



# Georgia Bar Journal

October 2007 • Volume 13 • Number 2

Georgia Condominium Law:  
Beyond the Condominium Act

# Georgia Condominium Law: Beyond the Condominium Act

by Peter M. Crofton and Mark V. Hanrahan

**T**he development and sale of residential condominiums and the establishment of related associations are governed by several distinct bodies of Georgia law. Foremost of these is the Georgia Condominium Act (the “Condominium Act”).<sup>1</sup> The Condominium Act establishes the unique rights, duties and obligations of parties developing and purchasing condominiums in Georgia. (A federal condominium statute also applies to apartments that are converted to condominiums.)<sup>2</sup>

In addition to the Condominium Act, residential condominiums are governed by a substantial body of law relating to the purchase and sale of residential real estate. This body of law encompasses pre-sale disclosure obligations, claims for construction defects and arbitration.

A third body of law that is often overlooked, but nevertheless applicable to residential condominium developments, is that relating to non-profit and for-profit corporations. The Condominium Act expressly provides that condominium associations are for-profit or non-profit corporations subject to the Georgia Business Corporation Code<sup>3</sup> or the Georgia Nonprofit

Corporation Code,<sup>4</sup> respectively.<sup>5</sup> This body of law establishes standards of conduct for a corporation’s officers<sup>6</sup> and directors,<sup>7</sup> procedures for a corporation to conduct business,<sup>8</sup> and rights and obligations of a corporation’s shareholders or members.<sup>9</sup>

The Georgia courts have had few opportunities to construe Georgia condominium law. Consequently, little guidance to the bar and general public exists concerning many aspects of Georgia condominium law, including the interaction between the distinct bodies of law that apply to residential condominium developments. This article will explore some of those areas of interaction.

## Disclosure of Defects

Much condominium litigation involves claims of defects in the property.<sup>10</sup> Some of that litigation also includes allegations of fraud on the part of the developer/seller based upon its failure to disclose defects prior to sale.<sup>11</sup> These failure-to-disclose claims raise the question whether a condominium developer has an obligation to inspect the property to discover defects, or even to disclose known defects.

The Georgia courts have repeatedly addressed a residential buyer’s right to claim fraud based on a seller’s failure to disclose known defects in the property:

“Fraud in the sale of real estate may be predicated upon a willful misrepresentation, i.e., the seller tells a lie; upon active concealment where the seller does not discuss the defect but takes steps to prevent its discovery by the purchaser; and thirdly a passive concealment where the seller does nothing to pre-

vent the discovery but simply keeps quiet about a defect which though not readily discernible, is known to the seller.”<sup>12</sup>

Georgia also recognizes two other species of fraud in the sale of residential real estate: constructive fraud and fraud through negligence.<sup>13</sup> Constructive fraud occurs when a seller makes representations that it “should have known” were false or conceals material information that it should have known.<sup>14</sup> Fraud through negligence occurs when a seller makes reckless misrepresentations of fact without any knowledge of their truth.<sup>15</sup> Outside of these obligations, Georgia does not impose on sellers affirmative duties to inspect and disclose defects in residential property.

Unlike general real estate law, the Condominium Act imposes on developers affirmative duties to detect and disclose defects in projects that involve the conversion of an existing building into a residential condominium.<sup>16</sup> The Condominium Act expressly defines a “conversion condominium” as one involving the creation of a residential condominium that includes any building that was occupied by a person who did not have the pre-existing contractual right to purchase the condominium.<sup>17</sup>

The scope of the definition of “conversion condominium” is a source of disagreement among practitioners. Some members of the bar contend that a conversion condominium only includes buildings that were previously used for residential purposes. Because, however, the definition does not refer to prior residential use, it appears that the term “conversion condominium” encompasses most re-use projects that renovate and convert to residential condominiums existing facilities such as warehouses, mills or historic structures such as office buildings or hotels.

The Condominium Act requires developers of conversion condominiums to include in the docu-

ments provided to potential buyers a “statement” describing the present condition and expected useful life of all structural components and mechanical and electrical components “material to the use and enjoyment of the condominium.”<sup>18</sup> This statement must be based upon the investigation of “an independent, registered architect or engineer.”<sup>19</sup>

These provisions create an affirmative duty on conversion condominium developers to investigate the condition of the property for purposes of finding and disclosing defects. Georgia’s courts have reported no decisions involving a claim that a developer performed an inadequate investigation, thereby breaching these affirmative duties to discover and disclose defects. Nevertheless, in light of Georgia’s jurisprudence on fraud in residential real estate sales, it is possible that the courts will allow fraud claims where a developer fails to perform an adequate property condition investigation and therefore does not discover and disclose defects that would have been identified if the investigation had been properly performed.

## Condition of Common Areas

Another aspect of condominium development that is the subject of litigation is the condition of common areas that the developer turns over to the association for management and care. This litigation has two distinct branches: (1) claims for work that should have been performed but was not; and (2) claims alleging defects in work that was performed.

### Claims Arising From Unrepaired Common Areas

A claim that a developer did not perform work that it should have performed can be more complex than it initially appears. At first blush, such a claim might appear to relate solely to whether the developer had a duty to perform certain work: for example, whether the developer had a duty to perform

work required by applicable building codes or the Americans with Disabilities Act.<sup>20</sup> Some claims, however, also contend that the developer had a duty to fund the condominium association’s reserve accounts so that the association could perform the work later if the developer initially elected not to perform such work.

Like many states’ condominium laws, Georgia’s Condominium Act requires a condominium developer to create a condominium association that will be responsible for the “maintenance, repair, renovation, restoration, and replacement” of the common areas, unless the condominium instruments provide otherwise.<sup>21</sup> The Condominium Act provides that the developer may control the association for up to seven years by appointing and removing the association’s officers and directors.<sup>22</sup> The Condominium Act also provides, however, that the developer is liable for ensuring that the association is run in a “prudent and businesslike manner” while it controls the association.<sup>23</sup>

An example of a claim for work not performed would arise in the context of a conversion condominium where the converted structure had worn-out flooring in common-area lobbies. If the developer opted not to replace the flooring, the condominium association would likely be faced with repairing or replacing the flooring in short order. Moreover, if the developer also failed to adequately fund the association’s reserve account to provide for the repair or replacement of the flooring, the association might be unable to fulfill its obligation to maintain the lobbies without imposing a substantial special assessment against the association members.

Courts that have addressed similar facts have found that the developer of a condominium or other planned unit development has a duty either to turn over the common areas to the association in good repair or to provide adequate funding for the associa-

tion's reserve accounts to repair and maintain the common areas:

[T]he developer has a fiduciary duty to the POA [property owner's association] to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of the transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair.<sup>24</sup>

Similarly, Section 6.20 of the *Restatement (Third) of Property* delineates the scope of the obligations that a developer owes to an association and its members relating to common areas. The *Restatement* provides:

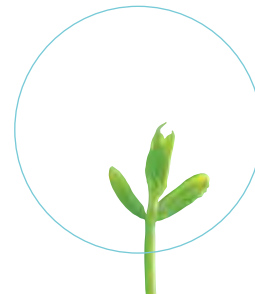
Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

- (1) to use reasonable care and prudence in managing and maintaining the common property;
- (2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
- ....
- (6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining . . . .<sup>25</sup>

The comments to this section of the *Restatement* make clear that a developer's liability arises from its failure to repair and maintain the common areas before turning them over to the association, coupled with its failure to fund the association's reserve accounts.<sup>26</sup> Comment (c) to Section 6.20 of the *Restatement* explains that in such circumstances, the developer is liable because purchasers of residential real estate "legitimately" expect that the common areas can be maintained without significant increases in the assessments that enable the association to fulfill its obligations to repair those common areas.<sup>27</sup>

The Georgia courts have not reported a decision involving the liability of a condominium developer that fails (1) to repair and maintain common areas; and (2) to adequately fund the association's reserve accounts. Nevertheless, in light of the similar requirements of the *Restatement* and the Condominium Act, it is foreseeable, and perhaps likely, that the Georgia courts, when confronted with the issue, would adopt the substance, if not the language, of the *Restatement*.

Additionally, Georgia corporations law imposes fiduciary or "good-faith" duties on the promoters of a corporation<sup>28</sup> and on its officers and directors.<sup>29</sup> As previously discussed, the Condominium Act expressly provides that associations are subject to Georgia's statutes concerning the formation and operation of business and non-profit corporations.<sup>30</sup> Just as Georgia's corporations



## IT'S TIME TO GROW YOUR RETIREMENT



Legal professionals know that growing a future begins now. A good start is selecting the right resource for a retirement plan for your firm. Your best option may be the cost-effective program that was created by lawyers for lawyers, and run by experts.

**ABA Retirement Funds** has been providing tax qualified plans for over 40 years. Today our program offers full service solutions including plan administration, investment flexibility and advice. Now we also offer our new Retirement Date Funds that regularly rebalance the fund's assets based on your selected target retirement date. Plus, our program now accepts Roth 401(k) contributions from profit sharing plans that currently offer a 401(k) feature. Isn't it time to start growing your future with the ABA Retirement Funds?

### LEARN HOW YOU CAN GROW YOUR FUTURE WISELY

Call an ABA Retirement Funds Consultant at 1-877-947-2272 [www.abaretirement.com](http://www.abaretirement.com)

### GET A FREE PLAN COST COMPARISON

Is your plan as cost-effective as it could be?

Just call 1-877-947-2272 for a custom cost comparison



For a copy of the Prospectus with more complete information, including charges and expenses associated with the Program, or to speak to a Program consultant, call 1-877-947-2272, or visit [www.abaretirement.com](http://www.abaretirement.com) or write ABA Retirement Funds P.O. Box 5142 • Boston, MA 02206-5142 • [abaretirement@citystreetonline.com](mailto:abaretirement@citystreetonline.com). Be sure to read the Prospectus carefully before you invest or send money. The Program is available through the State Bar of Georgia as a member benefit. However, this does not constitute, and is in no way a recommendation with respect to any security that is available through the Program. 11/2006

## The Georgia Condominium Act is the primary, but not exclusive, legal framework governing the development, construction and sale of residential condominiums.

law requires a promoter to truthfully disclose information to prospective stockholders,<sup>31</sup> the Condominium Act requires that the developer provide prospective buyers, i.e., prospective members in the association, with the association's estimated or actual budget for maintenance and reserve accounts.<sup>32</sup> Accordingly, it would not be surprising if the Georgia courts determined that a condominium developer owes the same duties to the association and its stockholders, i.e., members, that every other corporate promoter owes the stockholders in that corporation.

### Claims Arising From Defective Work in Common Areas

Intertwined in any discussion of Georgia's condominium law regarding construction defects is Georgia's statute relating to the Resolution of Construction Defects (the "Repair Act").<sup>33</sup> Enacted in 2004, the Repair Act sets forth a process for resolving construction disputes that the General Assembly intended as a means to reduce litigation while protecting the rights of homeowners.<sup>34</sup> That process has two principal components: (1) "claimants" must give pre-litigation written notice to "contractors" of alleged construction defects;<sup>35</sup> and (2) contractors are permitted to inspect and respond to alleged defects by offering to make repairs or to pay monetary settlements before claimants may pursue legal action.<sup>36</sup>

The Repair Act broadly defines the word "contractor" to include developers and sellers of condominium units, as well as construction contractors and subcontractors.<sup>37</sup>

Notwithstanding that broad definition, the most recent amendments to the Repair Act may restrict its applicability to licensed general and residential contractors.<sup>38</sup> The tension between these provisions creates a significant issue for the courts to resolve concerning the reach of the Repair Act.

Additionally, under the Repair Act, contractors are required, upon entering into a contract for the sale or construction of a residential improvement, to give the owner or purchaser notice of the contractor's right to notice and the opportunity to repair or pay for alleged construction defects before the owner can institute legal action.<sup>39</sup> To date, no Georgia court has interpreted this requirement in the Repair Act. Nevertheless, this mandatory notice requirement is found in similar repair-of-construction-defects acts of several other states. At least one court in one of these states has determined that because the notice requirement is mandatory, a contractor that fails to provide the required notice is precluded from enforcing its rights under that state's act.<sup>40</sup>

The Repair Act also broadly defines "claimant" as "anyone who asserts a claim concerning a construction defect" in any "single-family house, duplex, or multifamily unit designed for residential use."<sup>41</sup> Accordingly, claims asserted by condominium unit owners and associations relating to construction defects in condominium units and common areas are subject to the requirements of the Repair Act.<sup>42</sup> (The Repair Act is silent on whether it applies to claims for failure to disclose defects in the property.)

The Repair Act's definition of a

"construction defect" is also extremely broad, encompassing virtually any complaint regarding performance of construction:

"Construction Defect" has the meaning assigned by a written, express warranty either provided by the contractor or required by applicable statutory law; if no written, express warranty or applicable statutory warranty provides a definition, then "construction defect" means a matter concerning the design, construction, repair, or alteration of a dwelling or common area, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling or common area on which a person has a complaint against a contractor.<sup>43</sup>

The Repair Act imposes additional requirements on a condominium association seeking to bring a lawsuit for construction defects in common areas.<sup>44</sup> Before filing such a suit, (1) the members must approve commencement of an action by a two-thirds vote;<sup>45</sup> (2) the board of directors must have met or attempted to meet with the contractor in a good-faith attempt to resolve the association's claim;<sup>46</sup> and (3) the association must have satisfied "all of the preaction requirements for a claimant to commence an action."<sup>47</sup> Notwithstanding these provisions, the association may be prohibited from pursuing an action if its declaration waives its right to bring such an action, instead requiring each unit owner to sue for the damage to its individual ownership interest in the common areas.<sup>48</sup>


### Arbitration

One way that condominium developers have responded to the wave of construction defect litigation has been to require arbitration of defect claims. Arbitration clauses in residential real estate sales and financing contracts will be enforceable, provided that the arbitration clause itself is "initialed by

all signatories at the time of the execution of the agreement.”<sup>49</sup>

Georgia courts have narrowly construed this requirement to initial arbitration clauses. For example, in one case the court enforced an un-initialed arbitration clause in a new home warranty agreement that was separate from the sales agreement.<sup>50</sup> Similarly, in a more recent case, the court enforced an un-initialed arbitration clause within a warranty agreement, where the agreement provided that the Federal Arbitration Act applied to the exclusion of state law.<sup>51</sup>

## Conclusion

The Georgia Condominium Act is the primary, but not exclusive, legal framework governing the development, construction and sale of residential condominiums. When analyzing legal issues in Georgia relating to condominiums, it is imperative to remember that the Condominium Act materially supplements, but does not supplant, other Georgia law relating to residential real estate and business associations. Consequently, while many provisions of the Condominium Act have yet to be interpreted by the courts, condominium developers can reduce their litigation risks by complying with the requirements of these other bodies of law. 



**Peter M. Crofton** has assisted clients with construction related matters since 1990. He has represented Fortune 100 and other trans-national clients with construction projects in the United States, Caribbean, Central America, Europe and Asia. Crofton has focused his practice on construction projects in the hospitality and resort, energy and industrial arenas. He has represented clients involved in various luxury hotel and resort projects, and in developing mixed use projects that feature luxury condominiums and apartment homes.



**Mark V. Hanrahan** has focused his practice on construction law since 1996. Hanrahan has represented both purchasers and providers of construction services, including numerous Fortune 100 clients. In addition to mediation, arbitration and litigation, Hanrahan's practice includes drafting and negotiating construction-related agreements and counseling clients through troubled projects. Hanrahan has handled a wide range of construction issues, including defaults and terminations, changed work, mechanics' liens, schedule impacts and delays, construction defects, insurance and bonding.

## Endnotes

1. O.C.G.A. §§ 44-3-70 to -116.
2. 15 U.S.C. §§ 3601 to 3616.
3. See O.C.G.A. §§ 14-2-101 to -1703.
4. See *id.* §§ 14-3-101 to -1703.
5. *Id.* § 44-3-100(a).
6. See *id.* §§ 14-2-842 and 14-3-842.
7. See *id.* §§ 14-2-830 and 14-3-830.
8. See generally *id.* §§ 14-2-801 to -864 and 14-3-801 to -864.
9. See generally *id.* §§ 14-2-601 to -747 and 14-3-601 to -747.
10. See Troy McCullen, *Condo Buyers Take Developers to Court Over Failed Promises*, WALL ST. J. ONLINE, Nov. 13, 2006, <http://www.realestatejournal.com/buysell/market-trends/20061113-mcmullen.html>.
11. *Id.*
12. *Hudson v. Pollock*, 267 Ga. App. 4, 6, 598 S.E.2d 811, 814 (2004) (quoting *Smiley v. S & J Invs.*, 260 Ga. App. 493, 499-500, 580 S.E.2d 283, 289 (2003)).
13. See, e.g., *Brookshire v. Digby*, 224 Ga. App. 512, 516, 481 S.E.2d 250, 254-55 (1997).
14. *Id.* at 516, 481 S.E.2d at 254-55.
15. See, e.g., *Lanier Home Ctr., Inc. v. Underwood*, 252 Ga. App. 745, 749, 557 S.E.2d 76, 81 (2001).
16. See O.C.G.A. § 44-3-111(b)(10).
17. See *id.* § 44-3-71(10).
18. See *id.* § 44-3-111(b)(10)(A).
19. *Id.*
20. 42 U.S.C. §§ 12101 to 12213.
21. See O.C.G.A. §§ 44-3-100 and -105.
22. *Id.* § 44-3-101(a)(3).
23. *Id.* § 44-3-101(b).
24. *Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 562

- S.E.2d 633, 638 (S.C. 2002).
25. RESTATEMENT (THIRD) OF PROPERTY § 6.20 (1), (2), (6) (2000).
26. *Id.* cmts. b and c.
27. *Id.* cmt. c & illus. 3, 4.
28. See, e.g., *Downey v. Byrd*, 171 Ga. 532, 538, 156 S.E. 259, 263 (1930).
29. See O.C.G.A. §§ 14-2-830 and -842; 14-3-830 and -842.
30. *Id.* § 44-3-100(a).
31. See, e.g., *Georgia Portland Cement Corp. v. Harris*, 178 Ga. 301, 309, 173 S.E. 105, 109 (1934).
32. See O.C.G.A. § 44-3-111(b)(6)(A).
33. *Id.* § 8-2-35 to -43.
34. *Id.* § 8-2-35.
35. *Id.* § 8-2-38(a).
36. *Id.* § 8-2-38(b).
37. *Id.* § 8-2-36(6).
38. *Id.* § 8-2-43(d) (2006).
39. *Id.* § 8-2-41.
40. See *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 131 P.3d 905, 909 (Wash. 2006).
41. See O.C.G.A. § 8-2-36(3), (7).
42. See *id.* §§ 8-2-36(5), (7); 8-2-38; 8-2-42.
43. *Id.* § 8-2-36(5).
44. *Id.* § 8-2-42(e).
45. *Id.* § 8-2-42(e)(1).
46. *Id.* § 8-2-42(e)(2).
47. *Id.* § 8-2-42(e)(3).
48. *Piedmont Arbors Condo. Ass'n v. BPI Constr. Co.*, 197 Ga. App. 141, 141-42, 397 S.E.2d 611, 612 (1990); but see O.C.G.A. § 44-3-75(c) ("In the event of any inconsistency between [the Condominium Act] and the provisions of any declaration, [the Condominium Act] shall control.").
49. O.C.G.A. § 9-9-2(c)(8).
50. *Haynes v. Fincher*, 241 Ga. App. 179, 180, 525 S.E.2d 405, 407 (1999).
51. *Langfitt v. Jackson*, 284 Ga. App. 628, 635, 644 S.E.2d 460, 465 (2007).

A Multimedia Reporting Company  
Video and Demonstrative Evidence



**BULL DARTY  
HOPSON & WORLEY, LLC**  
BOARD CERTIFIED COURT REPORTERS

NEW NAME. MORE LOCATIONS.  
SAME RECORD OF EXCELLENCE.

Atlanta • Alpharetta • Cartersville • Dallas • Decatur  
Ellijay • Fayetteville • Macon • Marietta • Sandy Springs

4651 Roswell Rd., NE, Ste. F504 • Atlanta, GA 30342  
OFFICE 800-447-2855 FAX 404-256-0270  
[www.BullCourtReporting.com](http://www.BullCourtReporting.com)