



Setting the Standard of Care in Premises Liability Cases

In light of the unique relationship that exists between community associations and unit owners, our courts continue to struggle with determining the nature and extent of duties of care owed by an association to a unit owner in premises liability cases. In evaluating the applicable standard of care, our courts have seized upon a variety of approaches, but clearly no overall consensus has emerged, nor has a specific methodology been embraced by a majority of jurisdictions.¹ Given the huge legal consequences resulting from the trial court's determination of the standard of care governing premises liability cases in the community association arena, whether arising from hazardous conditions in the common areas due to original construction deficiencies or faulty maintenance and repair, it is crucial for a standard of care to be adopted that recognizes, and is consistent with, the legal relationship of the parties in this evolving field.

Typically, most jurisdictions that have addressed this issue find a duty of care either through a tort analysis, by examining the status of the claimant,² or through property law, holding that the function of a community association is so closely related to a landlord that it should be held to that standard.³ A minority hold that the source of the duty owed by a community association is properly found in the gov-

erning documents.⁴ However, as this article suggests, neither tort law nor property law serves as the proper vehicle for determining the applicable standard of care.⁵ Instead, as a small but growing number of our courts have concluded, the most appropriate standard of care may be found by reference to the contractual instruments affecting the parties, that is, the governing documents.

Principles of contract law constitute the most compelling authority in determining the obligations of community associations in premises liability cases because they comport with the unique contractual relationship created between the association and its members. Moreover, such contractual principles mesh seamlessly with the fundamental characteristics of covenants and servitudes, which are the basic building blocks of community associations.⁶ For the reasons discussed herein, our courts should abandon the archaic and often awkward tort and landlord-tenant classifications in construing liability of community associations

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in premises cases, and instead should look to the standards articulated in an association's governing documents for appropriate guidance.

THEORIES OF LIABILITY

Traditional Tort Analysis

Ever since the first condominium tort liability case reached the appellate level in 1971, our courts have grappled with determining the appropriate standard of care applicable to a condominium or homeowner association faced with a personal injury suit.⁷ Generally, the courts continue to be divided on the issue. Some courts employ common law tort principles and analyze the level of care based on the status of the claimant, that is, whether the claimant was an invitee, licensee, or trespasser. Others find the duty through a landlord-tenant analogy. Likewise, because of a lack of alternative theories, many courts merely extend the premises liability standards existing in their particular jurisdiction to cases involving condominium and homeowner associations, without regard to the appropriateness of such an extension.

Currently, a majority of the states apply the status of the claimant distinction to determine the standard of care applicable to community associations for injuries sustained on the common areas.⁸ In these jurisdictions, some simply assume that a unit owner is an invitee, while others critically consider the issue. For instance, in *Sacker v. Perry Realty Services*,⁹ one of the issues before the Georgia Court of Appeals was whether a condominium unit owner was an invitee or a licensee for the purposes of determining the appropriate standard of care for her personal injury cause of action filed against both the condominium association and the management company. The plaintiff argued that because she owned a condominium, she should be considered an invitee, whereas the defendants argued that the unit owner was a licensee.¹⁰ Ultimately, the court held that the owner of a condominium unit was an invitee in the condominium's common area, due to the mutuality of obligations and interests between the unit owner and condominium association.¹¹ Thus, because of this relationship, the court held that the association had duty to exercise ordinary care to protect the unit owner from unreasonable risks of which the association had superior knowledge.¹²

Unit owners are not alone in their designation by courts as invitees in suits involving community asso-

ciations. In *Davenport v. Cotton Hope Plantation Horizontal Property Regime*,¹³ the Supreme Court of South Carolina found that the tenant of a unit owner was an invitee for purposes of a personal injury suit against a condominium association. Likewise, courts have found a patient visiting her doctor's office,¹⁴ a renter of a condominium unit,¹⁵ a minor of a renter of a condominium unit,¹⁶ a guest of the guest of a tenant,¹⁷ and a mail carrier¹⁸ all to be invitees. Conversely, a police officer injured in a common area while responding to a fire alarm,¹⁹ as well as the guest of a tenant,²⁰ were both found to be licensees in personal injury actions filed against community associations.

Landlord-Tenant Analogy

Some jurisdictions apply a landlord-tenant analogy to the issue of a community association's liability and hold that associations have the same duty to unit owners with respect to common areas as a landlord owes to a tenant. For instance, in *Frances T. v. Village Green Owners Association*,²¹ the California Supreme Court held that a condominium association owed the same duty to a unit owner to provide adequate security measures for common areas to protect against criminal acts as would be owed by a landlord to a tenant.²² In *Frances T.*, a condominium unit owner brought suit against the association and its individual directors to recover damages for injuries sustained in a criminal assault allegedly resulting from the failure to provide adequate exterior lighting.²³ The court concluded that the condominium association was the functional equivalent of a landlord; and, therefore, traditional tort principles imposed on the association a "duty to exercise due care for the residents' safety in those areas under their control."²⁴ Interestingly, the court held that because the association was aware of and responding to the lighting problems, it had adequately performed the duties it agreed to perform; but, nonetheless, the association was held to a higher standard of conduct imposed by common law under landlord-tenant precepts.

The Florida Court of Appeals similarly applied the landlord-tenant analogy in determining the standard of care owed by a condominium association to a personal injury claimant, although that court focused primarily on the reasonableness of the association's conduct. In *Hemispheres Condominium Association v. Corbin*,²⁵ the court concluded that the duty owed by a condominium association to its

members is a "duty to exercise ordinary or reasonable care to see that its recreation area was reasonably safe for its residents and guests use."²⁶ In that case, the court found that the condominium association was not liable for the death of a tenant of a unit owner when the tenant drowned in the community swimming pool.²⁷ Moreover, the court concluded that the duty would be the same regardless of whether the injured party was a unit owner, guest, or tenant of the unit owner.²⁸

Contractual Duty

Some courts have specifically rejected both the status of the claimant distinction and the landlord-tenant analogy for purposes of determining the appropriate duty owed by community associations to individuals for injuries incurred in common areas.²⁹ For instance, in *O'Brien v. Christensen*,³⁰ the Massachusetts Supreme Court specifically rejected the status of the claimant distinction. In that case, two men who rented condominium units brought personal injury actions against the trustee of the condominium trust for permitting negligent repair of a balcony railing that subsequently broke and caused the men to fall more than 25 feet onto a neighbor's porch.³¹ Although ultimately holding in favor of the plaintiffs, the court agreed with the defendant's argument and specifically rejected the status of the claimant distinction as the theory by which to determine liability.³² The status of the claimant distinction, according to the Massachusetts Court, was "anachronistic and unduly confusing and ... did not promote tort law objectives of fairly allocating the costs and risks of human injuries."³³ The court found that the defendant-trustee's liability was determined by his express written obligations contained in the declaration of trust "to be responsible for the proper maintenance and repair of the common elements."³⁴

The Colorado Supreme Court also rejected the status of the claimant distinction, instead embracing the association's governing documents as the source of the obligations owed by a community association. In *Trailside Townhome Association, Inc. v. Acierno*,³⁵ the Colorado trial court applied the state's landowner liability statute to determine that the duty owed by a community association to a townhome owner was

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that of a licensee. In that case, the unit owner dived into the swimming pool located in a common area of the townhome complex, struck bottom, and subsequently sustained severe head and neck injuries.³⁶ The court reasoned that the townhome owner was a licensee because she was on the property with the consent of the community association and was at the swimming pool for her own convenience or to advance her own interests, pursuant to this permission or consent.³⁷ The trial court then applied the standard of care owed to a licensee and, in holding that the duty had not been breached, granted summary judgment in favor of the community association.³⁸

The Colorado Supreme Court, however, reversed the trial court and remanded the case based on its belief that the status distinction was a wholly inappropriate means of determining the duty of care. The Supreme Court looked to its state's landowner liability statute and reasoned that the statute applied to duties owed by landowners to third persons, who then must be characterized as either trespassers, licensees, or invitees.³⁹ Because the owners in *Trailside* did have a continuing right to make use of the common areas by definition of their ownership, independent of any association consent, the status distinctions simply did not apply.⁴⁰ Instead, the Supreme Court held that in a "complex relationship" such as that formed by *Trailside* and the unit owners, the appropriate standard of care for premises liability was correctly found in the governing documents.⁴¹

Likewise, in *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*,⁴² the Appellate Court of Illinois found the duty owed by a condominium association to a unit owner in the governing documents of the development. In that case, the plaintiff was a daughter of a unit owner and filed suit against the condominium association for injuries she sustained from slipping and falling on the common sidewalk.⁴³ The court looked to the declaration and bylaws of the condominium association and found that the association had imposed on itself a duty to remove snow otherwise not imposed on it by common law.⁴⁴ After con-

members is a "duty to exercise ordinary or reasonable care to see that its recreation area was reasonably safe for its residents and guests use."²⁶ In that case, the court found that the condominium association was not liable for the death of a tenant of a unit owner when the tenant drowned in the community swimming pool.²⁷ Moreover, the court concluded that the duty would be the same regardless of whether the injured party was a unit owner, guest, or tenant of the unit owner.²⁸

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cluding that the association did have a duty, the court then used the theory of foreseeability to determine that the plaintiff, even though not a unit owner, was within the realm of foreseeable plaintiffs and, therefore, was owed a duty of care by the association.⁴⁵

In evaluating a cause of action by unit owners against a condominium association alleging negligence for failing to protect their property from flooding, the Missouri Court of Appeals turned to the declaration and the bylaws to determine the applicable standard of care in the case of *Wescott v. Burtonwood Manor Condominium Association Board of Managers*.⁴⁶ In *Wescott*, the court concluded, as a matter of law, that the association did not owe any duty to the unit owners either to permit them to construct floodwalls or to protect them from the negligence of third parties, namely, the architects and developer who designed the floodwater paths.⁴⁷ The court's conclusion was based on a strict construction of the association's

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bylaws and the determination that the express provisions of the bylaws limited the association's duties.⁴⁸

Recently, in *Bradford Square Condominium Association, Inc. v. Miller*,⁴⁹ the Georgia Court of Appeals reversed the trial court's denial of a motion for summary judgment by a defendant condominium association, holding that the association's duty was properly found in the governing documents. In that case, the plaintiff was a unit owner who sued the association for the wrongful death of her husband arising from the criminal acts of third parties in the condominium's common area parking lot.⁵⁰ Initially, the court looked to Georgia law, but was

unsuccessful in finding that a condominium association had a duty to provide security for its unit owners.⁵¹ The court then turned to the governing documents and found that the unit owners had specifically amended the declaration to provide that the association would not have a duty to control the security of the condominium's common elements.⁵² Ultimately, the court reasoned that because the declaration was properly

amended, recorded, and filed to reflect the desires of the condominium unit owners, the association was not responsible for any nuisance existing on the condominium's common elements due to an alleged lack of security.⁵³ Without a duty, there cannot be liability.⁵⁴

ESTABLISHING THE APPROPRIATE STANDARD OF CARE

The Demise of the Status of the Claimant Distinction

As evidenced by the previous sections of this article, the status of the claimant distinction is losing its applicability in the community association arena. In general, those states that still retain the tripartite categorization as a means of determining the standard of care for premises liability extend that reasoning to community association lawsuits without regard to the unique relationship between an association and its members. Traditionally, the classification of the claimant's status has reflected the economic relationship between the landowner and the third party, and the levels of care generally increase for those landowners deriving direct pecuniary benefits from the presence of that third party.⁵⁵ However, a unit owner should not be characterized as an invitee, because his or her presence on the common areas does not confer an economic advantage to the association. Likewise, the mere payment of assessments to an association by an owner should not be enough to elevate the status of that owner to the highest status classification, i.e., an invitee. The association does not exist as a separate entity to profit from the unit owners; instead, it functions under the governing documents as their alter ego, performing managerial and maintenance work the unit owners chose not to undertake at the time they purchased their units.

Furthermore, in a condominium regime, where a unit owner actually owns an undivided percentage interest in the common elements, does it make sense for an owner to be classified as an invitee and afforded the highest level of care when injured on the very common elements owned by that claimant? Whether the community association is formed as a nonprofit corporation or an unincorporated association of unit owners, its liability for its acts or omissions with respect to the common areas it controls simply bears no reasonable relationship to the status of an injured unit owner or other third-party claimant.

Community Associations Are Not Landlords

The landlord-tenant analogy is not the appropriate method for determining the standard of care for community associations, because a community association is not comparable to a landlord.⁵⁶ Unlike landlords, who stand separate and apart from tenants with the intention of deriving profit from the relationship, community associations have a direct and integrated relationship with their members and are designed to provide services, not profit. Moreover, unit owners have a right to participate in the control of the community and may adopt measures designed to expand or reduce the duties of the association.⁵⁷ A tenant's relationship with his or her landlord is generally devoid of rule-making authority and/or control vested in unit owners in community associations. As a result, the high level of care, which may govern the conduct of landlords in their dealings with their tenants, is not appropriate in planned communities governed and controlled by unit owners.⁵⁸

Setting the Standard of Care by Contract

The most appropriate methodology today for determining the standard of care applicable to community associations in premises liability cases is to utilize those principles rooted in contract law. In particular, our courts should look to the very documents that create and govern community associations—namely, the declaration, bylaws, and rules and regulations—for guidance and instruction on the duty and level of care imposed on community associations.

It is well settled that by virtue of the recordation of the association's declaration, a purchaser of a unit within the community is "deemed to intend and agree to be bound by" the governing documents.⁵⁹ Many of our courts have now embraced this concept, and have construed the covenants, conditions, and restrictions as contracts in a number of circumstances.⁶⁰

Judicial recognition of the governing documents of community associations as contracts is not a radical concept. In *Johnson v. Fairfax Village Condominium IV Unit Owner's Association*,⁶¹ a condominium unit owner sought review of a judgment that denied his motion to vacate a prior order that granted summary judgment to the condominium association in the owner's suit, which challenged the authority of the association to sell his condominium without prior approval of a court.⁶² Relevant to this article, the court stated, "[t]he condominium instruments, including the bylaws and the sales agreement, are a contract that governs the legal rights between the

Association and unit owners."⁶³ Moreover, the contractual qualities of the governing documents are not just agreements between unit owners and the associations, but, in fact, represent a form of private law-making. Specifically, when an individual owner buys a unit in a community association, he or she agrees to subordinate some traditional ownership rights and privileges.⁶⁴ That the governing documents are considered enforceable contracts bears directly on the manner in which courts should construe them. Namely, they should be strictly construed as they are written, giving the language its clear, simple, and unambiguous meaning.⁶⁵

In view of the fact that the relationship between the community association and the unit owners is established and defined by reference to contractual instruments, it is entirely appropriate and prudent for the standards of care governing that relationship to be established by the same set of contractual instruments. As noted above, a few jurisdictions have already recognized the reasonableness of this approach.⁶⁶

Practical Considerations

Deriving the standard of care from the governing documents through a contractual analysis, rather than a tort analysis, is consistent with the underlying nature of the relationship formed between the community association and unit owners. Moreover, defining the duty of care in the governing documents provides a level of predictability and certainty not often available through traditional tort analysis. Likewise, a clearly articulated set of standards embodied within an association's governing documents provides both the association and unit owners with ample notice of the parties' obligations and duty of care and an opportunity to change such duties when the circumstances, and the members, require it.

To be sure, the lack of knowledge and notice as to what liabilities may be incurred by a community association by reason of the condition of premises owned or controlled by the association severely undermines the ability of the association to establish a sound budget and effectively allocate its financial resources. Even the ability of an association to obtain insurance and pay for premiums is directly affected by the type and scope of liability to which it may be subjected. In recognition of this predicament, the State of New Jersey enacted a statute that permits community associations to adopt an amendment to

their bylaws that effectively immunizes the association from civil liability other than that which is "willful, wanton, or [a] grossly negligent act of commission or omission."⁶⁷

Although legislation such as the foregoing statute in the State of New Jersey would represent an effective means through which to establish certain standards of care and limitations of liability for community associations, the legislative process may not be feasible or timely for many community associations. An alternative to the legislative process would be to create reasonable exculpatory clauses within the governing documents at the time the developer creates the association, or, subsequently, to enact amendments authorized by the members. A fair and reasonable exculpatory clause provides both the association and the existing or prospective unit owners with due notice of the scope of liability for losses incurred on premises owned or controlled by the association. Moreover, our courts have generally upheld exculpatory clauses in the community association context.⁶⁸ Thus, community association lawyers should not hesitate to include exculpatory clauses and other provisions that set out liability limits for community associations in the governing documents, and, absent willful, wanton, or grossly negligent misconduct, should argue that these limitations set the standard of care agreed upon by both the unit owners and associations.

CONCLUSION

As one jurist has observed, "The trend toward condominium living has generated a new dimension in legal relationships and possible duties there from."⁶⁹ By recognizing that new dimension and applying principles of contract law to premises liability cases, our courts can effectively establish a standard of care that reflects the unique contractual relationship between the community association and its members and comports with the concept of covenants that lays at the foundation of all community associations.

The status of claimant distinctions and landlord-tenant characterizations are simply ill suited for the premises case in the community association context. Rather, our courts should look to an association's governing documents to define the standard of care for which the association is liable. As such, practitioners should create and amend governing documents that articulate and establish fair and reasonable standards, including appropriate limitations of liability, that are tailored to meet the particular needs and requirements of associations and their members. Such approaches will serve to enhance an association's ability to manage its affairs, control expenses, and mitigate its exposure in the face of increasing claims for personal injuries attributable to the association's premises. ▀

Steven L. Sugarman, Esq. is with Steven L. Sugarman & Associates in Berwyn, Pennsylvania. Scott R. Reidenbach, Esq., and Donna C. Murphy contributed to this article.

STANDARDS OF CARE USED IN PREMISES LIABILITY CASES BY STATE

State	Case	Type of Injury	Liability Theory
Alabama	<i>Robison By and Through Robison v. Gantt</i> , 673 So.2d 441 (Ala. Civ. App. 1995), reh'g den., (1995). In this case, a minor whose family was renting condominium unit was an invitee. for purposes of determining whether owner of unit or owners' association owed minor duty to protect him from snake bite he received in swimming pool area. The court stated that a landowner would be liable only if it failed to exercise reasonable care in maintaining its premises in a reasonably safe manner. Thus, the condominium association was not liable because there was no evidence that it knew or had reason to believe that the snake was present in the pool area.	Personal injury	Status of the claimant
Arizona	<i>Martinez v. Woodmar IV Condominiums Homeowners Association</i> , 941 P.2d 218 (Ariz. 1997). Plaintiff filed suit against condominium association for injuries sustained from being shot while running away from a group of youths in a common area. With respect to common areas under its exclusive control, a condominium association has the same duties as a landlord; thus, association has a duty not only to the unit owners and their tenants but also to those who are on the land with their consent and who will inevitably be expected to use common areas such as the parking lot, and the duty to maintain the safety of common areas applies not only to physical conditions on the land, but also to dangerous activities on the land as well.	Personal injury caused by third party	Landlord-tenant analogy
California	<i>Frances T. v. Village Green Owners Association</i> , 723 P.2d 573 (Cal. 1986). Condominium association may properly be held to landlord's standard of care as to common areas under its control. Thus, condominium association had a duty to plaintiff, and they may have breached that duty of care by failing to respond in timely manner to need for additional exterior lighting and by ordering plaintiff to disconnect additional lights that she had installed herself.	Personal injury caused by third party	Landlord-tenant analogy
Connecticut	<i>Morin v. Bell Court Condominium Association</i> , 612 A.2d 1197 (Conn. 1992). Police officer brought action against condominium association for injuries sustained while on premises in response to fire alarm. Court held that common stairways and hallways of private condominiums were not held open to public, so as to afford licensee implied representation of safety given to invitees. Thus, police officer was found to be an invitee.	Personal injury	Status of the claimant
Connecticut	<i>Maffeo v. Harbour Landing Condominium Association, Inc.</i> , 1994 WL 669701 (Conn. Super. 1994) (unpublished). The court specifically addressed the legal status of an owner of a condominium unit for purposes of a claim of premises liability against the condominium association and concluded that the owner would be an invitee.	Personal injury	Status of the claimant
Connecticut	<i>Medcalf v. Washington Heights Condominium Association, Inc.</i> , 747 A.2d 532 (Conn. App. 2000). This case involved a third party's assault on a condominium visitor and that visitor's resulting injuries. The court stated that, as matter of law, the third party's actions were not within the foreseeable scope of risk created by condominium association.	Personal injury caused by third party	Common law tort
Colorado	<i>Truilside Townhome Association, Inc. v. Acierno</i> , 880 P.2d 1197 (Colo. 1994). In determining duty owed by townhome association to townhome owners while using common areas of townhome complex, to extent provisions of operative documents creating townhome complex and association prescribed duties of association to townhome owners and were consistent with public policy, those provisions controlled; operative documents could establish duty giving rise to tort obligations as well as create contractual obligations.	Personal injury	Governing documents
District of Columbia	<i>Lacy v. Sutton Place Condominium Association, Inc.</i> , 684 A.2d 390 (D.C. 1996). Tenant of condominium unit who entered attic space was "trespasser" since condominium association, through its rules and regulations, prohibited access to attic space. Condominium association and association's management company did not owe tenant duty of reasonable care to make attic space in unit safe, and thus, were not liable for tenant's injuries sustained when he fell from attic through ceiling of unit since tenant was trespasser while in attic and there was no allegation of wanton or willful conduct by association or management company.	Personal injury	Governing documents/ Status of the claimant

STANDARDS OF CARE (continued)

State	Case	Type of Injury	Liability Theory
District of Columbia	<i>D'Ambrosio v. Colonnade Council of Unit Owners</i> , 717 A.2d 356 (D.C. 1998). Council of condominium unit owners was not liable for pipe that froze and burst behind unit owner's wall, as provisions in association's bylaws allocating responsibility as between unit owners, with respect to pipes in their units, and council, with respect to pipes in common areas outside individual units, did not modify or limit provision in bylaws that council was not responsible for damages from "any pipe"; one provision dealt with maintenance responsibilities, while other provision was matter of financial risk allocation.	Property damage	Governing documents
Florida	<i>Hemispheres Condominium Association, Inc. v. Corbin</i> , 357 So.2d 1074 (Fla. App. 1978). Tenant of a unit owner sued the condominium association for the drowning death of her husband, allegedly caused by the association's negligent operation of a swimming pool. The court turned to landlord tenant law and determined that the duty owed to a user of a pool provided by a condominium association for its members was the same duty the association owed to its own members. This duty is described as a duty to exercise ordinary or reasonable care to see that its recreation area was reasonably safe for its residents and guests use. The court held for the condominium association because there was no evidence that actions or lack thereof were the proximate cause of the drowning.	Personal injury	Landlord-tenant analogy
Florida	<i>Winston Towers One Hundred Association v. De Carlo</i> , 481 So.2d 1261 (Fla. App. 1988), dismissed without op., 488 So.2d 832 (Fla.). In action by unit owner against condominium association to recover for injuries sustained when closet door opened and struck him as he walked down hall from his unit, association was held liable where association failed to take reasonable measures to keep door closed after obtaining actual knowledge that it had propensity to swing open.	Personal injury	Landlord-tenant analogy
Georgia	<i>Murphy v. D'Youville Condominium Association</i> , 333 S.E.2d 1 (Ga. App. 1985). Proximate cause of injury sustained by resident of condominium, who was thoroughly familiar with layout of condominium pool, including its depth and depth markings, when he dived into shallow end was his failure to exercise ordinary care for his own safety; thus, summary judgment for defendants who were involved in ownership, operation, design, construction, and maintenance of pool was warranted.	Personal injury	Status of the claimant
Georgia	<i>Plantation at Lenox Unit Owners Association, Inc. v. Lee</i> , 395 S.E.2d 817 (Ga. App. 1990). For purpose of determining scope of duty of condominium owners' association to private party guest injured on condominium premises, condominium unit owner who reserved the association's clubhouse for the party was "tenant" of the association, notwithstanding fact that unit owner was owner in common of all common property at the condominium complex, where the association rules required the owner to lease the clubhouse.	Personal injury	Status of the claimant
Georgia	<i>Powell v. Woodridge Condominium Association, Inc.</i> , 424 S.E.2d 855 (Ga. App. 1992). Condominium association was not liable to tenant for injury she suffered when her heel caught on weathered railroad ties used to form stairway to parking lot where tenant had equal knowledge of specific hazardous condition presented by cracked steps.	Personal injury	Status of the claimant
Georgia	<i>Sacker v. Perry Realty Services</i> , 457 S.E.2d 208 (Ga. App. 1995). Owner of condominium unit was "invitee" not licensee of condominium's common area, due to clear mutuality of obligations and interests between owner and condominium association; thus, association had duty to exercise ordinary care to protect owner from unreasonable risks of which association had superior knowledge. Moreover, condominium association could not avoid liability because in the Declaration of Condominium it expressly contracted to maintain and keep the common areas in good repair.	Personal injury	Status of the claimant

STANDARDS OF CARE (continued)

State	Case	Type of Injury	Liability Theory
Georgia	<p><i>Fisher v. HBS Management, Inc.</i>, 469 S.E.2d 885 (Ga. App. 1996). There was no evidence that corporation which managed condominium development or homeowners' association had actual or constructive knowledge of hazardous condition of common area parking lot, and thus corporation and association were not liable for injuries condominium unit owner sustained when he slipped and fell in parking lot; invisible ice which allegedly caused unit owner's fall was naturally occurring ice and not attributable to any affirmative action on part of defendants, and because there was no evidence of accumulation of ice creating obvious hazard of which defendants knew or should have known, they had no affirmative duty to remove any naturally occurring ice. Plaintiff was unit owner.</p>	Personal injury	Status of the claimant
Georgia	<p><i>Bradford Square Condominium Association, Inc. v. Miller</i>, 573 S.E.2d 405 (Ga. App. 2002). In this case, condominium owners sued condominium association for the criminal act of a third party. The court first looked to Georgia law and did not find a duty owed by a condominium association to provide security for the unit owners. Then the court looked at the governing documents that the unit owners specifically amended to provide that the association would have no duty to control the security of the condominium's common elements. Finding the declaration properly amended, recorded, and filed to reflect the desires of the condominium owners, the court held that the association was not responsible for the maintenance of any alleged continuing nuisance existing on the condominium's common elements due to an alleged lack of security.</p>	Personal injury caused by third party	Governing documents
Hawaii	<p><i>King v. Ilikai Properties, Inc.</i>, 632 P.2d 657 (Haw. App. 1981). Where condominium association had no "special relationship" to lessee and guest in condominium unit, who brought action arising out of assault and robbery by three unidentified persons in hotel, which also contained private condominium units, association was not liable to plaintiffs for damages sustained in assault and robbery.</p>	Personal injury caused by third party	Landlord-tenant analogy
Illinois	<p><i>Schoondyke v. Heil, Heil, Smart & Golee, Inc.</i>, 411 N.E.2d 1168 (Ill.App.1. Dist. 1980). Condominium associations and corporations, by virtue of declaration of condominium and condominium bylaws, voluntarily assumed duty of snow removal on condominium premises not imposed on them by common law, and thus owed duty to individual, who sustained injuries in fall on common portions of condominiums, to remove natural accumulations of snow and ice, although such individual was non-owner occupier of condominium unit, as such individual was within class of legally foreseeable plaintiffs.</p>	Personal injury	Governing documents
Indiana	<p><i>Strayer v. Covington Creek Condominium Association</i>, 678 N.E.2d 1286 (Ind. App. 1997). Unit owner sued condominium association to recover for injuries suffered by owner when he fell on a snow-covered sidewalk in common area. The court found that the declaration was a contract and that it did create a duty for the association to maintain the sidewalks. However, the court held that the unit owner's claim was not a breach of contract, but instead a tort claim barred by Illinois law that members of associations cannot sue unincorporated associations.</p>	Personal injury	Governing documents (unincorporated association)
Indiana	<p><i>Wellington Green Homeowners' Association v. Parsons</i>, 2002 WL 1060845 (Ind. App. 2002). Mail carrier sued condominium association and management company for injuries sustained when multi-box mailboxes detached from the wall and fell on him. Mail carrier was an invitee, and as such, absent evidence that condominium homeowners' association or its management company installed multi-box mailboxes, were aware of how mailboxes were attached to wall, or that they had any reason to determine whether mailboxes were securely attached to wall, neither were liable to mail carrier.</p>	Personal injury	Status of the claimant

STANDARDS OF CARE (continued)

State	Case	Type of Injury	Liability Theory
Iowa	<i>Stover v. Lakeland Square Owners Association</i> , 434 N.W.2d 866 (Iowa 1989). In this case, plaintiff sued owners association for injuries sustained in slip and fall while climbing wooden stoop in front of condominium in which her doctor's office was located. Plaintiff was determined to be classic business invitee.	Personal injury	Status of the claimant
Kansas	<i>Prime v. Beta Gamma Chapter of Pi Kappa Alpha</i> , 47 P.3d 402 (Kan. 2002). Fraternity member sued fraternity association for personal injury resulting from excessive consumption of alcohol. This state recognized unincorporated associations and held that the fraternity chapter was an unincorporated association and not a legal entity that could be sued, and therefore, it was not liable for plaintiff's injuries.	Personal injury	Unincorporated association
Maryland	<i>Pratt v. Maryland Farms Condominium Phase 1, Inc.</i> , 402 A.2d 105 (Md. App. 1979). Condominium association was liable for injuries sustained by child when he climbed tree and came in contact with uninsulated electrical wire located on property of condominium complex. The court held that the child was an invitee and that a jury could have found that a child of the plaintiff's age and education could not reasonably be expected to notice that wire and appreciate the danger while playing.	Personal injury	Status of the claimant
District of Maryland	<i>Cornell v. Council of Unit Owners Hawaiian Village</i> , 983 F. Supp. 640 (D. Md. 1997). Unit owner sued condominium association and management company for personal injuries resulting from slip and fall on ice formation in parking lot due to alleged negligent maintenance and design leading to faulty drainage. The court looked to the condominium bylaws, which included an exculpatory clause limiting liability of the association. The court granted summary judgment in favor of the association because the unambiguous language of exculpatory clause did not violate state law nor was it contrary to public policy.	Personal injury	Governing documents
Massachusetts	<i>O'Brien v. Christensen</i> , 662 N.E.2d 205 (Mass. 1996). Two men who rented condominium units sued repairman for negligently repairing balcony railing, as well as trustee of Condominium Trust and individual responsible for getting contract signed between the repairman and trustee for permitting the negligent repair. The court held that trustee was properly held responsible because liability was determined by trustee's express written obligations contained in the declaration of trust "to make repairs, additions and improvements to or alterations of the common elements," and "to be responsible for the proper maintenance and repair of the common elements."	Personal injury	Governing documents
Michigan	<i>DeBoard v. Fairwood Villas Condominium Association</i> , 483 N.W.2d 422 (Mich. App. 1992). Condominium owner's guest could not recover from condominium association or management corporation for allegedly defective condition of deck that caused him injuries. Guest was brother of unit owner and deemed a licensee.	Personal injury	Status of the claimant
Missouri	<i>Randol v. Atkinson</i> , 965 S.W.2d 338 (Mo. App. W. Dist. 1998), rehearing and/or transfer den. (1998). Unit owners sued their condominium association for damage resulting from fire caused by charcoal grill on a wooden deck. The court specifically declined applying a landlord-tenant analogy, and instead, held that duties owed by condominium association and developer to unit owners were limited to those duties included in the bylaws and Uniform Condominium Act, making common law duty of care inapplicable.	Property damage	Governing documents
New York	<i>Paolucci v. Wood Gate Homeowners Association, Inc.</i> , 238 A.D.2d 855, 656 N.Y.S.2d 550 (3d Dept. 1997). Homeowner association and its managing agent did not have actual or constructive knowledge of hazardous icy conditions on walkway or reasonable opportunity to correct condition, and, therefore, were not liable for newspaper delivery person's injuries sustained in slip and fall.	Personal injury	Common law tort (actual or constructive knowledge and notice)

STANDARDS OF CARE (continued)

State	Case	Type of Injury	Liability Theory
New York	<i>Risucci v. Zeal Management Corp.</i> , 258 A.D.2d 512, 685 N.Y.S.2d 280 (2d Dept. 1999). Condominium association and managing agent neither created allegedly dangerous condition that resulted from protruding screw that was part of pool cover system, nor had actual or constructive notice of it, and, therefore, were not liable for injuries sustained by condominium resident when she tripped on screw.	Personal injury	Common law tort (actual or constructive knowledge and notice)
New York	<i>Goodwin v. Knolls at Stony Brook Homeowners Association, Inc.</i> , (N.Y.A.D. 2 Dept 1998). Unit owner sued the homeowners association and the snow plowing company for personal injuries incurred when he slipped and fell on ice in a common area. The court held that both the association and the landscaping company were not liable because neither knew of nor created the ice.	Personal injury	Common law tort (actual or constructive knowledge and notice)
Ohio	<i>Chatelain v. Portage View Condominiums</i> , 783 N.E.2d 587 (Ohio App.3d 2002). Provision in condominium rules stating that association's responsibilities included snow removal from roadways, parking areas, and sidewalks imposed duty on association to clear natural accumulations of snow or ice from parking lot and other common areas.	Personal injury	Governing documents
Pennsylvania	<i>Smith v. King's Grant Condominium</i> , 640 A.2d 1276 (Pa. 1994) (Per Flaherty, J., with one Justice and Chief Justice concurring and one Justice concurring in result). Condominium unit owner did not show that condominium association failed to take reasonable care, as required to support liability for creation or maintenance of dangerous artificial conditions that caused sewer line to back up into her unit.	Property damage	Common law tort (reasonable care by possessor of land)
South Carolina	<i>Landry v. Hilton Head Plantation Property Owners</i> , 452 S.E.2d 619 (S.C. App. 1994). Unit owner sued the property owners association and the landscaping maintenance company for a personal injury claimed to have incurred as a result of stepping into a hole while walking across a sidewalk in a common area. The court conducted an extensive analysis to determine whether plaintiff was an invitee or licensee. Plaintiff's status was determined to be that of an invitee. The court reasoned that because plaintiff paid an annual fee to the association to maintain the common areas, she conferred benefit that is essential to a principal reason for the association's existence, thereby making her an invitee.	Personal injury	Status of the claimant
South Carolina	<i>Davenport v. Cotton Hope Plantation Horizontal Property Regime</i> , 508 S.E.2d 565 (S.C. 1998). Plaintiff was the tenant of a unit owner and sued the condominium association for personal injuries incurred when she slipped and fell due to allegedly negligently maintained lighting around the stairwell, which caused her to misjudge the step. The court found the applicable duty in the Horizontal Property Act and held that the association had a duty to maintain general common elements, which included stairways.	Personal injury	Statute: Horizontal Property Act
Texas	<i>Riddick v. Quail Harbor Condominium Association, Inc.</i> , 7 S.W.3d 663 (Tex. App. Houston, 14 Dist. 1999). Court looked to the condominium declaration to determine whether the condominium association had a duty to act reasonably and in good faith regarding the maintenance and repair that plaintiff claimed proximately caused damage to his property.	Property damage	Governing documents
Wisconsin	<i>Bethke v. Lauderdale of La Crosse, Inc.</i> , 612 N.W.2d 332 (Wis. App. 2000). Wisconsin has an immunity statute that generally immunizes property owners from liability when a person is injured while engaging in a recreational activity on the owner's land. In this case, the appellate court affirmed the trial court's holding that the condominium association was covered by the recreational immunity statute, and, therefore, was not liable for the plaintiff's injuries allegedly incurred due to the association's negligent conduct.	Personal injury	Recreational use statute

REFERENCES

1. See accompanying chart for examples from various jurisdictions. In addition, this article, like most of the judicial decisions reviewed herein, does not attempt to distinguish the "duty" of care with the "standard" of care because as that learned author observed in his well-known treatise: "What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty. The distinction is one of convenience only, and it must be remembered that the two are correlative, and one cannot exist without the other." Prosser, *The Law of Torts*, Sec. 53, 4th ed. (1974).
2. For further discussion, see *infra* notes 7-20 and accompanying text.
3. For further discussion, see *infra* notes 21-28 and accompanying text.
4. For further discussion, see *infra* notes 29-54 and accompanying text.
5. For further discussion, see *infra* sections, "The Demise of the Status of the Claimant Distinction" and "Community Associations are Not Landlords" on pages 64 and 65.
6. See generally, *Restatement Third, Property (Servitudes)*, Ch. 6.
7. *White v. Cox*, 95 Cal. Rptr. 259 (Cal. App. 1971). Cox is the seminal decision on the ability of a unit owner to sue an association. See also, *Murphy v. Yacht Cove Homeowners Association*, 345 S.E.2d 709 (S.C. 1986), holding, *inter alia*, that unit owner can sue association in tort and is not barred by joint principal rule. Other courts have simply assumed that individuals have standing to sue their associations. See, *Kremer v. Blisard Management & Realty, Inc.*, 711 S.W.2d 813 (Ark. 1986); *Winston Towers 100 Associations v. De Carlo*, 481 So. 2d 1261 (Fla. 3d D.C.A. 1986); *Admiral's Port Condominium Association v. Feldman*, 426 So. 2d 1054 (Fla. 3d D.C.A. 1983); *Janke v. Corinthian Gardens, Inc.*, 405 So. 2d 740 (Fla. 4th D.C.A. 1979); *Hemispheres Condominium Ass'n v. Corbin*, 357 So. 2d 1074 (Fla. 3d D.C.A. 1978); *Carter v. Willowrun Condominium Association*, 345 S.E.2d 924 (Ga. App. 1986); *Murphy v. D'Youville Condominium Association*, 156, 333 S.E.2d 1 (Ga. App. 1985); and *Schoonycke v. Heib, Heib, Smart & Golee, Inc.*, 411 N.E.2d 1168 (Ill. App. 3d 1980).
8. See generally, *Restatement of Torts (Second)* § 343. At common law, a landowner's duties to third parties depended upon whether a third party was an invitee, a licensee, or a trespasser. The landowner owed few duties to a trespasser. To a licensee the landowner owed duties to use reasonable care in his actions on the property and to warn of known hidden dangers. To an invitee, the landowner owed a duty to make the property reasonably safe. Social guests of a private landowner were considered licensees, not invitees, which meant that the private landowner had no obligation to correct patent dangers, and no obligation to search for hidden dangers known to him. Consistent with this rule, a private landowner had no obligation to remove snow and ice or to correct other obvious dangers.
9. *Sacker v. Perry Realty Services*, 457 S.E.2d 208 (Ga. App. 1995).
10. *Id.* at 209.
11. *Id.* at 210.
12. *Id.* at 210-11.
13. *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 508 S.E.2d 565 (S.C. 1998).
14. *Stover v. Lakeland Square Owners Association*, 434 N.W.2d 866 (Iowa 1989).
15. See, e.g., *Powell v. Woodridge*, 424 S.E.2d 855 (Ga. App. 1992).
16. *Robison By and Through Robison*, 673 So.2d 441 (Ala. Civ. App. 1995), reh'g denied (1995).
17. *Plantation at Lenox Unit Owners Association, Inc. v. Lee*, 395 S.E.2d 817 (Ga. App. 1990).
18. *Wellington Green Homeowners' Association v. Parsons*, 2002 WL 1060845 (Ind. App. 2002).
19. *Morin v. Bell Court Condominium Association*, 612 A.2d 1197 (Conn. 1992).
20. *DeBoard v. Fairwood Villas Condominium Association*, 483 N.W.2d 422 (Mich. App. 1992).
21. *Frances T. v. Village Green Owners Association*, 723 P.2d 573 (Cal. 1986).
22. *Id.* at 576-77.
23. *Id.* at 574.
24. *Id.* at 576-77, agreeing with intermediate appellate court that "since only the landlord is in a position to secure common areas, he has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure" and that his duty was to exercise reasonable care. See also, *Moody v. Cawdrey & Associates* 721 P.2d 708 (Haw. App. 1986).
25. *Hemispheres Condominium Association v. Corbin*, 357 So.2d 1074 (Fla. App. 1978).
26. *Id.* at 1074, 1076, citing *Manassa v. New Hampshire Insurance Company*, 332 So.2d 34, 36 (Fla.1st DCA 1976), noting that while facts in *Manassa* were not applicable to case at bar, duty to exercise ordinary care was.
27. *Id.* at 1076, noting that failure to provide professional lifeguard is not failure to exercise ordinary care in operation of private swimming pool, where plaintiff argued that negligence in this case stemmed from duty of defendant to take reasonable precautions to provide for safety of swimmers or to provide deceased reasonable rescue and medical attention.
28. See, e.g., *Id.* at 1074, holding that duty owed to user of pool provided by condominium association for its members was same duty association owed to its own members.
29. See, e.g., *Nolen v. Meredith Management Company*, Mass. Super. LEXIS 583 (1995), stating that "duty owed by a property owner to someone lawfully on his premises is one of reasonable care under the circumstances." In this case, the plaintiff brought a negligence action against the management company and landscaping company alleging that they were liable for the injuries she suffered when she slipped and fell on an accumulation of snow and ice as she left her condominium. The court granted summary judgment in favor of the management company stating that a "property owner is only liable in circumstances where some act or failure to act has changed the condition of naturally accumulated snow and ice, and the elements alone or in conjunction with the land become a hazard. Liability does not attach when a property owner removes a portion of an accumulation of snow or ice and a person is injured by slipping and falling on the remainder because the snow or ice remains as a natural accumulation." *Id.* See also, *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973), stating that land occupier owes common duty of reasonable care to all lawful visitors, therefore abolishing distinction between licensees and invitees; *Scurti v. City of New York*, 354 N.E.2d 794 (N.Y. 1976), rejecting categories and asserting foreseeability as appropriate measure of liability; *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993), stating that foreseeability of injury rather than status of entrant should be basis for liability, and therefore, abolishing distinction between licensees and invitees.
30. *O'Brien v. Christensen*, 662 N.E.2d 205 (Mass. 1996).
31. *Id.* at 205, 206. Also named as defendants were the carpenter who made the repairs and the person responsible for getting the contract between the carpenter and the trustee signed.
32. *Id.* at 209.
33. *Id.*, citing *Vertentes v. Barletta Co.*, 466 N.E.2d 500 (Mass. 1984), Abrams, J., concurring.
34. *Id.* at 208.

35. *Trailside Townhome Association, Inc. v. Acierno*, 880 P.2d 1197 (Colo. 1994).
36. *Id.* at 1197-99.
37. *Id.* at 1199.
38. *Id.* at 1201.
39. *Trailside Townhome Association, Inc. v. Acierno*, 880 P.2d 1197, 1202 (Colo. 1994), citing applicable Colorado statute.
40. *Id.* at 1202.
41. *Id.* at 1202-03. "We conclude that to the extent that the provisions of the operative documents creating the town home complex and the association prescribe the duties of the association to the town home owners and are consistent with public policy, those provisions control."
42. *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 411 N.E.2d 1168 (Ill. App. 1980).
43. *Id.* at 1168, 1170. The defendants were Heil, Heil, Smart & Golee, Inc., Cedar Run Homeowners' Association, Cedar Run V Condominium Association, and Tekton Corporation.
44. *Id.* at 1171.
45. *Id.* "Whether plaintiff here is an individual who is entitled to the protections afforded by defendants' assumption of the duty of snow removal depends upon whether plaintiff and defendants stand in such relationship to one another that the law imposes upon defendants an obligation of reasonable conduct for the benefit of plaintiff." Citing *Mieher v. Brown*, 301 N.E.2d 307 (Ill. 1973); *Cunis v. Brennan*, 308 N.E. 2d 617 (Ill. 1974).
46. *Wescott v. Burtonwood Manor Condominium Association Board of Managers*, 743 S.W.2d 555, 558 (Mo. App. 1987).
47. *Id.* at 558. "The duties owed by defendants to the individual owners are limited to those duties included in the...[Bylaws]."
48. *Id.* at 560-61.
49. *Bradford Square Condominium Association, Inc. v. Miller*, 573 S.E.2d 405 (Ga. App. 2002).
50. *Id.* at 405, 408.
51. *Id.* at 410-11.
52. *Id.* at 411.
53. *Id.*
54. *Id.* "There must be a duty to abate a nuisance before liability may attach." Citing O.C.G.A. § 41-1-5.
55. Prosser, *The Law of Torts*, Sec. 58, 4th ed. (1974).
56. *Frances T. v. Village Green Owners Association*, 723 P.2d at 591-95 (Cal. 1986), Mosk, J., concurring and dissenting; exploring differences between association and landlord in provision of security protections for residents.
57. See, e.g., *Francis T. supra*.
58. "The Rule of Law in Residential Associations," 99 *Harv. L. Rev.* 472 (1985).
59. *Villa Milano Homeowners Association v. Il Davorge*, 102 Cal. Rptr. 2d 1 (Cal. App. 2000), citing *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314 (Cal. 1995).
60. See, e.g., *Wrenfield v. De Young*, 600 A.2d 960 (Pa. Super. 1991), finding the declaration to be a contract between the homeowners and their nonprofit homeowner association in imposing attorneys' fees against a delinquent owner; *Villa Milano Homeowners Association v. Il Davorge*, 102 Cal. Rptr. 2d 1 (Cal. App. 2000), noting that individual condominium unit owners "are deemed to intend and agree to be bound by" written and recorded CC&R's, inasmuch as they have constructive notice of them when they purchase their homes, citing *Diamond Bar Dev. Corp. v. Superior Court*, 131 Cal. Rptr. 458 (Cal. App. 1976), holding that plaintiff-developer's contract with condominium unit owners consisted of CC&R's and bylaws contained in deed, and that rights and responsibilities of contracting parties are determined by terms of their contract; *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899 (Cal. App. 1998), involving CC&R's as contract between neighboring property owners prohibiting use of residential property for business activities; *Franklin v. Marie Antoinette Condo Owners Association*, 23 Cal. Rptr. 2d 744 (Cal. App. 1993), involving CC&R's as contract between homeowner and homeowners association with respect to homeowners association's obligation to maintain and repair common area plumbing; *Frances T. v. Village Green Owners Association*, 723 P.2d 573 (Cal. 1986), noting that "[t]he rights and responsibilities of contracting parties are determined by the terms of their contract"; see also, *Pepe v. Whispering Sands Condominium Association*, 351 So.2d 755 (Fla. Dist. Ct. App. 1977), holding that declaration of condominium "assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of real property."
61. *Johnson v. Fairfax Village Condominium IV Unit Owner's Association*, 548 A.2d 87 (D.C. 1988). On appeal, *Johnson v. Fairfax Village Condominium IV Unit Owner's Association* was affirmed, in part, and reversed, in part, and remanded on the issue of damages arising from the counterclaim for wrongful foreclosure.
62. See generally, *Johnson v. Fairfax Village Condominium IV Unit Owner's Association*, 548 A.2d 87 (D.C. 1988). The case was consolidated with the association's action for possession. See, *Bauer v. Harn*, 286 S.E.2d 192, 194 (Va. 1982); *Pepe v. Whispering Sands Condominium Association, Inc.*, 351 So. 2d 755, 757 (Fla. Ct. App. 1977).
63. *Johnson*, 548 A.2d at 91.
64. *Ryan v. Baptiste*, 565 S.W.2d 196, 198 (Mo. Ct. App. 1978).
65. *Johnson*, 548 A.2d at 91.
66. See cases discussed within Contractual Duty section, page 63.
67. N.J.S.A. 2A: 62A-12 *et. seq.* This statute provides: "[T]he association shall not be liable in any civil action brought by or on behalf of a unit owner to respond in damages as a result of bodily injury to the unit owner occurring on the premises of the qualified common interest community. [N]othing in this act shall be deemed to grant immunity to any association causing bodily injury to the unit owner on the premises of the qualified common interest community by its willful, wanton, or grossly negligent act of commission or omission."
68. See, e.g., *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc. et al.*, 983 F. Supp. 640 (D. Md. 1997), holding that condominium bylaws included exculpatory clause that limited liability of condominium association. In that case, plaintiff-unit owner sued condominium association for injuries sustained in slip and fall as result of ice formation in the parking lot. The court granted summary judgment as to the condominium association because the unambiguous language of the exculpatory clause did not violate state law nor was it contrary to public policy. See *Id.* See also, *D'Ambrosio v. The Colonade Council of Unit Owners, et al.*, 717 A.2d 356 (D.C. 1998), granting summary judgment to both condominium association and property management company because bylaws unambiguously stated that the association "shall not be liable...for injury or damage to person or property caused by the element or from any pipe, drain, conduit..."; *Franklin v. Marie Antoinette Condominium Owners Association*, 23 Cal. Rptr. 2d 744 (Cal. App. 1993), holding that exculpatory clause did not violate public policy because (1) non-negligent defendant was free to contractually shift risk of loss to condominium owners and (2) that provision was reasonable and fair to condominium owners as a whole.
69. *Schoondyke*, 411 N.E. 2d at 1172.