Mending the Social Compact: Expectancy Damages for Common Property Defects in Condominiums and Other Planned Communities

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Mending the Social Compact:
Expectancy Damages for Common
Property Defects In
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Planned Communities

By the year 2000, one-half of the population of the United States may be living in common ownership housing.1 If "common ownership housing" is interpreted to include not just condominiums but any housing development with a property owners' association and extensive common properties, that prediction may prove to be conservative. In much of the country builders seem to be constructing little else.

As the number of planned communities has grown, so has the amount of litigation involving their common properties. One of the most significant forms of common property lawsuits is the action against the community developer for alleged construction defects. These cases routinely involve millions of dollars and hundreds, even thousands, of interested parties. Whatever other relief they may

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want, the plaintiffs almost always seek expectancy damages. If they prevail, it is, of course, necessary to fairly measure and allocate those damages.

Despite the importance of the subject, an adequate guide for measuring expectancy damages in common property defects cases has not yet been developed. Scholarly journals have been nearly silent, and while some courts have dealt with the matter surprisingly well, several have made serious mistakes.

This Article suggests several mechanisms by which damages in these cases can be measured and allocated in a straightforward manner. These mechanisms are designed to be fair to defendants and to absent parties and to take into account the variations in the rules of construction liability applied by different states. These mechanisms are developed through successive illustrations and formulae in Part III and are summarized in a step-by-step procedure in Part V.

I

CONTEXT OF THE PROBLEM

A. Some Complicating Factors

The question of how to measure and allocate damages to common properties arises most frequently when, in a suit by unit owners against the developer of a planned community, the plaintiffs have proven developer responsibility for one or more construction defects on the basis of one or more liability theories. The number of reported cases indicates that the question has arisen often enough, but several complicating factors, discussed below, have made its solution difficult.

1. Allocation of Property Ownership and Maintenance

One factor complicating the development of a general measure of expectancy damages is the difference between various communities’ allocation of property ownership and maintenance responsibilities. Ownership distribution differs according to whether the complex is a condominium, a single family home development, or some other type of planned community. Maintenance responsibilities may vary without much regard for allocation of formal legal title to property.

Most of the reported litigation has involved communities which

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2 There is, however, a very brief treatment in Pearlstein, Developer Liability for Defects in Condominiums, 74 I.l.l. B.J. 18 (1985).
are in condominium ownership. Condominium ownership is closely defined by statute in every state. In order to qualify as a condominium, the individual ownership/co-ownership division must meet the applicable statutory requirements. Generally, a "condominium" community must give each individual property owner title to a three-dimensional block of air space. The statute may require that this air space be confined within a building, or it may authorize its extension out-of-doors so as to include patios and balconies. Appurtenant to ownership of each air space, and inseparable from it, is a fixed percentage interest in all parts of the condominium outside the individually owned blocks of air space. These co-owned portions of the complex are designated "common elements" or "general common elements." They include buildings'...
structural members (floors, walls, roofs), facilities within the air space blocks utilized by more than one unit owner (e.g., common pipes), and the grounds, recreational facilities, and other exterior portions of the complex. Although the condominium association may hold title to other parcels of realty, it cannot hold title to the common elements; its functions with respect to the common elements are purely those of a community manager and regulator. Those functions are funded by assessments levied upon the unit owners.

Most condominium documents set aside portions of the general common elements (for example, garages and balconies) for the use of certain owners to the exclusion of others. These portions are usually designated "limited common elements."

As a general rule, the condominium association has maintenance responsibility for commonly owned property while individual homeowners must care for property within their blocks of air space. This is only a general rule, however, and exceptions are frequently encountered.

Because of the importance of co-owned property in condominium communities, most of the reported condominium cases center around alleged defects in such property. Allegations of deficiencies in property titled to the condominium association are more rare.

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8 For a non-technical introduction, see R. NATELSON, supra note 3, at 15-22.
9 This is specifically or impliedly authorized in some condominium statutes. See, e.g., ILL. ANN. STAT., ch. 30, §§ 318.3, 318.4(g) (Smith-Hurd 1986); UNIF. CONDOMINIUM ACT § 3-102(a)(8), 7 U.L.A. 502 (1980). But see Towerhouse Condominium, Inc. v. Millman, 475 So. 2d 674 (Fla. 1985) (holding that statutory authorization for the association to acquire condominium units did not include authorization to hold title to other realty). For an example of a condominium declaration in which association ownership of property is authorized, see 1A (Part 2) P. ROHAN & M. REISKIN, CONDOMINIUM LAW AND PRACTICE, at app. 148 (Supp. 1987).
10 See, e.g., FLA. STAT. ANN. § 718.115(2) (West Supp. 1986).
11 The most frequent exceptions are for the limited common elements, for which maintenance responsibility is occasionally in the owner of the unit to which they are appurtenant. See, e.g., Condominium Declaration, Cottonwood Villas (Adams County, Colo.) § 17(a)(3) (air conditioning units) (on file at the Oregon Law Review). A declaration amendment altering maintenance responsibilities was at issue in Hillsboro Light Towers, Inc. v. Sherrill, 474 So. 2d 1219 (Fla. Dist. Ct. App. 1985). See also UNIF. CONDOMINIUM ACT § 2-108 comment 1, 7 U.L.A. 470 (1980).
12 The author has been unable to find any reported cases. However, the association mentioned in supra note 9 sued the developer on claims for defective construction of both common elements and association-owned recreation areas.
While most of the reported common property defect cases involve condominium communities, other kinds of communities have also been the subject of litigation. In a few cases, the development in question is a complex of single family homes sharing common properties. These subdivisions have been popular for some time, especially in resort areas. The subdivision’s common properties are usually titled to the homeowners’ association rather than to the unit owners. Moreover, the common areas are usually less extensive, and less vital to day-to-day living, than those in other planned communities—a fact which may account for the relative paucity of reported decisions.

A significant minority of common property defects cases arise in planned communities which do not qualify as condominiums, but which are more interdependent than most subdivisions of single family homes. Builders bestow a variety of names upon these developments: “town home” communities, garden homes, patio homes, cluster homes, and the like. All will be referred to herein as “hybrids.”

One popular plan provides for: (a) individual ownership of a town house unit and the lot on which it is situated (including individual ownership of airspace above the lot), (b) association ownership of all areas not encompassed by the lot, and (c) association maintenance of common areas and the exterior portions of all buildings. Other ownership/maintenance splits are possible, and some

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13 One significant case involving such property is Occidental Land, Inc. v. Superior Court, 18 Cal. 3d 355, 556 P.2d 750, 134 Cal. Rptr. 388 (1976).


appear in the reported cases.\textsuperscript{17}

It is important to keep in mind, moreover, that the division of maintenance responsibility in hybrid communities may deviate significantly from the division of formal property ownership.\textsuperscript{18} The dividing lines between individual and common maintenance in each community, like those between individual and common ownership, can be determined only by consulting the community’s operative documents. Even the allocation of responsibility for each parcel’s property tax may differ from the division of title ownership.\textsuperscript{19} Thus any system of calculating and allocating expectancy damages must account for such variations between different planned communities.

2. \textit{Interests Protected}

Another factor which has complicated the measurement and allocation of damages in planned communities has been the significant number of the interests which need, or seem to need, protection. Included in these interests are (a) individual enjoyment of defect-free units, (b) association interest in the units to the extent the association has maintenance responsibility therefor, (c) individual enjoyment of the common properties, (d) association interest in maintenance of the common properties, (e) the level of the monthly, quarterly, or annual homeowner assessments (dues, maintenance fees) paid by unit owners, and (f) the interest of individual unit owners in preventing damage to their units resulting from common property defects.

\textsuperscript{17} An example of another ownership scheme is found in Del Mar Beach Club Owners’ Ass’n v. Imperial Contracting Co., 123 Cal. App. 3d 898, 176 Cal. Rptr. 886 (1981) (association owned all of complex except for individual air space units). \textit{See also} Covenants, Magna Carta Townhomes (Denver County, Colo.) (entire complex divided among unit owners with extensive “common easements”) (on file with Oregon Law Review); \textit{Unif. Planned Community Act}, prefatory note, 7B U.L.A. 1 (1980).

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\textsuperscript{19} For instance, it is common for the association to have maintenance responsibility over the exteriors of privately owned units. \textit{See}, \textit{e.g.}, Declaration of Covenants, Yorktown Homes Association (Adams County, Colo.), art. vi, § 1. (on file at the Oregon Law Review.)

\textsuperscript{17} This scheme is also the form of hybrid community contemplated by the uniform "Planned Unit Development Rider" issued by the Federal National Mortgage Ass’n (FNMA) and the Federal Home Loan Mortgage Corp. (FHLMC). \textit{R. Kratovil \& R. Werner, Real Estate Law} 416 (1979).

3. Theories of Liability

Still another complicating factor in measuring damages is the variety of legal theories under which a developer may be found liable. One common basis of liability is for breach of express contract, a rubric that includes (a) violation of an express warranty, (b) violation of the terms of the legal documents governing the community, and (c) developer breach or unilateral alteration of contracts of which unit purchasers are found to be third party beneficiaries.

An even more frequent basis for a finding of developer liability for common property defects is breach of implied warranty. Most states now recognize implied warranties running from professional developers (or "builder/vendors") to the purchasers of new homes, including residential units in planned communities. These warranties are commonly known as warranties of "habitability," "workmanship," or "merchantability," and they generally protect the purchaser against any latent defects caused by poor workmanship, irrespective of the fault or lack of fault of the developer.

Another popular theory of liability is developer misrepresentation, which includes concealment and nondisclosure. To the extent such misrepresentation is fraudulent, or characterized as "constructive fraud," it may be a basis for an award of punitive damages.

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23 The applicable law is surveyed in Diamond, supra note 20.


25 The cases on both sides of the privity question are collected in Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 244-45, 678 P.2d 427, 429-30 (1984).

When the developer's misrepresentation is innocent, the issues involved become indistinguishable from those surrounding breach of express warranty.

In jurisdictions which have not yet recognized the implied warranty of habitability, negligence remains the chief alternative. Moreover, some states which do recognize an implied warranty have imposed a privity requirement that precludes warranty protection beyond the first purchase from the builder/vendor. A privity requirement is usually absent in negligence cases.

Strict tort liability has been adopted by the courts of three jurisdictions—California, New Jersey, and the District of Columbia—in transactions involving the sale of defective homes. Privity is irrelevant in these cases.

Breach of fiduciary duty is a theory of liability with special application to planned communities. Since an association manages, and perhaps owns, the common properties, a fiduciary relationship between the association and the owners is said to be formed at about the same time the documents governing the community become operative. Moreover, this association is often incorporated. Almost invariably, the association's initial directors are nominees of the developer, and the developer may retain corporate control for years after the first units are sold. Indeed, the operative documents may enable the developer to dominate the association as long as any units remain unsold. Courts have almost routinely imposed standards, loosely characterized as "fiduciary," upon the controlling developer, his nominees, or both, and have even extended such duties to present and future unit owners as well as to the association as an entity.

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27 See Graham v. First Am. Nat'l Bank, 594 S.W.2d 723 (Tenn. 1979) (though punitive damages were possible, they were denied where purchasers were aware of defects).
32 The law of fiduciary duty with respect to homeowners' associations is reviewed in
Most fiduciary duty cases arise as a result of developer mismanagement of the corporate or financial affairs of the association. Breach of fiduciary duty has also been a common allegation where the developer is responsible for construction deficiencies, but the courts have been reluctant to characterize poor construction as a breach of fiduciary duty. Hence, this Article will not consider fiduciary duty remedies, except to the extent that expectancy damages may be relevant.

4. The Parties Plaintiff

Calculation and apportionment of damages in common property defects cases have also been complicated by the fact that the parties plaintiff vary from case to case. In some rare cases the plaintiffs are individual unit owners who do not represent anyone but themselves. More frequently encountered is the suit initiated by the property owners' association, in which the association as an entity is the only plaintiff, or is a kind of class representative on behalf of its present or former members. A few courts have refused to grant condominium associations standing in common property cases because they do not actually hold title to the common elements. Thus, in some states it has become necessary for individual owners to commence class actions against their developer. However, such individually maintained actions tend to be inefficient and expensive, laden with technical traps for the homeowners prosecuting them. Fortunately, limitations on association standing have now been repudiated in the overwhelming majority of jurisdictions and can

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33 E.g., B & J Holding Corp., 353 So. 2d 141; Raven's Cove Townhomes, Inc., 114 Cal. App. 3d 783, 171 Cal. Rptr. 334.


36 Most states now have statutory provisions specifically authorizing associations to sue for common element defects, or have judicially interpreted their statutory law to permit such actions, or have adopted this position by judicial rule or common law. Several of these jurisdictions had at one time required class actions but have reversed
definitively be said to still be the law in very few. 37

Since owners frequently sell their units and are replaced by other owners, members of a plaintiff class or of a plaintiff association may vary over the course of the litigation. This can be a problem when the applicability of a particular theory of recovery may depend upon privity with the developer. Also, there may be unit owners who purchased their property for investment purposes. They will not be entitled to recover on the implied warranty theory and or-thodox damage law would require that their damages be calculated differently in any event. These problems can be solved by employing the damage allocation methods discussed in Part III. 38

themselves, e.g., Florida (Fla. R. Civ. Pro. 1.221) and California (Cal. Civ. Proc. Code § 374 (West Supp. 1986)). Other jurisdictions permitting associations to sue for common element defects are as follows:


38 See infra notes 70-91 and accompanying text.
5. **Whether Damage Can Be Repaired**

Standard damage theory suggests that awards for irreparable injury to residential property should be calculated differently from awards for injury that can be remedied. Thus, when faced with a case in which the cost of repair would be grossly disproportionate to the diminution in market value resulting from the defect, the courts often award the diminution in market value so as to avoid "economic waste." Obviously, a community may at the same time suffer from defects which are "remediable" and defects which are not. Any unified theory of common property expectancy damages must take both kinds of loss into account.\(^3\)

**B. A Simplifying Factor**

Fortunately, resolving the problem of expectancy damages is the key to determining the scope of relief in the overwhelming majority of common defects cases. Resort to other remedies is relatively rare, even, as we shall see, when the theory of liability does not sound in contract.

Rescission, for example, is of little practical importance in most such cases. A lawsuit for common property defects will usually come to judgment years after the closing of title on most of the units in the complex.\(^4\) Usually the defects were discovered some time after most homeowners purchased their units. In many, if not most cases, there has been a period in which the developer has attempted to remedy matters, but, for one reason or another, has not been fully successful in doing so. Thus, by the time of judgment, the association and the individual unit owners have expended considerable time and money finishing the job themselves. For those problems which have been or which can be remedied, they want reimbursement for the cost of repair. For defects that have proven to be irremediable, they usually want compensation to reflect their loss in value or any increase in future expenses due to those defects. In addition, whatever their complaints, the owners are usually well-settled within their units, which may also have increased in

\(^3\) *See infra* notes 86-91 and accompanying text.

value since the time of purchase. The plaintiffs, therefore, seldom elect to have their transactions rescinded.

Neither is the remedy of specific performance of much significance in common property defect cases. There is, of course, a certain judicial reluctance to order specific performance of construction contracts. Moreover, most associations and home-owners do not care to see the company responsible for their problems undertake to do the work again. They want the work done, but they want it performed by firms of their own choosing.

Orders of restitution and awards of punitive damages are also rare in cases of this nature, primarily because the most obvious theoretical basis for either—breach of fiduciary duty—has not yet served as an independent ground of liability for construction defects. Awards of punitive damages are rare (judging by the relative absence of awards in reported common defects cases) and are not, of course, easily reducible to calculable form.

Thus, to the extent that we resolve issues of expectancy damages, we resolve the most important remedies issues for common property construction defects cases.

II

EXPECTANCY DAMAGES: INITIAL CONSIDERATIONS

Before proceeding to the calculation of expectancy damages in Part III, it is appropriate to consider briefly two preliminary issues:

41 D. Dobbs, supra note 40, at 907. Homeowners' associations are rarely in the position alleged by the plaintiff in Brummel v. Clifton Realty Co., 146 Md. 56, 125 A. 905 (1924) (financial inability to repair). Even when they are in such a position, they generally prefer damages to specific performance. The author has uncovered no reported repair cases in which specific performance was requested, although injunctions and specific relief have been utilized to ensure developer compliance with other obligations. See, e.g., St. Francis Courts Condominium Ass'n v. Investors Real Estate, 104 Ill. App. 3d 663, 432 N.E.2d 1274 (1982) (ordering removal of encroachment onto common elements); Wiley, 282 Or. 9, 578 P.2d 384 (reinstating original terms of an improperly modified lease-option).

42 In practice, a developer will frequently present a settlement offer by which it offers to make repairs itself rather than pay damages. These offers are usually resisted by homeowners' associations, and, if not rejected out-of-hand, are usually accepted with great reluctance.

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(1) the extent to which expectancy damages will be a relevant remedy for tortious loss, and (2) whether the "difference in value" portion of the expectancy award should, in most cases, be based upon the cost to repair the damage or upon the diminution in the market price resulting from the damage.

A. Liability Theories to Which Expectancy Damages Are Relevant

"Expectancy damages"—the difference in value between what was promised and what was given, plus certain consequential losses—is of course the name applied to the most commonly used formula for calculating financial awards for breach of contract. As one would expect, this is the usual measure of recovery for common area defects when the plaintiffs prove liability on a warranty or other contract theory.44

The expectancy measure has also been employed in construction cases when the theory of recovery is misrepresentation, negligence, or strict tort liability. Thus, if property is tortiously represented to be free of defects, and it proves to be otherwise, the plaintiffs have been given the option of rescinding the contract or affirming it. As suggested in the previous Part, they will nearly always affirm it. They will then be entitled to the benefit of their bargain plus reimbursement for certain other loss—that is to say, they will be entitled to expectancy damages.45

The same measure is applied when the cause of the injury is negligence. Any developer performing work pursuant to contract has an obligation to parties who may foreseeably be affected "to perform the work subject to the contract with reasonable care and skill."46


A developer who fails to meet that standard of care is liable for the damage, which is defined as the difference between the value of an improvement made with reasonable care and skill and the value of what was in fact given (plus reimbursement for certain other loss). In the overwhelming number of cases this measure will be identical to contract expectancy damages.

The same measure of damages has also been held applied in strict tort liability cases. Indeed,

[the legal effort in all such cases is to compensate the landowner for the damage done. From this point of view it makes no difference whether the substantive theory is trespass, negligence, contract, or strict liability in tort—or even waste or nuisance. What is important is to identify the landowner's interests and to compensate for the damage done to them.]

**B. Diminution in Market Value vs. Cost to Repair**

In real estate cases, the “difference in value” component of the expectancy damage formula has traditionally been calculated by either: (1) subtracting the market value of the property as delivered from the market value as promised (diminution in market value), or (2) awarding the cost of putting the property into its promised condition (cost to repair).

Courts applying the diminution in market value approach to expectancy damages have traditionally done so by comparing the appraised value of the defective property with an estimate of value without defects. Thus, if a builder promised a structure worth $100,000 and delivered one appraised at $90,000, damages in the amount of $10,000 would be awarded. The justification for this approach is the belief that the property owner can then sell his defective real estate for $90,000 and use the proceeds, together with the damage award, to acquire equivalent property.
This substitutionary theory makes sense in many other economic contexts, but is often inappropriate in cases involving defective real estate. This is particularly, although not exclusively, true in cases in which the defective property is owner-occupied real estate. In such situations, cost to repair usually is seen as the preferable measure.\textsuperscript{51} The usual reasons given have been the "uniqueness" of real estate (its special value to its owner, beyond its mere market value)\textsuperscript{52} and the perceived unfairness to the owner of permitting a builder to ignore agreed upon specifications so long as he provides a structure of equal market value.\textsuperscript{53}

There are other reasons for rejecting the diminution in market value approach to measuring expectancy damages in cases involving owner-occupied residences. These reasons arise out of aspects of the residential sales market that cause it to differ from markets in other products.

First, the nominal sales price of a property is influenced significantly by the financing package that happens to be employed. Which package is used may be largely a matter of accident. Traditional techniques of residential appraisal do not take into account the influence of financing structure upon price.\textsuperscript{54}

Second, there are various aspects of the real estate market which tend to exaggerate the actual impact of construction defects upon saleability. Most residential property is sold through real estate brokers. Due to increasing liability exposure, brokers often hesitate to list defective property. Moreover, the residential market tends to be more irrational than some others. Prospective home buyers often look more for "magic" than for value and may shun property with admitted defects—even if the asking price is low enough to compensate for the existence of the defects.\textsuperscript{55}

\textsuperscript{51} D. Dobbs, supra note 40, at 314-15; A. Harrell, supra note 45, at 155. See infra, note 63.

\textsuperscript{52} Farnsworth, supra note 49, at 1154-56; A. Harrell, supra note 45, at 154-55.

\textsuperscript{53} D. Dobbs, supra note 40, at 898.

\textsuperscript{54} The availability of Federal Housing Administration (FHA) or Veteran's Administration (VA) financing may result in prices higher than would otherwise be negotiated, since FHA and VA interest rates and downpayment requirements are generally lower than for conventional loans. The presence of some rather unconventional "conventional" loans—such as graduated payment mortgages (GPM's) and adjustable rate mortgages (ARM's)—also impact on price, as does the practice of owner financing.

\textsuperscript{55} The honest seller of a defective home, who freely admits its problems, may well find himself at a disadvantage when competing for a sale with the dishonest seller. This may be true even when the latter's property displays rather obvious warning signs, such as cracking, the presence of new paint and plaster, and basement water lines. Self-
Another distorting factor is real property's immovability. In the event of local oversupply, it cannot be shipped to areas where the need for homes is such that buyers are willing to purchase defective units.

The cumulative effect of these market factors is that the owner of defective property may be unable to sell it for anything approximating appraisal value. Indeed, a willingness to drop one's price somewhat may be rewarded only by "low ball" offers from bargain-hunters seeking to profit from the seller's perceived desperation. In such situations the actual proceeds from a sale are not likely to be sufficient to enable the owner to acquire substitute property if he has been awarded damages based only upon reduction in appraised value.\(^5\)

Despite the foregoing, there are situations in which, at least prima facie, \textit{diminution in market value} seems a more appropriate measure than \textit{cost to repair}. For example, the damage may be irreparable or the \textit{cost to repair} may exceed the \textit{diminution in market value} to a disproportionate degree. Alternately, some or all of the plaintiffs may be prior owners who, although suffering loss, have no need for additional repairs; or certain units may be owned by investors rather than by the occupants and therefore have no special value above their economic value. Each of these special situations will be considered in the next section, which develops the formulae necessary for calculating damages in common property defects cases.

\textbf{III}

\textbf{CALCULATION OF EXPECTANCY DAMAGES}

\textbf{A. Introduction}

This Part develops the formulae necessary for calculating and allocating damages in common property defects cases. The Part begins with certain equations applicable to expectancy damages generally, then alters them so as to (a) calculate damage awards for deception plays a large role in facilitating residential sales. If the seller openly admits a defect, self-deception on the buyer's part is less likely.

\(^5\) Some cases and problems related to the distress sale are discussed in \textit{A. Harrell}, \textit{supra} note 45, at 107-10. "Market value" as appraisers employ the term, is usually defined so as to exclude the distress sale: "The highest price in terms of money that a property would bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably and assuming the price is not affected by undue stimulus." \textit{American Institute of Real Estate Appraisers, The Appraisal of Real Estate} 23 (7th ed. 1978) (emphasis supplied).
planned communities, and (b) equitably divide those awards among the persons entitled to share in them. Eight formulae are developed in all. Among these are four Community Damage Formulae (employed to compute the compensable loss to an entire housing complex), two Unit Damage Formulae (employed to apportion an award among units), and two Individual Damage Formulae (employed to apportion an award among individual owners). Readers interested primarily in applying these equations rather than tracing their development processes are referred to Part V, which provides a summary procedure for their application to actual cases.57

B. The Farnsworth Formulae

In a celebrated article,58 Professor Farnsworth has digested much of the law of contract damages to a series of formulae, several of which will serve as starting points in our own calculations of common element damages. He thus sets forth his initial expectancy equation:

\[
\text{Loss on the bargain} = \text{loss in value} - \text{cost avoided}
\]

*Loss in value* is defined as "the difference between the value to the injured party of what the other party was to have done under the contract and the value of what he in fact did."59 *Cost avoided* is the portion of the injured party's obligation which he has avoided as a

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57 It will assist the causes of brevity and clarity if, before proceeding further, we employ some standard abbreviations to denote the more common expressions appearing in our equations. The following list will be employed:

- \( D = \) damages to the entire community
- \( D_a = \) damages attributable to Unit \( A \)
- \( D_{ai} = \) damages attributable to owner \( A1 \)
- \( LIV = \) loss in value
- \( CTR = \) cost to repair (or cost to remedy or restore)
- \( CA = \) cost avoided
- \( DCA = \) direct cost avoided (for our purposes, this is the same as cost avoided)
- \( OL = \) other loss
- \( UL = \) unique loss
- \( CCA = \) collateral cost avoided
- \( CIL = \) collateral income lost
- \( Dim/SP = \) diminution in (re-)sale price (including both defects which impact all units equally and those which impact the particular unit disproportionately)
- \( ComDim/SP = \) diminution in (re-)sale price due to defects common to the community, i.e., impacting all units equally
- \( PIA = \) past increased assessments
- \( FIA = \) future (projected) increased assessments

58 Farnsworth, supra note 49.
59 Id. at 1161.
result of being excused from further performance when the other party breached.

Professor Farnsworth points out that contract damages include, not just loss on the bargain, but certain other costs as well, "such as physical harm to the injured party's person or property and expenses incurred by him in an attempt to salvage the transaction after breach. The general measure of recovery, then," he continues, "is the sum of these two ingredients of the injured party's loss.

\[ \text{Damages} = \text{loss on the bargain} + \text{other loss}.\]

Farnsworth then combines the two equations to yield "Formula A":

\[ \text{Damages} = \text{loss in value} - \text{cost avoided} + \text{other loss} \]

In symbolic form, this equation can be rendered:

\[ D = LIV - CA + OL \]

C. The First Community Damage Formula

Loss in value may, as noted in the previous section, be defined as diminution in market value or as cost to repair. Farnsworth noted the trend toward awarding cost to repair in noncommercial property cases, and since his article appeared in 1970, the trend has become more pronounced. Virtually every reported common element case to consider the issue has held cost to repair as the appropriate measure of loss in value, at least where the damage could be repaired.

Moreover, since common property defect cases of the kind discussed herein are initiated after the sale has been closed and the price of the units has been paid, cost avoided for the community as a whole as a result of the builder's breach will almost invariably be "zero." Taking that into account, and substituting cost to repair

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60 Id. at 1161-62.
61 Id. at 1162.
62 Id. at 1168-69.
64 However, cost avoided may be significant for individual members of the commu-
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for *loss in value* in Farnsworth’s Formula A, we arrive at the equation:

\[ \text{Damages} = \text{cost to repair} + \text{other loss} \]

In symbolic form:

\[ D = CTR + OL \]

This equation defines the damage to the entire community, including, as we shall see, present and prior unit owners. This is the First Community Damage Formula.

While the First Community Damage Formula is well supported by case law,\(^{65}\) it remains inadequate in several ways: (1) it does not provide a mechanism for compensating for defects which cannot be repaired; (2) it does not distinguish between *other loss* suffered by the community as a whole and *other loss* suffered by individuals; (3) it does not distinguish between that portion of the award attributable to the initial purchaser who suffered a lower sales price because of common property defects and the portion attributable to the subsequent purchaser who took advantage of that lower sales price; (4) it does not distinguish between the portions attributable to (a) the owner who paid higher assessments during his period of ownership so that repairs could be effectuated, and (b) his successor in interest who, as a current association member, will benefit from a judgment ordering that the association be reimbursed; and finally, (5) it does not distinguish between portions of the award attributable to successive owners whose respective claims (warranty, negligence, misrepresentation) might not all be valid under applicable state law.

**D. The Second Community Damage Formula**

In order to remedy the problems inherent in the First Community Damage Formula, it will be necessary to shift attention from the community as a whole to the individual units and then to the

individual unit owners. In order to facilitate this process, let us posit the following case example:

Belaire Condominium is a community consisting of ten residential units, two in each of five buildings. The units are lettered “A” through “J”. Each unit consists of individually owned airspace, contained within apartments, and a ten percent undivided interest in the common elements. Included in the common elements are the structural members of each building (including foundations, load-bearing walls, and roofs), the space above the property, landscaped grounds, soil beneath the complex, and certain limited common elements such as terraces and garages.

The community is governed by the Belaire Condominium Association (hereinafter the Association), which also holds legal title to a parcel of land donated to it by the developer. This land is improved by a swimming pool, a tennis court, and a small building for clubhouse use. Each unit pays assessments equal to ten percent of the total association budget.

Construction of the community began in January 1980 and ended on December 31 of the same year. The declaration was filed and the Association formed on July 1, 1980. Sales commenced in September 1980, and continued until January 1983. The developer relinquished control of the Association on December 31, 1981. Judgment against the developer in a lawsuit brought by the Association on behalf of all present and prior unit owners was filed on December 31, 1985.

Illustrations to demonstrate the problems inherent in common property damage calculation and to aid in the development of additional formulae to deal with those problems will be drawn from the foregoing model. These illustrations are not intended to be definitive in themselves; they are merely sign posts along the way.

Illustration 1.

The drainage system of the complex was constructed defectively. It will cost $10,000 to correct, none of which has yet been spent. The initial owner of Unit A (hereinafter referred to as Al) purchased his unit in January 1981 directly from the developer. He currently lives there. Al suffered personal injury when he slipped on ice located on the sidewalk. The ice was attributable to water which streamed down the sidewalk as a result of defective drainage and which then froze overnight.

In calculating the damages attributable to the owner of Unit A, we can start with Farnsworth’s Formula A:\(^{66}\)

\[ D_a = LIV_a - CA_a + OL_a \]

\(^{66}\) See supra text accompanying notes 58-61.
Because Al was an initial purchaser and probably had no notice of the drainage defects at the time of his purchase, the deficiencies presumably did not affect his purchase price. Accordingly, there is no cost avoided. Because the damage is remediable, the loss in value portion of the equation is equal to Unit A's proportion of the total cost to repair. This proportion will not be based on remedial work undertaken by individual unit owners. In most communities the Association will be required to make repairs and will be the only entity authorized to do so.\textsuperscript{67} The cost of any work done will be paid for through assessments levied upon each unit according to the proportions specified in the condominium declaration—generally according to each unit's appurtenant share in the common elements.

Thus, the share of the total damages attributable to Unit A will be calculated as follows:

\[
D_a = 0.10 \times CTR + OL_a
\]

\[
D_a = 0.10 \times 10,000 + \text{damages for personal injury}
\]

\[
D_a = 1000 + \text{damages for personal injury}
\]

Al's other loss (his personal injury damage) will have to be pleaded and proven separately. Indeed, while it is theoretically possible for there to be a common claim for other loss (as when the association suffers personal property damage, or its clubhouse is so defective it must rent an alternative facility), in real life it is almost always the sum of individual claims.\textsuperscript{68} However, this fact will not

\textsuperscript{67} Nearly all condominium declarations have clauses authorizing the association to make repairs and limiting the right of unit owners to do so, at least without association consent. See, e.g., DECLARATION OF CLIFF DWELLINGS CONDOMINIUMS, art. VI, § 1 (Custer County, Colo.); S. Lee, supra note 1, at 236-38. Typical declaration wording is also to be found in Schmeck, 441 So. 2d at 1096, n.6. The association's duty to repair has important implications for measuring the damages of investor owners. See infra notes 84-85 and accompanying text.

\textsuperscript{68} Raven's Cove Townhomes, Inc., 114 Cal. App. 3d at 802, 171 Cal. Rptr. at 345 (lost use of facilities); Lash, 128 Cal. App. 3d at 920, 180 Cal. Rptr. at 724 (personal property damage and water damage in some units); Schmeck, 441 So. 2d 1092 (water leakage into several units and remedial measures taken by some unit owners); Welch v. Point of Americas Condominium Apartments, Inc., 373 So. 2d 60 (Fla. Dist. Ct. App. 1979) (damages for fraud may differ among different owners); Goldenfarb v. Land Design Inc., 409 A.2d 662 (Me. 1979) (promised parking for certain units not provided); Siller v. Hartz Mountain Assoc., 93 N.J. 370, 380-81, 461 A.2d 568, 573 (1983) (personal property damage hypothesized); Stony Ridge Hill Condominium Owners Ass'n, 64 Ohio App. 2d 40, 410 N.E.2d 782 (loss of use of building); Frantz v. CBI Fairmac Corp., 229 Va. 444, 447-48, 331 S.E.2d 390, 394-95 (1985) (location of some units would cause them to be especially affected by developer's breach); Rouse v. Glascam Builders, Inc., 101 Wash. 2d 127, 677 P.2d 125 (1984) (defects in limited common element patio appurtenant to one unit).
usually be grounds for denial of class action or representative action certification.\footnote{Objections to class action certification because of possible differences in damages have almost always been overruled by the courts in common property cases. This is because, whatever the problems of proof on damages, it is more convenient and economical to try the issues of liability in one action. \cite{1} Tassan v. United Dev. Co., 88 Ill. App. 3d 581, 591-93, 410 N.E.2d 902, 913 (1980); Deal v. 999 Lakeshore Ass'n, 94 Nev. 301, 305-07, 579 P.2d 775, 778-79 (1978). Similar considerations militate in favor of permitting the association to represent all or part of the class. Del Mar Beach Club Owners Ass'n, Inc. v. Imperial Contracting Co., Inc., 123 Cal. App. 3d 898, 907, 176 Cal. Rptr. 886, 890 (1981); Siller, 93 N.J. 370, 377-79, 461 A.2d 568, 571-72.}

Breaking other loss into common and individual damages results in the following equation, the Second Community Damage Formula:

\[
D = CTR + OL(assn) + OL_{a1} + \ldots + OL_{jn}
\]

(where \(a1\) is the first owner of Unit A and \(jn\) is the last owner of Unit J). The Second Community Damage Formula is employed in figuring a community's total award where all defects are reparable.

\section*{E. The Problem of Successive Owners: Attributing Damages to Individuals}

In Illustration 1, Unit A had been sold to owner \(a1\), but had not changed hands between the time it was initially sold and the time of judgment. If there have been successive owners of a unit, however, should the common damages be allocated between them? If so, how? Some courts have been frankly puzzled by this question. For example, in \textit{Tassan v. United Development Company},\footnote{At the time, Illinois law was unsettled on the point. The warranty was extended to remote purchasers in \textit{Redarowicz v. Ohlendorf}, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).} the plaintiffs were all original owners of units in a condominium called "Village on the Lake Condominium No. 5." They initiated a class action against the developer on behalf of themselves and "all past and present owners of units in Condominium No. 5." The theories of liability included claims for breach of express warranty and implied warranty of habitability. The defendants attacked certification of the class, arguing that the warranty of habitability did not extend to remote purchasers,\footnote{88 Ill. App. 3d 581, 410 N.E. 2d 902 (1980).} and that the developer's express warranty was not assignable to those remote purchasers. On an interlocutory appeal, the Illinois Appellate Court upheld class certification, reserved the privity issue for the trial judge, and then added:
Each original purchaser owns an undivided interest in the common elements. As such, it would appear that each original purchaser would be entitled to have all of the common elements repaired completely if there is shown a breach of an implied warranty of habitability or a breach of the express warranty to repair defects in the common elements. We have difficulty discerning how we could separate the interests of the original purchasers in the common elements from the interests of second purchasers in the common elements. But we will not attempt here to resolve this difficulty until the trial court has ruled on whether the second purchasers have any rights.\(^7\)

Some courts have been faced with the issue more squarely, but most of them have reached unsatisfactory resolutions. In a number of cases, plaintiffs representing current owners only (and sometimes not even all of those) have been awarded total repair costs without regard to whether the individuals profiting from the award have suffered any loss, without regard to whether they actually have a claim under state law, and without serious regard for the potential of future claims by other aggrieved parties.\(^4\) The next series of illustrations will serve as the vehicle for developing formulae which will better enable the courts to take such factors into account.

Illustration 2.

The facts being as otherwise stated in Illustration 1, assume that Unit B was purchased in January 1981 by \(B1\), who sold his unit to \(B2\) in January 1984. At trial, \(B1\) proves that the unit sold to \(B2\) at that time for $49,000 (representing fair market value), which is $600 less than it would have sold for had the drainage not been defective. Assume the developer is liable to \(B2\) as well as \(B1\), because the jurisdiction does not impose a privity limitation upon the implied warranty of habitability. Neither \(B1\) nor \(B2\) has been inconvenienced by the drainage, and neither has other loss. Calculate the loss attributable to Unit B and apportion it between \(B1\) and \(B2\).

It is clear that the total loss attributable to Unit B must be the sum of the damages attributable to \(B1\) and \(B2\):

\[
D_b = D_{b1} + D_{b2}
\]

The damages suffered by each of these individuals must, in turn, be calculable with Farnsworth's Formula A. If we substitute Formula A into the foregoing equation, we arrive at:

\[
D_b = [LIV_{b1} - CA_{b1} + OL_{b1}] + [LIV_{b2} - CA_{b2} + OL_{b2}]
\]

\(^{73}\) Tassan, 410 N.E.2d at 913.

\(^{74}\) On cases that have, and have not, allocated damages, see infra notes 92-113 and accompanying text.
Since \( B1 \) has already sold his unit, his \textit{loss in value} is his loss of sales price\textsuperscript{75}—\$600. This amount happens to coincide with \( B2 \)'s \textit{cost avoided}, the amount he saved as a result of the defects. We also know that \( B2 \)'s \textit{loss in value} will be the proportion of the (as yet unpaid) \$10,000 repair bill assessable to his unit. Thus,

\[
D_b = [600 - 0 + 0] + [1000 - 600 + 0]
\]

So \( B1 \) will recover \$600 and \( B2 \) will recover \$400.

The total \textit{loss in value} figure, \$1000, is exactly the same as was calculated for Unit A in Illustration 1 — which is proper, since both units have been in existence for the same period of time and the same percentage of the common elements is appurtenant to each. The developer's liability is the same for each unit. But allocating part of the loss attributable to Unit B to owner \( B1 \) compensates him for his loss of sales price; it obviates any need for another lawsuit, and it prevents overcompensation of \( B2 \).

Since \( B1 \) no longer has any interest in the community, it would be unfair to use his share of the award for repairs. It should be remitted to him to compensate him for his loss of market price. \( B2 \)'s share should be paid to the Association to be utilized for repairs. If such a result will leave the Association without enough money to correct the deficiencies, it may be that the Association will have to obtain the balance by levying assessments upon all present owners. Each present owner's assessment will be reduced by the amount of the award attributable to that owner.\textsuperscript{76}

Thus, each unit will be assessed \$1000. \( B2 \) will be credited with his share of the award (\$400) leaving him a \$600 balance to pay. \( B2 \) has already saved \$600 at the expense of \( B1 \) by reason of the defects: the amount assessed from him will give him a whole unit at the same expenditure he would have paid for a whole unit in the first place. On the other hand, the entire amount of the award attributable to \( A1 \) (a present and original owner) may be utilized to offset \( A1 \)'s share of the future assessments for repair. Since both his assessment and his credit will be \$1000, he will not have a deficiency to pay.

The foregoing suggests that in order to do substantial justice in a common property defects lawsuit, prior unit owners should be made parties—or at least class members. If they claim that the de-


\textsuperscript{76} This procedure of assessment/credit is made necessary by the fact that under the terms of their operative documents, most associations do not have the power to alter the proportion of assessments imposed on each unit.
fecteds reduced the price they received for their units upon sale, they should have the burden of proving that claim. To the extent they do not meet the burden of proof (and if the defect was latent or not commonly known at the time of sale, they will not be able to) damages will be payable to the association and/or the current owners rather than to them. Thus, in many such cases, owners like $B2$ will not have to yield a portion of their award, and the association will retain all or most of it for repair.

In the illustrations so far, the Association did not spend repair funds before judgment. This will not, however, be the usual case. Consider the following:

Illustration 3.
The facts being as otherwise stated in Illustration 2, Belaire Condominiums also has defective roofs. Although neither $B1$ nor $B2$ has suffered other loss from those roof defects, $1000 was spent on roof repairs in 1982 (during $B1$'s tenure of ownership) and $3000 was spent in 1984 (during $B2$'s tenure). Complete repair will cost an additional $3000. At trial, $B1$ proves that Unit B sold to $B2$ in 1984 for $200 less than it would have with proper roofs.

As in the preceding illustration, the total loss attributable to the unit is the total of the losses of $B1$ and $B2$:

$$D_b = [LIV_{b1} - CA_{b1} + OL_{b1}] + [LIV_{b2} - CA_{b2} + OL_{b2}]$$

In this instance, the loss in value for $B1$ is a combination of the amount of repair costs attributable to his unit during his period of ownership ($100 of $1000) and the loss in the resale price of his unit. $B2$'s loss in value is his proportionate share of repairs made during his tenure ($300 of $3000) and of future repairs ($300 of $3000). $B2$'s diminished purchase price provides him with a cost avoided of $200.

$$D_a = [(100 + 200) - 0 - 0] + [(300 + 300) - 200 + 0]$$

Thus, if $B1$ can carry his burden of proof regarding diminution in sales price, he will recover $300, which should be paid to him directly. $B2$, having already had the advantage of a lower purchase price, will recover $400. This will be more than $B2$'s proportionate share of the future repair assessment ($300). Therefore, that amount can be credited to $B2$'s bill and the $100 balance remitted to him.

We can confirm our calculations as follows: We know that the total cost to repair will be $7000, and that the amount attributable to Unit B will be $3000.
\[ D_b = .10 \times CTR + OL_b, \text{ or} \]
\[ D_b = .10 \times 7000 + 0 = 700 \]

This corresponds to the sum of the amounts recovered by \( B1 \) and \( B2 \). If damages had not been apportioned, this amount would have been collected by \( B2 \) only, or by the Association for the benefit of \( B2 \) or other current owners—even though \( B1 \) suffered much of the damage attributable to this unit.

This apportionment scheme is of particular importance when, under applicable state law, the developer has a legal liability to some, but not all, of the successive owners of a unit. For example, a statute of limitations may bar recovery by an earlier owner, but not by a later one. Alternately, there may be no finding of negligence, and the particular jurisdiction in which the matter arises may limit the implied warranty of habitability to the first purchaser from a builder/vendor. Similarly, in a jurisdiction without a privity requirement, the first purchaser may be a party not entitled to warranty protection (such as an investor or a person who has signed a valid warranty disclaimer), although a subsequent owner qualifies for protection. An analogous situation may arise in states such as Colorado, which limit the implied warranty of habitability to initial purchasers, and permit subsequent purchasers to recover for negligence, but only if the defect was latent at the time the property changes hands.\(^7\) Moreover, there are jurisdictions that, while recognizing the implied warranty of habitability, altogether deny recovery in negligence for mere "economic losses," i.e., for loss of bargain.\(^8\) Any such jurisdictions imposing a privity requirement in warranty cases would effectively limit developer liability to the first owner.

Illustration 4a.

The facts being as otherwise stated in Illustration 3, assume the plaintiffs allege breach of implied warranty and negligence. Assume that the property is located in a jurisdiction that requires privity for recovery on implied warranty theory. Assume further that the builder is absolved from any negligence.

\(^7\) Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983). "Latent or hidden" defects are defined as "those manifesting themselves after purchase and which are not discoverable through reasonable inspection." \textit{Id.} at 1045.

A latent defect would not affect the first purchaser's sales price, but once he had sold his unit he would presumably be barred from recovery. When the defect is discovered, the current owner would have a negligence claim. On the other hand, a defect discovered during the tenure of the first owner might well affect the price he could get for the unit and would provide him with a remedy, although later owners had none.

\(^8\) See \textit{id.} at 1044.
In this case, local law requires that B2, the remote purchaser, be denied any recovery. Since Illustration 3 suggests that B1 is entitled to recover $300, the damages attributable to Unit B should be limited to that amount.

Illustration 4b.

The facts being as otherwise stated in Illustration 3, assume there is no privity requirement in this jurisdiction, but B1 signed a valid disclaimer of warranty. B2 signed no such disclaimer.

In this instance, total recovery attributable to the unit would be $400 — the share recoverable by B2.

F. Apportioning Damages Through Assessment Analysis

The remainder of this Part develops the various formulae and techniques for apportioning, through assessment analysis, a damage award to the units in a planned community and the owners of those units. A discussion of the judicial history and reasons for apportionment appears in Part IV.

1. Remediable Defects: the First Unit Damage Formula

Illustration 5a.

Owner C1 purchased his unit in March 1981, and continues to reside there. The tennis court, which is a “common area” titled to the Association, is defective. C1 has no particular interest in tennis and so has suffered no other loss. The Association spent $1000 on temporary repair of the tennis court in April 1981, and another $1000 in March 1985; but to permanently rectify the situation would require the expenditure of an additional $30,000. What are the damages attributable to Unit C?

Although several courts have decided questions of association standing to sue based on whether the alleged defects are titled to the association (“common areas”) or to all owners in common (“common elements”), no such distinction has been drawn for purposes of damages—nor should there be. The effects of repairable construction deficiencies upon human beings are exactly the same in both situations. In each case, there is an increased level of association assessments imposed to pay for repairs. Indeed, it should be one goal of damages theory to compensate past and present owners for the increased level of assessments a defect has caused or, in absence of recovery, would cause.

Virtually all planned community organizational documents require the association to make repairs.\(^{80}\) While the board of directors of the association may exercise discretion regarding how or when to make those repairs, the fundamental duty remains intact, and despite his lack of interest in tennis, \(C1\) will be assessed so that the tennis courts can be corrected. In part, he already has been so assessed.

It is clear, therefore, that the cost to repair attributable to a unit is a component of the increase in assessments—both past and future—which the owners of the unit have been or (in absence of a damage award) will be forced to pay. But it may not be the only component. As mentioned earlier,\(^{81}\) there can be other loss attributable to the association rather than to any unit owner. Since the association is incorporeal, its other loss is always financial. If otherwise uncompensated for, this other loss must be paid for by an increase in assessments. Association other loss and any other items of common other loss, therefore, constitute additional elements in each unit’s increased assessments.

Certain damage items are not assessable, however. These are non-common damages, injuries unique to particular owners or particular units. They include each owner’s other loss. They also include certain loss in value items such as reduced rent for investor-held units and irremediable loss impacting disproportionately upon certain units.\(^{82}\) For purposes of this Article, all injury of this nature—that is, all non-common, non-assessable injury—will be called unique loss.

Adding unique loss for each past and present owner to the community’s aggregate past and future assessment increases produces the Third Community Damage Formula.

\[
D = PIA + FIA + UL_{al} + \ldots UL_{jn}
\]

This equation is of mere transitional interest, but when it is reduced to the unit level it gives us the much more important First Unit Damage Formula. For Unit \(C\), this is as follows:

\[
D_c = PIA_c + FIA_c + UL_c
\]

This is the formula employed to allocate to a particular unit the portion of the award attributable to reparable defects. Applying it

\(^{80}\) See supra note 67 and accompanying text.

\(^{81}\) See supra text accompanying note 68.

\(^{82}\) See infra notes 83-91 and accompanying text.
to Illustration 5a enables us to determine the damages attributable to that unit:

\[ D_c = \$200 + 3000 + 0 \]

\[ D_c = \$3200 \]

2. Remediable Defects: the First Individual Damage Formula

Illustration 5b.

The facts being as otherwise stated in Illustrations 2 and 5a, \( B1 \) is an avid tennis player. The first \$1000 assessed and paid by the Association for tennis court repair was assessed and paid during his tenure of Unit B. When he sold his Unit to \( B2 \), who has no particular interest in tennis, the diminution in market value (reflected in sales price) on the Unit due to the lack of a suitable court was \$300. The second \$1000 for tennis court repair was assessed and disbursed during the tenure of \( B2 \), and, as previously indicated, \$30,000 remains to be spent. What are the damages attributable to each successive owner of Unit B?

As indicated previously, the damage to an owner is his loss in value, less his cost avoided, plus his other loss. As also noted above, where the defects can be repaired, each non-investor owner's loss in value is an amalgamation of the increased assessments he has had to pay (or will have to pay in absence of an award) and any reduction of price on resale due to defects. His cost avoided is any amount he saved in purchasing a defective unit due to defects common to the community. His other loss includes personal injury and property damage.

After separating re-sale losses common to the community from those unique to his particular unit and including the latter in the category of unique loss, in symbolic form, the damage to owner \( B1 \) may be stated:

\[ D_{b1} = PIA_{b1} + FIA_{b1} + ComDim/SP_{b1} - CA_{b1} + UL_{b1} \]

This is the First Individual Damage Formula. It is utilized where the defects have been or can be fully repaired. The damages attributable to \( B1 \) may be calculated:

\[ D_{b1} = \$100 + 0 + \$300 + 0 + \text{loss of use}, \text{ or} \]

\[ D_{b1} = \$400 + \text{loss of use}. \]

Damage to \( B2 \) may be calculated:

\[ D_{b2} = \$100 + 3000 + 0 - 300 + 0 \]

\[ D_{b2} = \$2800 \]
Occasionally a unit will have been owned by more than three persons. This requires allocation of damages among more than three owners. Insofar as this procedure involves ascertaining who was a unit owner on the date a repair was paid for, there is little problem. It is conceivable, although not likely to be proven at trial, that the second of three owners may have purchased his unit for a lower price than he would have gotten in absence of the defects and then sold it for a still greater reduction. In that event, where the First Individual Damage Formula is utilized, there are figures for both cost avoided (lower purchase price) and the lower resale price.

3. Remediable Defects/Investor-owners

Illustration 6.

The facts being as otherwise stated in Illustration 3, Units E and F are not owner-occupied, but are held for investment. Unit E was purchased by $E1$ from the developer in 1981 and was rented out immediately. The same year, Unit F was bought by $F1$, who resided there until July 1, 1982, then rented it out until July 1, 1983, when he sold it to $F2$, another investor. $F2$ continued to lease out the unit. Assuming a decrease in rental value of $10.00 per month due to roofing problems, what are the damages attributable to each of these owners?

Let us consider the individual damage formulae for owner $F2$ in order to determine if the damages attributable to an investor differ in any way from those attributable to a community resident. Of course, as an investor, owner $F2$ will not have an implied warranty claim, since he did not buy the property in question as a home for himself. Assume, however, that claims in negligence have been established as to all parties. In an investment context, cost to repair does not ordinarily serve as the measure of damages. Here, however, the Association must make repairs, and the investors are required to pay the assessments imposed for financing those repairs. This leads us to surmise that there will be little, if any, difference in their individual damage formulae.

Professor Farnsworth's equation for commercial loss is derived from substituting the quantity [collateral income lost - collateral cost avoided] for loss in value in his Formula A. He thereby arrives at Formula A':

\[ D = CIL - CCA - DCA + OL \]

DCA (direct cost avoided) corresponds to "cost avoided" (CA) in his

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83 Farnsworth, supra note 49, at 1166.
Formula A; in the context of this Article, it will be used to take into account any savings in acquisition costs due to the presence of common defects. Collateral income lost may occur in any of three ways: (a) the presence of the defect may drive down rental value (resulting in rental value lost), (b) higher assessments may cut into cash flow, and/or (c) property defects may reduce the price available on resale. Substituting those items for owner F2 into Formula A\(^1\), we arrive at:

\[
D_{F2} = [RVL_{F2} + PIA_{F2} + FIA_{F2} + Dim/SP_{F2}] - CCA_{F2} - DCA_{F2} + OL_{F2}
\]

As observed earlier, rental value lost is a component of unique loss.\(^84\) That part of the diminution in the market price attributable to defects impacting disproportionately upon Unit F is also part of unique loss. If collateral cost avoided is assigned its appropriate quantity of "zero," direct cost avoided is changed to its equivalent cost avoided, disproportionate effects on market value are separated out and included in unique loss, and this statement is thereupon regrouped, we arrive at:

\[
D_{F2} = PIA_{F2} + FIA_{F2} + ComDim/SP_{F2} - CA_{F2} + UL_{F2}
\]

Thus, F2's individual damage formula is identical to the First Individual Damage Formula for any other owner. The same results can be obtained for E, F1, or any other investor.\(^85\) It therefore makes no difference that F1 purchased his unit for a home and later converted it to investment purposes, or that F2 and E1 used their units as investments only. The method of calculation is precisely the same. Moreover, since the First Unit Damage Formula is merely the sum of each owner's Individual Damage Formula, there is no difference in apportioning common damages among investor and resident-owned units.

\(^84\) See supra text accompanying note 82.

\(^85\) F1's share of the damages will be, according to the Second Individual Damage Formula:

\[
D_{F1} = PIA_{F1} + FIA_{F1} + ComDim/SP_{F1} - CA_{F1} + UL_{F1}
\]

\[
D_{F1} = PIA_{F1} + 0 + ComDim/SP_{F1} - 0 + RVL_{F1}
\]

\[
D_{F1} = $100 + $200 + (10 \times 12 \text{ mos})
\]

\[
D_{F1} = $300 + $120
\]

\[
D_{F1} = $420
\]

F2's damages will be $700. The two added together will be $1120 (equal to $700 in increased assessments plus $420 lost rent). E1's damages will equal this sum plus $10.00 per month for the additional months he has suffered rental value lost.
4. Irremediable Defects

Certain kinds of defects may be designated "irremediable." These are deficiencies inherent in the community itself, which can never be corrected (such as the development's location) or can be corrected only at a cost so far in excess of the diminution in market value that a court would deem it "economic waste" to award to the plaintiff the cost to repair. Thus, an award must be fashioned which takes into account the fact that the defects are permanent, that the community will always have a lower aggregate value because of them, that certain units will suffer uniquely, and that the association may have to levy, over the life of the project, assessments higher than it would have if not for the deficiencies.

The following illustration will provide a case study:

Illustration 7.

The facts being otherwise as stated in the model, Units G and H are in a building positioned beneath a steep slope. The builder did not take adequate steps to deal with the slow collapse of the slope and resultant pressure against the building. Removal of the slope or building would be impracticable. In late 1985, the Association was forced to construct a retaining wall at a cost of $2000. The cost of regular upkeep of the wall over the 75-year projected life of the project is estimated at $300 per annum. Although none of these $300 installments has yet been paid, at the time of judgment this projected negative cash flow is estimated to have a net present value of $5000. An appraiser has determined that the erection of the wall has decreased the aesthetic attractiveness of Units G and H and that fact alone will diminish their market value by approximately $2000 each.

The units were sold by the developer to owners G1 and H1 before the problem became apparent. H1 sold to H2 in December 1985, after the wall was constructed. Calculate the damages as of the end of 1985.

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87 The issues of "economic waste" are discussed in D. DOBBS, supra note 40, at 898-903; Farnsworth, supra note 49, at 1170-75; and A. HARRELL, supra note 45, at 162-77. The best synthesis of the cases is Professor Harrell's. He suggests that when cost to repair grossly exceeds diminution in value, the latter will be awarded unless (a) repair would be necessary to restore a central part of the consideration to the landowner, or (b) the breach was "willful" (that is, culpable in a tort sense).
88 "Net present value" of a series of future cash flows is the sum of the discounted values of each future cash flow. In this illustration, we would calculate net present value by selecting a current interest rate (possibly a money market rate), and calculate the present value of $300 paid a year from now, add to that the present value of $300 paid two years from now, and so on for 75 payments over 75 years. Discounted cash flow analysis is applied in a condominium setting in A-S Dev., Inc. v. W.R. Grace Land Corp., 537 F. Supp. 549 (D.N.J. 1982), aff'd, 707 F.2d 1388 (3d Cir. 1983).
Before attempting to reduce the issues to equation form, several observations should be made regarding this problem. The damage to the community is of three kinds. First, there is the loss incurred in minimizing the problem, a loss represented by the $2000 already paid. Any damage award can easily compensate for this expenditure by reimbursing the owners of each unit for their proportionate shares. Second, there is the future negative cash flow of $300 per year. Since the net present value of this flow is $5000, this is the common diminution in value to the community resulting from the irremediable damage. This portion of the award should be allocated to benefit all units. Third, there is damage unique to two units—those adjacent to the problem—in the amount of $2000 each. This part of the award should go to the owners of those two units.

Thus, the total award ($11,000) will be distributed among the units as follows: (a) $2000 among ten units equally, or $200 per unit, for past increased assessments; (b) $500 among ten units equally in lieu of higher future assessments; and (c) $2000 each to the owners of Units G and H.

Recall that the Third Community Damage Formula was

\[ D = PIA + FIA + UL_{a} + ... UL_{j} \]

This formula is adequate to deal with Illustration 7 if modified in one particular: the figure for “future assessments” must be reduced to its present net value. Previously, that was not necessary, since when future assessments represented merely the cost of repairing items which had not yet been remedied it was assumed that the money would be spent for repairs within a relatively short time after it had been made available to the Association. But in Illustration 7, future assessments will be disbursed over a 75-year period; hence, the need to determine present value.

It would seem to follow that past assessments should also be adjusted in value to the time of judgment. It is true that an ideal award would take into consideration the present value of assessments paid months or even years earlier. This matter, however, is generally regulated by the prejudgment interest provisions of state

89 “Remediable damage” and “irremediable damage” are called “temporary damage” and “permanent damage” by some courts. See, e.g., Stony Ridge Hill Condominium Owners Ass’n v. Auerbach, 64 Ohio App. 2d 40, 47, 410 N.E.2d 782, 788 (1979); but the latter terms are deceptive, so they are avoided here. See D. Dobbs, supra note 40, at 313-14, 337.
law and court rules and thus cannot be reduced to equation form here.

The foregoing analysis leads, therefore, to the Fourth Community Damage Formula, derived from adding the discounted value of future assessments for irremediable defects to the Second Community Damage Formula.

\[
D = CTR + NPV \text{ of } FIA(\text{irrem}) + OL(\text{assn}) + OL_{a1} + \ldots OL_{jn}
\]

This Fourth Community Damage Formula may be utilized to calculate an award in all cases, not just in irremediable defects cases. However, when future repairs will be made within a relatively short time, the net present value of future assessments (cost of future repairs) will not differ appreciably from the total dollar amount of future assessments.

Next, a formula to employ when irremediable defects must be attributed to particular units is necessary. This is the Second Unit Damage Formula for Unit G (the unit which has not been resold):

\[
D_G = PIA_g + NPV \text{ of } FIA_g + UL_g
\]

Now, the net present value of the future assessments in Unit G is theoretically equal to the diminution in value of that unit common to the community as a whole (that is, the diminution due to higher assessments only and apart from G's proximity to the retaining wall). Thus, the Second Unit Damage Formula can also be stated as follows:

\[
D_G = PIA_g + \frac{\text{ComDim}}{SP_g} + UL_g
\]

Substituting the applicable numbers for Unit G gives us:

\[
D_G = 200 + 500 + 2000, \quad \text{or} \quad D_G = 2700
\]

Next, the damages for owners HI and H2 should be calculated. Just as the First Unit Damage Formula was converted into the Second Unit Damage Formula by discounting the future assessments component, the same can be done to derive the Second Individual Damage Formula, for use when some of the defects are irremediable. For owner HI, that formula would be

\[
D_{hi} = PIA_{hi} + NPV \text{ of } FIA_{hi} + \frac{\text{ComDim}}{SP_{hi}} - CA_{hi} + UL_{hi}
\]

HI paid his unit's proportionate share of the $2000 cost of the retaining wall ($200), but will have no future assessments since he no longer lives in the complex. The diminution in value of his unit
was $2500 — $500 due to a problem common to the community (the higher assessments) and $2000 due to a situation unique to his unit. Making the appropriate substitutions results in the following:

\[ D_{hl} = 200 + 0 + 500 - 0 + 2000, \text{ or} \]
\[ D_{hl} = 2700 \]

H2's damages should be "zero" since they were patent when he bought his unit, and the illustration states that the market price was adjusted accordingly. Whether he would be permitted to recover for personal injury or property damage due to such patent defects is a question of local law.91

5. Assessment Analysis: Conclusion

This section has demonstrated that whether the individual owners are investors or homeowners, whether they were initial purchasers or remote purchasers, and whether the construction defects are reparable or irreparable, assessment analysis provides a viable basis for allocating a common damage award among units. Of course, neither compensation for unique losses nor reduction in market value is calculable through assessment analysis. They must be proven by — and paid separately to — the owners who incurred those losses.

IV
TO ALLOCATE OR NOT TO ALLOCATE

The Illinois court in Tassan v. United Development Co.92 could speculate on whether to, and how to, allocate damages among successive owners without actually having to deal with the matter. Several other courts have had to face the problem more directly,
and the results have varied. A judicial decision in which allocation was called for, but not instituted, was issued in the Florida District Court of Appeal's case of *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.* In *Drexel*, the plaintiffs were a condominium association and certain representative unit owners. In a suit against the developer, they alleged the existence of certain defects in the condominium, including (1) absence of aluminum fencing required by the construction plan filed with governmental authorities, (2) ceilings that were not sufficiently fire-resistant to comply with fire regulations, and (3) bedroom windows which did not open sufficiently to comply with those same regulations. The plaintiffs' theories of liability were negligence and breach of implied warranty. After finding for the plaintiffs on both counts, the trial court awarded them the full cost of repair for all three items.

On appeal, the developer argued (a) that a privity requirement should be imposed for warranty recovery, (b) that recovery based on negligence should not be recognized for economic loss, and (c) that the trial court should have denied damages to the plaintiffs insofar as they represented subsequent, rather than original, purchasers—in other words, that the damages should have been apportioned.

The court agreed that privity was necessary for recovery on a warranty claim, but recognized a cause of action for negligence on behalf of both immediate and remote purchasers. It found that, with respect to both the window and ceiling defects, there had been both negligence and breach of warranty. It further found that a warranty claim had arisen from the fencing defect, but that there had been no negligence with respect to that item. This last finding should have had the effect of barring subsequent purchasers from recovery for defective fencing. Nevertheless, the court concluded as follows:

> We hold that as to common elements, the appellees may recover the entire damages on either theory, albeit the subsequent or remote purchasers will benefit thereby. To conclude otherwise and apportion the damages would penalize the original purchasers. In order for appellees to receive the benefit of their bargain and be made whole, the amount of damages awarded must equal the

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94 *Id.* at 519.
95 *Id.* at 520.
96 *Id.*
sum necessary to correct the condition.\textsuperscript{97}

The court also stated, as an additional reason for affirming the award for the ceiling defects, that "it was appropriate to award entire damages on implied warranty because it concerns common elements."\textsuperscript{98}

The court's reasoning is clearly erroneous. An apportioned award for the fencing would preserve the benefit of the original purchasers' bargain by reimbursing them (and only them) for the future assessment increases that repairs would make necessary. The association could, in other words, retain that portion of the award attributable to future repairs and credit it to the assessment invoices sent to original purchasers who still owned their units. Subsequent purchasers would be duly assessed without offset. The original purchasers would get the "benefit of their bargain," because, at no cost to them, the repairs would be made — for the association was (or could be) legally required to make them.\textsuperscript{99}

At first glance, it appears possible that the Drexel court committed harmless error. While the facts are not entirely clear, it is possible the plaintiffs therein were representing former owners as well as present owners. If the warranty damages of former owners were included in the award, it would indeed have equalled entire cost of repair. However, there is no evidence that the former owners actually received any portion of the award, or that the court heard evidence from them of their reduced sales prices, or that the court considered any defect-related assessments they had paid during their periods of ownership. It appears that the court intended that the entire award be utilized for future remedial measures, thus benefiting those unit owners in a manner not otherwise sanctioned by law.\textsuperscript{100}

Had the court applied the Individual Damage Formulae set

\textsuperscript{97} Id. at 519-20.
\textsuperscript{98} Id. at 520.
\textsuperscript{99} Supra note 67.
\textsuperscript{100} A similar error in reasoning had been made two years earlier in Stony Ridge Hill Condominium Owners Ass'n v. Auerbach, 64 Ohio App. 2d 40, 410 N.E.2d 782 (1979), where the court held that although only four of 24 unit owners had proven fraud "[e]ach person who purchased a condominium unit, as a result of the misrepresentation, has a right to have the whole damage to the entire common area of the building remedied and completely satisfied." 64 Ohio App. 2d at 43, 410 N.E.2d at 785.

While this is true, it doesn't follow that the developer should pay the entire bill. However, Stony Ridge Hill can be justified on other grounds, i.e., that in a class action like setting, illustrative testimony by a few homeowners was adequate to establish fraud as to the entire class. Brickyard Homeowners' Ass'n Management Comm. v. Gibbons Realty Co., 668 P.2d 535, 543 (Utah 1983).
forth above, it would not have wandered into error.

In *Juno By the Sea Condominium Apartments, Inc. v. Juno By the Sea North Condominium Association*, decided by the same court nine months later, *Drexel* was cited to justify granting an entire repair award to an association plaintiff without proper allocation. In *Juno* there were apparently no individual plaintiffs, and no attempt had been made to include former owners in the case or to afford them due notice of the proceedings. As a result, the court permitted remote purchasers, who otherwise would have had no legal right to recovery (and who may have already benefited from lower acquisition prices), to appropriate — without notice — funds that rightfully belonged to earlier unit owners. Yet just a year earlier, after a Texas trial judge made an analogous error, that state’s court of civil appeals had quite properly reversed:

> The judgment also granted a recovery on behalf of all owners against the defendants, and ordered the money expended for certain specific repairs and maintenance of the common elements. Thus, the interests of the absent owners will be affected by the judgment; yet they have not had their day in court. Even under the liberalized version of our Rule 39 . . . the absent owners should have been made parties.

The Texas appeals tribunal was speaking of the need to join all present unit owners in a common element suit, but its reasoning is equally applicable to prior unit owners, and the court in *Juno* should have applied it. Perhaps other courts will do so.

At any rate, it appears that when an association suit or other representative action is commenced, the plaintiffs should include prior owners within the plaintiff class (preferably in one or more subclasses), and duly notify them of the proceedings in the manner in which class members are usually notified. Specifically, they should be informed of their right to intervene through their own counsel, that they may be entitled to a refund of certain assessments levied while they were owners, that they may avail themselves of the opportunity to prove additional damages, and that any judgment obtained in the proceeding will be binding on them. If the plaintiffs do not do so, the defendants should be permitted to insist upon noti-

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101 418 So. 2d 1190 (Fla. Dist. Ct. App. 1982).
102 *Id.* at 1191-92. The error of *Drexel* has crept into other decisions as well. See, *e.g.*, *Starfish Condominium Ass’n v. Yorkridge Serv. Corp.*, 458 A.2d 805, 812-13 (Md. 1983).
fication of prior owners or upon an opportunity to prove any offsets attributable to them.\textsuperscript{104}

Earlier, an allusion was made to jurisdictions which have denied associations standing to sue for common element defects.\textsuperscript{105} Decisions in those jurisdictions are illustrative of a judicial mindset which, for common element purposes, essentially ignores the existence of the association as sole managing agent and focuses exclusively upon the interests of the co-owners. \textit{Drexel} and \textit{Juno} are illustrative of the opposite error: they disregard the fact that each community is comprised of co-owners who may have different, and occasionally even contradictory, interests. The decision in \textit{Goldenfarb v. Land Design, Inc.}\textsuperscript{106} is a further example of this latter outlook. In \textit{Goldenfarb}, the developer of a condominium had sold fourteen "large units" and ten smaller units to members of the public. Plaintiffs had each purchased a "large unit." They alleged that the defendant had represented to them that each "large unit" would enjoy the use of two parking spaces on the common elements, although smaller units would have just one each. Of the total of thirty-eight promised spaces, however, only thirty-five proved to be of adequate size.

A referee found that total damages had amounted to $3900 and awarded one-fourth of that amount to each of the four plaintiffs. The superior court affirmed the award, and the defendant-developer appealed. On appeal, the Supreme Court of Maine sustained the result as to liability, but reversed as to the allocation of damages. First, it assumed that the $3900 award was intended to reflect the entire damage to the community rather than to the individual plaintiffs (an assumption that was not clearly correct).\textsuperscript{107} Then it ordered that the case be remanded for "(a) a finding of the respective percentage of ownership interests of the Plaintiffs and (b) an award to the Plaintiff unit owners of each unit represented in this cause of their aliquot portion of the total loss sustained by all the owners of the common areas."\textsuperscript{108}

To an extent, the Court's allocation was proper, but it was alloca-
tion which ignored the differences between owners — the differences in each owner's *unique loss*. Each of the plaintiffs had been promised two parking spaces. Due to the shortage, however, at least three of them had received only one. Obviously their damage was a good deal more than that of those unit owners who received what they had been promised. Application of proper Unit and Individual Damage Formulae would have improved the chances of their being properly compensated.

A more adequate allocation structure was applied in *REC Centers, Inc. v. Shaughnessy*. There, a class of condominium owners had sued for recovery of improper overcharges on a recreation lease and had won an award for the entire amount of the overcharges, despite the fact that the class did not include prior unit owners. The appeals court reversed the award insofar as it included excess amounts paid by prior owners and limited the recovery to overcharges imposed on the class members, i.e., the current unit owners.

In *Andrikopoulos v. Broadmoor Management Co.*, overcharges on an association management contract were correctly allocated to the owners whose assessments had been thus improperly increased. The court suggested that "the Association was in an ideal position to represent all of the owners and to disburse the award among them." While neither *REC Centers* nor *Andrikopoulos* involved causes of action for common property defects, it is difficult to discern why that should make any difference.

One reason there has been judicial resistance to allocation of damage awards, although never openly expressed, is a general impatience with the magnitude and complexity of these cases and an unwillingness to complicate them any further. Yet, it is well to remember that the alternative to allocation is often to reward unde-

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109 See *supra* note 82 and accompanying text. The *Goldenfarb* court pointed out that it was the association which actually allocated the spaces. It is difficult to see what difference that made, since the loss to the plaintiffs was the same. Had there been 38 spaces, each of the plaintiffs would have had two spaces rather than one. Another case not properly protecting unit owners' legitimate interest in their *unique loss* is *Frantz v. CBI Fairmac Corp.*, 229 Va. 444, 331 S.E.2d 390 (1985). In *Frantz*, individual unit owners, uniquely damaged due to their proximity to the developer's improper commercial development, were denied the right to intervene in the association's lawsuit against the developer where the proposed settlement would bind them, but where the terms of the settlement disregarded their unique interests. *Id.*


112 *Id.* at 439.
serving parties and punish deserving ones. Moreover, failure to allocate results in determinations of liability inconsistent with the jurisdiction's other law — and for no reasons other than the number of parties involved or the legal form of the community's governing documents.

As for the complexity concern, it is the author's experience that the process of allocation has proven daunting only in very large communities with extensive construction deficiencies. Yet, such communities often have the resources to afford the computer time or clerical personnel necessary to undertake even the most complicated allocation task. But such extreme cases are rare. Most communities will have suffered two or three major defects, for which several easily identifiable repairs have been made. Since applicable statutes of limitation ensure that any community suing the developer on a common defects claim will be relatively new, most units will still be owned by those who originally bought them. Among prior owners, few, if any, are likely to intervene to prove loss in market value. Demonstrated items of unique loss, such as personal injury or property damage, will tend to be limited in quantity and easily identifiable.

V

SUMMARY: MEASURING AND ALLOCATING EXPECTANCY DAMAGES

This section summarizes the procedures to be employed in calculating and allocating damages for defects in common property cases. The four basic steps are as follows:

First: In absence of a statute prescribing a different approach, the total damage to the community should be pleaded and proven using one of the Community Damage Formulae. Where all defects are reparable, the equation best employed is the Second Community Damage Formula:\textsuperscript{113}

\[ \text{Damage} = \text{cost to repair} + \text{other loss attributable to the association} + \text{other loss attributable to each past and present owner} \]

In symbolic form:

\[ D = CTR + OL(\text{assn}) + OL_{a1} \ldots + OL_{jn} \]

\textsuperscript{113} The author has found none. But see UNIF. CONDOMINIUM ACT. § 1-114, 7 U.L.A. 452 (1985) (expectancy damages specifically authorized).

\textsuperscript{114} See supra notes 66-69 and accompanying text.
As noted earlier, judicial support for this equation and the closely related First Community Damage Formula is substantial.\textsuperscript{115}

If some of the defects are irremediable, the net present value of any resultant future additional maintenance costs caused by those deficiencies, that is, future higher assessments, should be added to the Second Community Damage Formula. Moreover, any irremediable decrease in the value of particular units should be included in the other loss attributable to those units. Thus,

\begin{equation}
D = CTR + NPV \text{ of } FIA(\text{irrem}) + OL(\text{assn}) + OL_{ol}
\end{equation}

This formula may also be employed where the defects are remediable and will be repaired soon. In that case, however, the net present value of the future assessments is essentially the same as the dollar amount of the future assessments.

\textit{Second:} The next task is to allocate the damages among units in the community. Common, i.e., assessable, expenditures that have already been made may be lumped together and allocated among units by multiplying each unit's share of the common elements by the total expenses incurred. Future expenditures — whether discounted or not — should be similarly multiplied.

Some or all unit owners may have unique loss. This includes all non-assessable items, such as (1) other loss (e.g., loss of use, personal injury, property damage), (2) in the case of an investor, proven lost rental value, and (3) any irremediable loss of market value unique to a unit. The process of allocating the award among units is best summarized by the Second Unit Damage Formula, the sum of past assessments attributable to defect repairs, the unit's prorata share of the net present value of any future assessments, and that unit owners' unique loss. \textit{If applied to Unit J, the equation in symbolic form is:}

\begin{equation}
D_J = PIA_J + NPV \text{ of } FIA_J + UL_J\textsuperscript{116}
\end{equation}

Damages may be allocated on the basis of that formula to all unit owners who purchased from the developer and have not sold their units as of the date of judgment. Usually that will include a majority of the owners, since a common element defects case is almost always resolved when the complex is just a few years old.

It is possible that the amount of the award is based upon settle-

\textsuperscript{115} See supra notes 65, 68 and accompanying text.

\textsuperscript{116} See supra notes 86-91 and accompanying text.
ment; if so, it may represent a recognition by the parties of potential liability on some claims and not other claims. To the extent practicable, the allocation of the award among units should take into account which defects are being compensated for and any pro-rata level of compensation agreed to.

Third: For those units that have changed hands, another step is necessary. Any prior expenses must be pinpointed as to their date and allocated to the owners who held units on that date. If there have been numerous small expenses, the parties may wish to allocate them on a monthly, quarterly, or annual basis (making the rough assumption, for example, that an owner who had title to a unit at the beginning of a quarter held it throughout the quarter). Unique losses must be attributed to the proper unit owners as well, if they have been pleaded and proven by those owners. Similarly, if any prior owner has proven that defects resulted in a reduction of his price on resale \((\text{Dim}SP)^{117}\) or, in the absence of prior owners, the defendants have demonstrated that subsequent owners are either (1) not entitled as a matter of law to recovery,\(^{118}\) or (2) have benefited from lower acquisition prices,\(^{119}\) then the appropriate adjustments must be made.

When all the defects can be repaired, the formula employed for calculating the loss attributable to an individual owner is the First Individual Damage Formula.\(^{120}\) This is the sum of any past and future assessments the owner must pay \((\text{past increased assessments plus future increased assessments})\), plus any diminution in his resale price (if he has sold his unit) due to general community defects \((\text{ComDim}/\text{SP})\), less any savings in his acquisition cost as a result of those defects \((\text{CA} \rightarrow \text{cost avoided})\), plus his unique loss. This last element will include injury to person or personal property, loss of use or reduction in rental proceeds, and diminution in resale price due to common defects which impact disproportionately upon his unit. This is the First Individual Damage Formula for owner \(J1\):

\[
D_{ji} = PIA_{ji} + FIA_{ji} + \text{ComDim}/\text{SP}_{ji} - CA_{ji} + UL_{ji}
\]

Where some of the defects are irremediable, this equation is altered by substitution of the net present value of future increased assessments. This is the Second Individual Damage Formula:

\(^{117}\) See supra note 75 and accompanying text. See generally notes 70-78 and accompanying text.

\(^{118}\) See supra notes 77-78 and accompanying text.

\(^{119}\) See supra text accompanying note 75.

\(^{120}\) See infra Part III(F)(2).
\[ D_{jl} = PIA_{jl} + NPV \text{ of } FIA_{jl} + \text{ComDim/SP}_{jl} - CA_{jl} + UL_{jl} \]

Fourth: Once the sums are allocated, they must be distributed. All sums proven to be due to persons who no longer own units should be distributed to those persons. As to persons who currently own units, each owner proving unique loss should be directly paid the sums attributable to that unique loss. All assessments attributable to prior repairs should be remitted directly to the owners who paid them or be credited to their future assessment bills. They should not be retained by the association and credited to a general fund. That would be unfair, since different amounts will be attributable to different owners. The same procedure should be followed for all awards for the discounted value of recurrent future assessments (that is, for irremediable defects). Amounts awarded for future repairs should be retained by the association, preferably in a trust fund, for the purpose of making those repairs.\(^{121}\)

\(^{121}\) See supra notes 75-78 and accompanying text.