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Activist judges & implied HOA covenants

Expansive interpretations making new law and public policy for a "better society"

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A. Justice in a dysfunctional judicial system

As a general principle, it is a self-feeding cycle whereby unjust, pro-HOA laws serve to further create unjust judicial precedent. Homeowner justice is repeatedly denied as more and more cases rely on bad court opinions based on unjust laws, solidifying the strength and weight of these earlier cases that serve as precedent. It is a primary cause of the failure to obtain justice for homeowners in HOAs.

An inherent defect in our judicial system is the false assumption that all laws serve justice equally among the citizens. *"EQUAL JUSTICE UNDER LAW"* are the words written above the main entrance to the Supreme Court Building. But, how can justice be equal under unjust laws that favor one faction over another? In the US Constitution's statement of objectives, The Preamble, we find the simple objective, "to establish justice."

The continual controversy over the next person to become a Supreme Court Justice attests to the fact that the Justices have failed to defend the Constitution first and foremost. And the Founding Fathers never thought of, or never ever entered into their minds, the need for a Supreme Court oversight or appellate function. America sorely needs one today.

Similarly, state supreme courts are final, unless the controversy involves a federal issue of law or the Constitution. HOA matters and real estate controversies are under state law, not federal law.

"Under American federalism, the interpretation of a state supreme court on a matter of state law is normally final and binding and must be accepted in both state and federal courts. Federal courts may overrule a state court only when there is a federal question, which is to say, a specific issue (such as consistency with the Federal Constitution) that gives rise to federal jurisdiction." **(Wikipedia).**

From an analysis of the *Restatement (3rd) Properties:Servitudes* and the 2002 Colorado Evergreen case, which relies on the Restatement in part, an activist pro-HOA court becomes apparent. The Colorado Supreme Court reaches out to implied covenant, makes recourse to overly broad and expansionist interpretations of the meaning of words and terms, and ascribes public government attributes to private HOA entities.

B. Restatement (3rd) Property:Servitudes (2000)

What is also quite clear is the reliance by the courts on the pro-HOA Restatement of Servitudes, which is supposed to be a summary of the various court decisions to guide the judges in arriving at their opinions when state laws are silent. From the Forward by the ALI (American Law Institute) Director:

"ALI's fundamental mandate [is] to promote the 'clarification and simplification of the law and its better adaptation to social needs.' The underlying law is largely judge-made. Few scholars, practitioners, or judges have had the incentive to propose coherent and policy-based reform. The best Restatements have taken on this challenge, and have often had major impact."

"Professor Susan French [Reporter (chief editor/contributor) for this Restatement] begins with the assumption . . . that we are willing to pay for private government because we believe it is more efficient than [public] government . . . . Therefore this Restatement is enabling toward private government, so long as there is full disclosure . . . ."

Section 6.13, comment a, states:

"The question whether a servitude [covenant as pertaining to HOAs] unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law". Section* 3.1, comment h, states: *"in the event of a conflict between servitudes law and the law applicable to the association form, servitudes law should control."

Are these the views of the courts or of ALI that publishes these Restatements? Are they neutral or activist statements designed to override constitutional and state laws? Apparently, the courts find no fault with their views of the law and how the law should be applied as contained in the Restatement.

It is my position that the American Law Institute sees itself as the modern day incarnation of Plato's *Philosopher Kings.* These HOA philosopher kings see themselves as elitist, intellectual wise men who are best suited to advise government on how to rule. They also see themselves as moral persons, free from self-interest and working for a better society. ALI is delusional.

(For ease of reading, I will follow the format of my earlier *Memo 1* and quote the court opinions along with my commentaries in [*italics*].)

C. *Evergreen v. West* (Colo. 2000)

Valid amendment --

1. **The Association relied on voluntary assessments from lot owners to pay for maintenance of and improvements to the park area. Pursuant to the modification clause, at least seventy-five percent of Evergreen Highlands' lot owners voted to add a new Article 16 to the covenants. This article required all lot owners to be members of and pay assessments to the Association.**

2. **[T]he owners of seventy-five percent of the lots . . . may change or modify any one or more of said restrictions. We conclude that the terms "change" and "modify," as used in the Evergreen Highlands covenants, are expansive enough to allow for the addition of a new covenant.**

3. **Moreover, from a linguistic standpoint, the Lakeland conclusion that "change or modify" can only apply to the alteration of existing covenants, and not the addition of new and different ones, is not well-founded. Confining the meaning of the term "change" only to the modification of existing covenants, then, seems illogically narrow. For these reasons, we find the court of appeals' reliance on a linguistic analysis to distinguish covenant modification language unsatisfactory.**

4. **We conclude that the modification clause of the Evergreen Highlands covenants is expansive enough in its scope to allow for the adoption of a new covenant.**

[I am wondering what happened to the legal understanding of the term, "addendum," which is extensively used in real estate agreements. If a contract is to be changed or modified, an amendment form is used, whereas if new items are added to an agreement, an addendum (in general, "the following additional terms and conditions are included in the contract") form is used. This term does not appear in the opinion. I guess the judges missed that in law class.

Since this is a very important transaction for the average person, one would think that extra care would be taken to protect the people. Let's take a more legalistic look at the blind side of the court. Recognizing the difference, legislative bills, for example, are introduced with wording "is added to" or "to add" to designate an addition to law, as distinguished from "is amended to read" modification or change to an existing law.

Furthermore, if the learned developer and his attorney wanted to include the right to add with less than 100% consent, then it's their error for the failure to put it in writing! But, the Court chose to place the burden on the average homeowner for the HOA attorney's failure. How dare it take sides!]

5. **We instead conclude that the different outcomes in the Lakeland and Zito lines of cases are based on the differing factual scenarios and severity of consequences that the cases present. In those cases where courts disallowed the amendment of covenants, the impact upon the objecting lot owner was generally far more substantial and unforeseeable than the amendment at issue here. In addition, we note that, at fifty dollars per year, the mandatory assessment imposed on Respondent is neither unreasonable nor burdensome. To the contrary, the existence of a well-maintained park area immediately adjacent to Respondent's lot undoubtedly enhances Respondent's property value.**

   [This opinion is unbelievable! The Court is making new law as to what conditions would permit the taking of private property without the owner's consent that is not stated in the statute. It declares that a benefit to the owner's property value warrants a rejection of property rights protections in the Constitution by private entity, the HOA. Is that justice?]

<u>Implied covenant --</u>

6. **The Association additionally argues that, even in the absence of an express covenant imposing mandatory assessments, it has the implied power to collect assessments from its members.**

7. **When lot purchaser has knowledge that homeowners association provides facilities and services to community residents, purchase creates an implied-in-fact contract to pay a proportionate share of those facilities and services.**

8. **Reflecting this considerable body of law, the newest version of the Restatement of Property (Servitudes) provides that "a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community...." Restatement (Third) of Property: Servitudes . 6.5(1)(a) (2000). In addition, as explained in a comment to**

that section, the power to levy assessments "will be implied if not expressly granted by the declaration or by statute." Id. at . 6.5 cmt. B.

9. **We find the Restatement and case law from other states persuasive in analyzing the issue before us today. In addition, these authorities are in harmony with the legislative purpose motivating the enactment of CCIOA. [Colorado Common Interest Ownership Act] See, e.g., . 38-33.3-102(1)(b), 10 C.R.S. (2002) ("That the continuation of the economic prosperity of Colorado is dependent upon the strengthening of homeowner associations ... through enhancing the financial stability of associations by increasing the association's powers to collect delinquent assessments"); . 38-33.3-102(1)(d) ("That it is the policy of this state to promote effective and efficient property management through defined operational requirements that preserve flexibility for such homeowner associations").**

***[With respect to the above paragraphs 6 – 9, this is the most direct confirmation that Colorado, and apparently other state legislatures that also follow the Restatement, has created special laws for special private entities. The basis of its legitimate government interest for such laws is economic prosperity. Yet, the above quote goes well beyond the questionable validity of its general interest when it begins to interfere with the day-to-day HOA operations, and assisting in HOA debt collections. The failure to meet the US Supreme Court's judicial scrutiny criteria, which I've published elsewhere, did not enter into the court's decision.*]**

10. **Respondent therefore contends that because the original covenants did not impose such a servitude, Evergreen Highlands is not a common interest community, and accordingly cannot have the implied power to levy assessments against its members pursuant to these authorities. Respondent's argument, however, relies on the assumption that the servitude or obligation to pay which would have defined Evergreen Highlands as a common interest community was required to have been made express in the covenants or in his deed. This assumption is incorrect.**

11. **As explained by the Restatement: An implied obligation may ... be found where the declaration expressly creates an association for the purpose of managing common property or enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions. When such an implied obligation is established, the lots are a common-interest community**

within the meaning of this Chapter. Restatement (Third) of Property: Servitudes . 6.2 cmt. a (2000).

[In paragraphs 10 and 11 above, the Court is making new law as applied to HOAs and violating the very essence of contract law. It "pulls out of the air" the validity of absent contractual terms, because it now defines "declaration" to include to power to compel mandatory assessments. It uses the Restatement to defend its contrary to contract law position of an implied power to "tax." What then, is the point of the declaration of CC&Rs?

The Court blinds itself to voluntary associations, which is another alternative to mandatory associations, and the Court is saying that it doesn't care what the intent was. The Restatement, not part of the declaration, now defines what the law is. What happened to "if they wanted "A" then "A" should have been included in the agreement"? The court will not second guess.]

* * * * *

The judiciary generally recognizes the injustice of being required to follow the law, whether good or bad. However, it fails to be an activist judiciary on behlf of the people. In Section C, Case Study on Judicial Acceptance of Retroactive HOA Amendments, I quote the Florida Supreme Court in its *Woodside Village* opinion as reflecting the judiciary's position on establishing justice:

> ***"We recognize the concerns that owners . . . regarding the imposition of lease restrictions through subsequent declaration amendments without the consent of all unit owners.***
>
> ***"Although we believe such concerns are not without merit, we are constrained to the view that they are better addressed by the Legislature. If condominium owners are to be restrained in their enactment of . . . restrictions, it is appropriate that such restraint be set out in the legislative scheme that created and regulates condominiums and condominium living.***
>
> ***"I write simply to urge the Legislature to seriously consider placing some restrictions on present and/or future condominium owners' ability to alter the rights of existing condominium owners."***

In short, the ball is in the legislative court. Justice for the people is to be obtained from the legislature and not the courts. The court's advice to *seek*

redress there **reflects a blindness to the reality of the HOA special interest dominance of state legislatures. But, somehow, the courts are not blind to the special interest propaganda of making a better society through the HOA legal scheme.**

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