The

248. UCA, § 2-103(d); UCA § 3-106, Comment 1.

249. ILL. REV. STAT. ch. 30, § 306 (1979).

250. UCA § 3-111.

251. *Id.*

252. UCA § 311(a).

253. ILL. REV. STAT. ch. 30, § 309.1 (1979).

254. *Id.*

255. UCA § 3-111(a).

unit owner is permitted to sue, notwithstanding the fact that he is a unit owner or a member or officer of the association.²⁵⁶

Nothing in the ICPA allows the unit owners to sue. The ICPA places the representative capacity in the board of managers to sue or be sued in actions involving the common elements or two or more units.²⁵⁷ How, then, can a unit owner force a board of managers to sue when it fails or refuses to do so? Simply stated, he cannot.²⁵⁸

Insurance

Under both the UCA and the ICPA, the association is required to obtain and maintain property insurance covering all risks, as well as comprehensive general public liability insurance on the property.²⁵⁹ The UCA requires the property insurance to cover the units and common elements.²⁶⁰ The ICPA requires the insurance to cover the full replacement cost of the common elements and the units,²⁶¹ whereas under the UCA coverage must be eighty percent of the actual cash value of the units and common elements.²⁶² The use of an eighty percent co-insurance factor seems to be a concession to the insurance industry and a backward step for the coverage required by the ICPA. Both the UCA and the ICPA require the insurance losses to be adjusted by, and payable to, the association or an insurance trustee designated for that purpose.²⁶³ The named insured under both the UCA and ICPA is the association.²⁶⁴

The ICPA requires that comprehensive public liability insurance be maintained by the board to insure the board of managers, the association, the management agent, and their respective employees and agents. Unit owners are additional insureds, but only as to property not reserved for their exclusive use.²⁶⁵ Under the ICPA, the developer must be named as in-

256. *Id.*

257. ILL. REV. STAT. ch. 30, § 309.1 (1979).

258. Both the UCA and ICPA make the unit owners liable in contract and tort for use, operation, and the unit owner's conduct with respect to his own unit.

259. UCA § 3-112; ILL. REV. STAT. ch. 30, § 312 (1979).

260. An exception is that the UCA does not require all risk insurance on a condominium conversion, but only fire and extended coverage. The reason given is that the building may be sold "as is," and the cost of all risks may not be justified. UCA § 3-112, Comment, 4.

261. ILL. REV. STAT. ch. 30, § 312 (1979).

262. UCA § 3-112(a)(1).

263. UCA § 3-112(d); Ill. Rev. Stat. ch. 30, § 312 (1979). Items normally excluded from coverage, such as excavations and foundations, are excepted.

264. *Id.*

265. ILL. REV. STAT. ch. 30, § 312 (1979). The UCA also requires that unit owners be additional insureds with respect to ownership of common elements or membership in the association. UCA § 3-112(c)(i).

sured under the comprehensive public liability policy both in his capacity as unit owner and as board member.²⁶⁶

Lien holders and unit owners, under the UCA, are protected under a trust of the insurance proceeds held for their benefit by the association or insurance trustee.²⁶⁷ Under the ICPA, if the unit owners and all parties in interest decide not to rebuild, the proceeds are paid to the unit owners, after first paying the liens on the shares of each unit to the extent possible. If the property is not repaired or replaced, unit owners are paid their share, but no provision is made for lien holders to receive payment for their respective interests as in the insurance section of the UCA.²⁶⁸

The UCA requires the insurance company to issue certificates of insurance upon request to unit owners, mortgagees, and any beneficiary under a deed of trust.²⁶⁹ A mortgagee should obtain a standard mortgage clause if the mortgagee wishes to protect itself against distributions of insurance proceeds to unit owners, because the UCA does not provide protection to mortgagees in the event of partial destruction of the condominium regime. If the condominium is terminated after destruction of a part or the whole, the termination section of the UCA will protect mortgagees.²⁷⁰ The ICPA contains a similar provision for the division of proceeds if reconstruction, repair, or replacement is not to occur.²⁷¹

Lien for Assessments

Every existing state statute now provides, with some exceptions, that first mortgages come ahead of the unit owners' association's lien for unpaid assessments, unless otherwise provided in the declaration.²⁷² The UCA provides that the lien for common expense assessments comes ahead of the first mortgage or deed of trust to the extent of common assessments due during the six months immediately preceding an action to enforce the association's lien.²⁷³ This is indeed a significant departure from existing practice, but it is an attempt to strike an equitable balance between collection of unpaid assessments and the need to protect the priority of security interests of mortgage lenders.

266. ILL. REV. STAT. ch. 30, § 312 (1979).

267. UCA § 3-112(d).

268. *Id.*

269. UCA § 3-112(f).

270. *See* UCA § 2-120(c).

271. *See* ILL. REV. STAT. ch. 30, § 314 (1979).

272. *E.g.* ILL. REV. STAT. ch. 30, § 309 (1979).

273. UCA § 3-115(b).

The UCA also establishes a statute of limitations of three years to bring an action to recover unpaid special assessments.²⁷⁴

UCA commentators have suggested that a six-month escrow with the mortgagee could be required. However, this requirement of six months would run afoul of the Real Estate Settlement and Procedures Act (RESPA). The most that could be required is an initial deposit of twice the amount of estimated common expense assessments, in addition to the payment of the current month's assessment paid with the regular installment. Many mortgagees prefer that the assessments be paid to the owners' association, and not to the mortgagee. Some primary lenders and secondary market investors are already requiring that a deposit equal to two months' common expense assessments be paid to the association to be held for working capital and reserves. The ICPA provides that, with some exceptions, the lien for assessments is a prior lien to all other liens and encumbrances, recorded or unrecorded.²⁷⁵ Notwithstanding any provision of the ICPA to the contrary, there is some debate in Congress whether a declaration which makes common expense assessments subordinate to a prior recorded mortgage is subordinate, if the drafters of the declaration fail to provide that the mortgage is prior. It is generally conceded among lawyers, however, that a simple statement in the declaration that the common expenses lien shall be subordinate to the mortgage is sufficient to make the lien of the prior recorded encumbrancer superior to the lien of the common expenses. Title companies in the Chicago area have been careful to check for inclusion of such language in condominium declarations to guarantee to themselves the availability of Mortgagee's Title Insurance Coverage.

Another question arises about the possibility that the lender's priority under the ICPA could be lost if the association notifies the mortgagee about unpaid assessments which become due and payable after the mailing of such notice, and thereafter the mortgagee requests the association to advise him of unpaid assessments. If not answered within twenty days, this request would make all unpaid common expense assessments subordinate to the lien of the mortgage. The uncertainties of such a "bounce back" provision cause one of the authors to suggest that a provision (in the declaration or bylaws) that the

274. UCA § 3-115(d).

275. ILL. REV. STAT. ch. 30, § 309 (1979). The exceptions are municipal, state, or federal taxes, special assessments and special taxes whenever levied, and encumbrances on the interest of such unit owner recorded prior to the date of such notice of the common expense lien which by law would be a lien prior to subsequently recorded encumbrances.

mortgage is a prior lien makes the mortgage prior to the lien of all subsequent unpaid common expenses.

The assessment is regularly insured-over in standard loan policies which insure the priority and enforceability of the lien of the mortgage. However, the standard loan policy ends the responsibility of the title company at the effective date and time of the issuance of the title policy, and the policy does not insure against liens created after the time or date of the policy. The policy raises a specific exception to the declaration and the ICPA, and is not, therefore, authoritative on the question of the relative priorities of the lien of the mortgage as against unpaid common expense assessments after the effective date of the policy. However, the matter of priorities of the mortgage over any assessments can be insured by obtaining an endorsement to the standard loan policy.

To satisfy mortgagees who are required to purchase the property which is subject to the first liens of its mortgage or trust deed, the condominium documents under the ICPA should state that each holder of a first mortgage or trust deed who comes into possession of a unit by foreclosure²⁷⁶ will take the unit free of claims for unpaid assessments and charges against the unit which accrue prior to the time such holder comes into possession of the unit.²⁷⁷ No such provision could be enforced even if it were included in the UCA declaration. UCA section 3-115 must be rewritten if mortgagees are to be given a first lien over the lien of common expense assessments. The present section 3-115 as to priority of liens cannot be varied by agreement of the parties.²⁷⁸ Why would any mortgagee agree to such a change? Mortgagees are in the business to make money and have enough financial sophistication concerning the nature and increasing value of the condominium concept to agree that it is protected by the continuing payment of assessments and to realize that simple family dwellings are not decreasing in value in today's market.

Some mortgagees may raise the question about whether the mortgage is a first lien. Under the UCA, the mortgage is not a first lien, whether or not assessments are in default or foreclosure proceedings have begun, and the mortgage holder's first

276. The mortgagee might acquire possession by foreclosure of the mortgage, or by deed or assignment in lieu of foreclosure, or by purchase at a foreclosure sale.

277. Exceptions would be claims for a pro rata reallocation of such assessments, or charges resulting from a pro rata reallocation of such charges, or assessments to all units including the mortgaged unit.

278. See UCA § 1-104 (provisions may not be varied by agreement unless the Act expressly allows such agreement).

lien takes a subordinate position to the potential unpaid assessments, which are due during the six months before an action to enforce the association's lien.²⁷⁹ The mortgagee may protect itself by drafting the mortgage to provide that the mortgagee may pay the assessments and add any such amount to the indebtedness.²⁸⁰ The mortgage holder will also be concerned about receiving notice of any unpaid assessments. The mortgage holder should see to it that the constituent documents require the association to give the mortgagee notice of unpaid assessments or of any foreclosure action instituted to recover unpaid assessments.²⁸¹ Under the ICPA, notice of unpaid assessments should be given to all those who have a recorded lien against the subject unit.

Until lending institutions are able to react to this section and learn to live with the UCA, if the UCA is enacted in the form drafted by the Uniform Commissioners, there may be difficulties encountered in the primary and secondary mortgage markets, the private mortgage insurance industry, and with the Veteran's Administration (VA) and the Federal Housing Authority (FHA). Minnesota recently enacted its version of the UCA. No priority was given to the lien of common expense assessments over the lien of the mortgage.²⁸² In the recently-enacted West Virginia version of the UCA, the provision giving priority of the lien of common expense assessments over the mortgage lien was adopted in substantially the form proposed under the UCA.²⁸³

ARTICLE 4

Protection of Purchasers

A *quid pro quo* for the flexibility given the developer is the equally innovative and liberal consumer protection of UCA Article 4. Article 4 applies primarily to units purchased from the developer.²⁸⁴ The primary consumer protection is disclosure. The

279. The assessments may include special assessments, fees, charges, late charges, fines, and interest.

280. If the borrower covenants to pay all assessments promptly, the mortgagee could treat the sum as additional indebtedness and/or foreclose, if necessary.

281. The drafters of the UCA are aware that some laws forbid some lending institutions from making loans not secured by first priority liens. They suggest that laws affecting the lending institution should be reviewed and amended when necessary.

282. Minnesota Uniform Condominium Act, ch. 582, 1980 Minn. Sess. Law Serv. 893 (West).

283. W. VA. CODE ch. 36B § 36B-3-115 (1980).

284. UCA §§ 4-101, 4-102(b). Disclosure is required in all residential unit sales unless the project consists of 12 units or fewer, is not a flexible condominium, and has no power reserved to the declarant to make the condomin-

ICPA also requires disclosure,²⁸⁵ but the disclosure is less extensive. If the condominium is a conversion condominium, additional disclosure requirements must be met under the ICPA.²⁸⁶

Public Offering Statement

Disclosure under the UCA takes the form of a public offering statement which includes not only copies of condominium documents, but also other important material procured by the developer in a list of items including such things as: (1) whether additional units might be rented or marketed to investors; (2) a brief description of any options reserved by declarant to withdraw withdrawable real estate, and the anticipated effects that withdrawal would have on the remaining portion of the condominium; (3) copies of any contracts and leases which would be subject to cancellation by the association under section 3-105;²⁸⁷ (4) a statement that the purchaser has a right to cancel within fifteen days after receipt of a public offering statement; (5) a statement before conveyance which describes the penalty assessed against the declarant if he fails to provide the public offering statement; and (6) the status of financial arrangements for improvements labeled "must be built" in the declaration.²⁸⁸

The public offering statement required by the UCA is similar to the disclosure required by the ICPA, but the UCA is much more comprehensive in scope. Both the UCA and ICPA require disclosure prior to execution of a contract to sell the first unit.²⁸⁹ Failure to give the disclosure required by the ICPA before execution of the contract by a bona fide purchaser, who intends to occupy the premises, will give the purchaser the right to rescind the contract and receive a refund of all deposits with interest.²⁹⁰ If any amendment has been made in any of the items disclosed, the time for avoidance of the contract is extended. This latter

ium part of a larger condominium, group of condominiums, or other real estate. In this case, some of the disclosures are not necessary.

The article does not apply to gifts of units, court ordered transfers, transfer by government, disposition by foreclosure or deed in lieu of foreclosure, or disposition of a condominium located wholly outside the state pursuant to contract executed wholly outside the state or resale transfers. UCA § 4-101(b). The article can also be waived or modified by agreement of purchasers of nonresidential units. UCA § 4-101(a).

285. ILL. REV. STAT. ch. 30, § 322 (1979).

286. ILL. REV. STAT. ch. 30, § 322(e) (1979).

287. See notes 241-244 and accompanying text, *supra*.

288. UCA § 4-102(a)(18).

289. UCA § 4-106; ILL. REV. STAT. ch. 30, § 322 (1979). The declaration may be recorded before the information is disclosed.

290. ILL. REV. STAT. ch. 30, § 322(e)(4) (1979). The purchaser may rescind at any time within five days of receipt of the last item required to be disclosed or until the closing, whichever is earlier.

provision has resulted in much dissent and strong objection from the real estate industry. The authors hope that the legislature in Illinois will resist this special interest lobby.

The UCA gives the purchaser the right to cancel the contract within fifteen days after receiving the public offering statement, if he does not receive the statement more than fifteen days before execution of the contract.²⁹¹ If the unit is conveyed without a public offering statement and all amendments thereto, the purchaser has a right to sue for damages and other relief, in addition to receiving ten percent of the purchase price from the declarant.²⁹²

Disclosure: Conversion Condominiums

In the case of a conversion condominium the UCA, like the ICPA, requires disclosure of additional information about the condition of the building in the public offering statement. The justification for the additional information is the difficulty inherent in a single purchaser's attempt to determine the condition of what is likely to be an older building renovated for the purpose of condominium sales. The UCA generally requires a statement based on an independent architect's or engineer's report for developments of more than twelve units describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium. It also requires a statement by the declarant of the expected useful life of each item, or a statement that no representations are made about specific items, and a list of the outstanding notices of uncured violations of the building code, together with the estimated cost of curing those violations.²⁹³ The ICPA requires an engineer's report if the condominium conversion contains more than six units.²⁹⁴

Purchaser's Right to Cancel

UCA section 4-106 provides for a "cooling off" period not provided under the ICPA. Unless a purchaser is given the public offering statement more than fifteen days before the execution of a contract for the purchase of his unit, the purchaser may can-

291. UCA § 4-102(12)(i).

292. UCA § 4-102(12)(ii). Neither the ICPA nor the UCA extends the time for avoidance of the contract by the purchaser beyond closing or conveyance. UCA § 4-102(12)(i); ILL. REV. STAT. ch. 30, § 322 (1979).

293. UCA § 4-104.

294. ILL. REV. STAT. ch. 30, § 322, (4) (1979). It is beyond the scope of this paper to discuss all the various ordinances which have been enacted by Illinois municipalities respecting condominiums and the conversion process.

cel the contract before conveyance but within fifteen days after first receiving the public offering statement.²⁹⁵

If a declarant fails to supply the purchaser with the public offering statement and all amendments, the purchaser is entitled to receive, in addition to damages from the declarant, ten percent of the sales price of the unit.²⁹⁶ Note that the section makes it clear that any amendments to the public offering statement prepared between the date of the contract and the date of the conveyance must also be furnished to the purchaser. However, the Uniform Commissioners' comments suggest that the "cooling off" period is not itself extended by the requirement to furnish amendments between the times of contract signing and unit closing.²⁹⁷

The only right under the ICPA to cancel or avoid the contract is given under the section requiring disclosure.²⁹⁸ The period for avoidance is extended five days each time delayed information is given to the purchaser, but not beyond the closing.²⁹⁹ Therefore, the major difference between the two statutory provisions is that under the UCA the purchaser is entitled to recover ten percent of the sales price from the declarant, in addition to damages or other relief. This ten percent penalty factor in a large project where mass closings are pre-planned could be a most significant financial handicap to a developer.

Resale of Units

UCA section 4-107 provides that when a unit is resold by its owner, other than declarant, the owner is to give a shorter and simpler resale certificate to the prospective purchaser than the detailed public offering statement discussed earlier.³⁰⁰ The drafters of the UCA believe it is important for a purchaser to have sufficient facts with which to make a rational judgment about the advisability of purchasing the condominium unit.³⁰¹ Moreover, although the obligation for disclosure rests with the resale seller, the association has an obligation to provide the information to the unit owner within ten days after requests for such information.³⁰² A reasonable fee to prepare the certificate

295. UCA § 4-106(a).

296. UCA § 4-106(c).

297. UCA § 4-106, Comment 4.

298. ILL. REV. STAT. ch. 30, § 322 (1979).

299. *Id.*

300. *See* UCA § 4-107.

301. UCA § 4-107(a). Before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association, and a variety of fiscal, insurance, and other information concerning the condominium and the unit are required by this section.

302. UCA § 4-107(b).

required under this section may be charged under the ICPA, but not under the UCA.³⁰³ This ICPA section expands upon the information now required under the 1979 amendments to the ICPA. The ICPA only requires that the purchaser other than the developer, upon request, be able to inspect certain documents and statements required by the seller.³⁰⁴

There does not appear to be a penalty for the seller under either the ICPA or the UCA if he fails to perform. The question is: How does the seller force the board of managers to give all the information that must be provided to the seller? The question remains unanswered under the ICPA, while the UCA gives a claim for relief to any person for violation of any section of the UCA.³⁰⁵ The principal officer of the unit owners' association is required to provide the information within thirty days of the unit owner's request. Can the unit owner bring a suit against the board under the ICPA? There probably should be an *effective* remedy coupled with the right to bring suit. The same may be said of the UCA, although it does provide a cause of action or claim for relief for violations of the Act.

The UCA requirements for disclosure are about the same as those of the ICPA, but the ICPA does not require a statement disclosing (1) the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit, and (2) a statement about whether the executive board (board of managers) has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements, or any portion of the condominium. Further, it should be specified under the ICPA what responsibility the seller has to disclose information to the purchaser that is not within the first-hand knowledge of the seller. The UCA makes it clear that the unit owner is not liable to the purchaser for erroneous information contained in the association's resale disclosure statement to the unit owner.³⁰⁶

Escrow of Deposits

The UCA and ICPA both provide that deposits of the purchaser shall be held in escrow until closing.³⁰⁷

303. ILL. REV. STAT. ch. 30, § 322.1 (1979).

304. ILL. REV. STAT. ch. 30, § 322.1(i) (1979).

305. UCA § 4-115.

306. UCA § 4-107(b). Under the UCA, the purchaser who does not receive a timely certificate and disclosure is permitted to avoid the contract for five days after receiving the certificate or until closing, whichever occurs first. UCA § 4-107(c).

307. UCA § 4-108; ILL. REV. STAT. ch. 30 § 324 (1979). The UCA alternatively provides that deposits be held in escrow upon default by the pur-

Conversion Condominiums

The word "tenants" in the UCA includes subtenants.³⁰⁸ The ICPA uses the term tenants more generally.³⁰⁹ Tenants must be given notice of a developer's intent to convert rental property into a condominium. Under the UCA, the notice dates from 120 days before the declarant will require the tenant to vacate.³¹⁰ In the ICPA, the notice of intent must be given not later than 120 days before, and not earlier than one year before, the date the developer intends to record the declaration.³¹¹ The ICPA further requires the developer to file a certificate with the declaration that he has given such a notice of intent to all tenants.³¹² The ICPA requires the notice to state whether the tenancy will be renewed or terminated.³¹³ If the tenancy is to be renewed, the terms of renewal must be specifically set forth in the notice.³¹⁴ The UCA requires a timely notice to tenants to vacate and generally sets forth the rights of tenants.

The ICPA gives the tenant, whose tenancy expires within 120 days of receipt of notice of intent, the right to extend his tenancy for 120 days from notice upon the same terms and conditions by giving notice to the developer within thirty days of receipt of the original notice.³¹⁵ The UCA gives a similar right in that no tenant can be required to vacate on less than 120 days' notice. The ICPA gives the tenant a right of first refusal for 120 days after receipt of notice of intent, during which time the tenant may purchase the unit upon substantially the same terms and conditions as set forth in any duly executed contract to sell the unit between the developer and a third party.³¹⁶ However, the ICPA does not specifically and expressly require the developer to notify the tenant of such a contract.³¹⁷ The right of first refusal given to the tenant under the UCA is somewhat different.

chaser or seller. The ICPA provides that the seller pays interest on the escrow if it is applied to the purchase price. ILL. REV. STAT. ch. 30, § 324 (1979).

308. See UCA § 4-110(a).

309. See, e.g. ILL. REV. STAT. ch. 30, § 330 (1979).

310. UCA § 4-110(a).

311. ILL. REV. STAT. ch. 30, § 330 (1979).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. This tenant's right applies to a sale contract made during the 120 days, if the tenant gives notice to the developer within 30 days of notice from the developer of such a contract.

The UCA requires the declarant to offer to sell the unit to the tenant for sixty days after delivery of the notice.³¹⁸ This is a period during which the tenant has the exclusive right to purchase. In addition, if the tenant fails to purchase, the declarant cannot offer the unit on more favorable terms to any other person for 180 days.³¹⁹ This is the right of first refusal, which is intended to discourage unreasonable offers by the declarant to the tenant. The UCA condominium conversion subsection only applies to residential units, and the restriction on sale only applies to units whose boundaries are substantially the same as before the conversion.³²⁰ The ICPA right of first refusal applies to any real estate converted to a condominium.³²¹

The UCA provides that if the unit is conveyed to a bona fide purchaser, without notice or knowledge of the right to purchase, by a deed which states that the declarant has complied with the sixty-day rule,³²² title will pass free of the right of the tenant to purchase but without prejudice to the right of the tenant to bring an action for damages.³²³ The ICPA contains a similar provision.³²⁴ Any provision in a lease or any termination of occupancy in the case of conversion in violation of the ICPA is void as contrary to public policy if the lease is executed after the effective date of the section.³²⁵ Although the UCA does not affirmatively state this rule, if section 4-110 is adopted, a lessee is afforded the cause of action available in section 4-115.

Express Warranties of Quality

UCA sections 4-111 through 4-114 were adapted from the real estate warranty provisions in the Uniform Land Transactions Act.³²⁶ Significantly, there are no similar sections in the ICPA. The express warranties dealt with in the UCA were intended to meet the expectations of the purchaser created by the declarant's conduct in connection with the inducement of sale. Express warranties are created by promises relative to the unit, including its attendant rights and benefits, and by models or de-

318. UCA § 4-110(b).

319. UCA § 4-119(b).

320. *Id.*

321. ILL. REV. STAT. ch. 30, § 330 (1979).

322. UCA § 4-110(b) (option to purchase).

323. UCA § 4-110(c).

324. The ICPA provides that the developer may convey the unit free and clear of any interest in the tenant if the developer states in the deed that the tenant had no right, waived the right, or failed to exercise the right, but without prejudice to the right of the tenant to bring an action against the developer for damages for breach of any right given the tenant under the act. ILL. REV. STAT. ch. 30, § 330 (1979).

325. ILL. REV. STAT. ch. 30, § 330 (1979).

326. UNIFORM LAND TRANSACTIONS ACT § 2-308.

scriptions of the condominiums.³²⁷ The section provides that any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.³²⁸ Therefore, a developer cannot negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

Implied Warranties of Quality

The rule of *caveat emptor* as it relates to the sale of residential dwellings has been watered down significantly over the years. Recently the Illinois Supreme Court followed the trend of other jurisdictions in avoiding the harshness of *caveat emptor* to afford relief to vendees of new homes who subsequently discover latent defects in the structure. In *Petersen v. Hubschman Construction Co., Inc.*,³²⁹ the court recognized the implied warranty of habitability applicable to sales of new homes as an independent undertaking collateral to the covenant to convey.

On August 28, 1980, the Illinois Appellate Court delivered a significant decision in the case of *Roberto Tassan v. United Development Company*.³³⁰ In *Tassan*, plaintiffs appealed from an order dismissing two counts of their amended complaint. Count I sought damages from *both* the developer-seller of the condominium units *and* from the general contractor for an alleged breach of an implied warranty of habitability in refusing to repair defects in the common elements. Count IV sought damages from the developer-seller for an alleged breach of an express warranty in the individual contracts for sale of the units, alleging the same defects as in Count I.

Although the scope of the article does not permit an exhaustive analysis of *Tassan*, the appellate court's rationale in reversing the trial court's dismissal of Counts I and IV and remanding for further proceedings warrants discussion. The trial court dismissed Count I, holding that the developer-seller had disclaimed the implied warranty of habitability by a clause in the pre-printed contract form it used to sell the individual units.

327. UCA § 4-111(a) states that express warranties are created as follows:

- (1) any affirmation of fact or promise which relates to the unit, its use or rights appurtenant thereto, area improvements to the condominium that would directly benefit the . . . unit, or the right to use or have the benefit of facilities not located in the condominium . . . ;
- (2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements

328. UCA § 4-111(c).

329. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

330. 88 Ill. App. 3d 581, 410 N.E.2d 902 (1980).

The disclaimer language was identical to that found in most new construction real estate sales contracts used in Illinois, expressly disclaiming all warranties, representations, or promises, "whether oral, implied or otherwise" not made in the sales contract. Although the *Petersen*³³¹ decision involved a builder-seller, the *Tassan* court reasoned that the dependent relationship between the unit purchasers and the developer-seller was the same as in *Petersen*, and concluded that the developer-seller *could have made* an implied warranty of habitability in *Tassan*. The court also concluded that the general contractor might be liable for the alleged breach of implied warranty if, on remand, plaintiffs could show a joint venture relationship with the developer-seller. Finally, the *Tassan* court held that, as indicated in *Petersen*, even a conspicuous disclaimer clause, by itself, was insufficient to show as a matter of law that the purchaser knowingly read, understood, and effectively waived his right to claim a breach of the implied warranty of habitability.

Interestingly, the *Tassan* court also held that a one-year express warranty allegedly covering the same defects as the implied warranty of habitability did not displace the implied warranty of habitability. Accordingly, the *Tassan* opinion, although not dispositive of all the issues raised by either plaintiffs or defendants, is a case worthy of careful scrutiny. At this writing, defendants' petition for a rehearing has been denied by the appellate court and a petition for leave to appeal has been filed with the Illinois Supreme Court.

Therefore, section 4-112 of the UCA reflects the most recent innovative thinking about implied warranties by providing a warranty of suitability and of quality of construction.³³² However, these implied warranties may be excluded or modified.³³³

The UCA declarant warrants that the property will be in at least as good condition, at the earlier of delivery of possession or conveyance, as it was at the time of contracting.³³⁴ The declarant also impliedly warrants that a unit and the common elements are suitable for the use intended, and that improvements made or contracted for by the declarant or made by any person before the creation of the condominium will be free from defective materials and constructed in accordance with law and

331. See note 329 and accompanying text *supra*.

332. UCA § 4-112(a).

333. The *Petersen* court said that the warranty does not merge in the deed. It described the implied warranty of habitability as equivalent to the warranty of merchantability found in U.C.C. §§ 2-314, 2-315; ILL. REV. STAT. ch. 30, §§ 2-314, 2-315 (1979). *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 41-42, 389 N.E.2d 1154, 1158-59 (1979).

334. UCA § 4-112(a).

sound engineering and construction standards, and in a workmanlike manner.³³⁵ The declarant also warrants to a purchaser that the use does not violate the law at time of delivery of possession or conveyance, whichever is earlier.³³⁶ Any conveyance of a unit transfers to the purchaser all the declarant's implied warranties of quality.³³⁷ The word declarant includes affiliates of the declarant.³³⁸

These implied warranties arise only against the declarant. However, the commissioners' comments to this section suggest that a nondeclarant who fails to disclose defects may be liable to the purchaser for fraud or misrepresentation under the common law. The warranty as to the quality of construction for improvements is quite broad, and imposes liability upon the declarant for defects which may not be so serious as to render the condominium unsuitable for the ordinary purposes of real estate of a similar type. Interestingly, this section provides that a conveyance of a unit transfers to the purchaser all warranties of quality *made by any declarant*, and section 3-104(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him *even after* he conveys all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements.

Exclusion or Modification of Implied Warranties of Quality

Implied warranties of quality may be excluded, modified, or disclaimed under the UCA.³³⁹ Section 4-113 does not permit a general disclaimer of implied warranties of quality with respect to a unit occupied for residential use; each disclaimer must be specific.³⁴⁰ When permitted, the declarant may exclude or modify his liability if the purchaser signs an instrument which states a specific defect or specified failure to comply with applicable law, if the defect or failure were part of the basis of the bargain. Therefore, it is possible, but not likely, that the seller could put a whole laundry list of specific defects into the contract and make appropriate recitations as required by this section. The ICPA has no similar sections, but as we have indicated, the case law probably covers the subject.

335. UCA § 4-112(b).

336. UCA § 4-112(c).

337. UCA § 4-112(f).

338. UCA § 4-112(e).

339. UCA §§ 4-112(d), 4-113.

340. UCA § 4-113(b).

Statute of Limitations for Warranties

A six-year statute of limitations is established under the UCA, but the parties may agree to reduce the period of limitations to not less than two years.³⁴¹ If the period is reduced in the case of a residential use, an agreement to reduce must be evidenced by a separate instrument executed by the purchaser.³⁴² It appears that the remedy of the unit purchasers would be a suit for damages within the statute of limitations. There is no special statute of limitations provided in the ICPA. Not every right provided in the ICPA is accompanied by a remedy. If the statute provides any remedies it limits them to making certain provisions void, either expressly or by implication, or gives the unit purchaser the right of avoidance.³⁴³ The UCA is progressive insofar as it recognizes the problem and generally gives any injured unit owner a right of action.³⁴⁴

Effective Violations of Rights of Action; Attorney's Fees

The UCA provides a general cause of action or claim for relief for violation of the Act either by declarant or by any other person subject to the Act's provisions. Punitive damages may be awarded for willful violation and, in an appropriate case, reasonable attorney's fees may be awarded.³⁴⁵ This section of the UCA should be read in conjunction with section 3-111, which limits the right to an action against the declarant if the declarant or his agent is at fault, or if the action sounds in tort or sounds in contract relating to convertible or withdrawable real estate. The right of action is against the association if the association is at fault. The latter is not true under the ICPA.

ARTICLE 5

Article 5 is an optional article creating an administrative agency to regulate the registration and sales practices of condo-

341. UCA § 4-114(a).

342. *Id.*

343. *See, e.g.*, ILL. REV. STAT. ch. 30, § 322 (1979).

344. It should be noted that effective November 29, 1979, a new section 21.3 was added to the Limitations Act, ILL. REV. STAT. ch. 83, § 21.3 (1979). This new section establishes a potential 14-year statute of limitations for actions based upon tort, contract "or otherwise" against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property. The action shall be commenced within two years from the time the plaintiff knew or should reasonably have known of such act or omission, and must be brought within 12 years of the act or omission. However, if the act or omission is discovered in the 12-year period, the plaintiff shall have at least two full years to file suit, thus the potential of 14 years if the act or omission is discovered on the last day of the twelfth year.

345. UCA § 4-115.

miniums. Lenders in the primary and secondary mortgage market are capable of continuing to protect the unit purchasers' interests adequately. The authors believe that the Consumer Fraud Division of the Attorney General's Office has the necessary machinery to police violations of the Act without the expense of additional tax dollars being spent on another governmental agency in the state of Illinois. In fact, no other state bar association or legislature that has studied the Act has yet opted for inclusion of this section.

CONCLUSION

Illinois needs an orderly framework of statewide condominium legislation which would provide a realistic balance of interests among tenants, unit purchasers, builders, sellers, converters, lenders, and units of local government throughout the state. Illinois is no longer in the vanguard of states regarding condominium enabling laws, and we need to become a truly "second generation" condominium state. The UCA satisfies this need for a modern statutory framework not only for residential, but also for commercial, industrial, mixed-use, time-sharing, and leasehold condominiums. Uniform legislation, on both a national and state basis, will allow developers, lenders, and buyers to understand the law.

The reader is asked to consider the crazy-quilt of existing legislation and the differences among the various state statutes, as well as the national marketing, insuring, and mortgaging problems of condominium units. The conclusion is surely not that all states should adopt the UCA in the form presented, but that the adoption of the UCA would necessarily involve the thoughtful draftsmanship of statutes addressing common and recurring issues. The result will be that states adopting the UCA will have commonly understood statutes with differences based primarily on local or state constitutional requirements, or existing state laws.