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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS

BILL #: HB 1649

RELATING TO: Condominiums

SPONSOR(S): Representative Bense

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT
(2) SMARTER GOVERNMENT
(3)
(4)
(5)

I. SUMMARY:

This bill provides that:

- A condominium association may not bring an action for fraud or misrepresentation against a developer, sales agent, or broker on behalf of individual owners. Each owner must bring his or her own action for fraud or misrepresentation against a developer, sales agent, or broker.

- No more than 50 percent of any assessment made but not yet collected by the association may be used as collateral by the association to secure financing of the association's efforts to pursue litigation or remedy construction defects.

- A condominium association must prepare and distribute a prelitigation disclosure to unit owners prior to the association instituting an action where the amount in controversy is in excess of $100,000.

- The liability of a condominium developer is limited, should the developer obtain a bond and should the developer's architect and engineer have specified liability insurance coverage.

- A condominium developer, and a sales agent employed by the developer, is not liable to purchasers for oral statements or promises.

This bill does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes [x]	No []	N/A []
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

A condominium is a form of ownership of real property property created pursuant to ch. 718, F.S., which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements. The common elements of a condominium are owned and managed by a condominium association. All unit owners in a condominium are required to be given a voting share in the condominium association, which must be a not-for-profit corporation. Condominium associations have the right to assess fees to the unit owners in order that the association have operating and reserve funds.

The developer of a condominium project must initially set up the association and name the initial directors of the corporation. When unit owners other than the developer own 15 percent or more of the units in a condominium that will be operated ultimately by an association, the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the board of administration of the association. Unit owners other than the developer are entitled to elect not less than a majority of the members of the board of administration of an association:

- Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business; or
- Seven years after recordation of the declaration of condominium; or, in the case of an association which may ultimately operate more than one condominium, 7 years after recordation of the declaration for the first condominium it operates; or, in the case of an association operating a phase condominium created pursuant to s. 718.403, 7 years after recordation of the declaration creating the initial phase,

whichever occurs first. The point at which unit owners may elect a majority to the board of director of the association is known at “turnover”.

At the time of turnover, the developer must relinquish control of the association, and the unit owners must accept control. The developer is required to deliver to the association, at the developer's expense, all property of the unit owners and of the association which is held or controlled by the developer. Property to be turned over includes all books and records of the association, and the construction plans and specifications.

Section 718.124, F.S., provides that the statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have do not begin to run until the unit owners have elected a majority of the members of the board of administration.

Typically, an association will, upon turnover, employ professionals to examine the books and records of the association, and to examine the construction details and quality. Should an association discover a problem during this examination, the association may choose to file a lawsuit against the developer.

Legal Actions and Legal Fees

Section 718.111(3), F.S, provides a condominium association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property. After control of the association is obtained by unit owners other than the developer, the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; representations of the developer pertaining to any existing or proposed commonly used facilities; and protesting ad valorem taxes on commonly used facilities and on units; and may defend actions in eminent domain or bring inverse condemnation actions. If the association has the authority to maintain a class action, the association may be joined in an action as representative of that class with reference to litigation and disputes involving the matters for which the association could bring a class action. The right of an association to act on behalf of owners does not limit any statutory or common-law right of any individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available.

Warranties

In addition to any written warranty that the developer and purchasers may agree upon, s. 718.203, F.S., provides that a developer is deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:

- As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.

- As to the personal property that is transferred with, or appurtenant to, each unit, a warranty which is for the same period as that provided by the manufacturer of the personal property, commencing with the date of closing of the purchase or the date of possession of the unit, whichever is earlier.

- As to all other improvements for the use of unit owners, a 3-year warranty commencing with the date of completion of the improvements.

- As to all other personal property for the use of unit owners, a warranty which shall be the same as that provided by the manufacturer of the personal property.

- As to the roof and structural components of a building or other improvements and as to mechanical, electrical, and plumbing elements serving improvements or a building, except mechanical elements serving only one unit, a warranty for a period beginning with the completion of construction of each building or improvement and continuing for 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.

- As to all other property which is conveyed with a unit, a warranty to the initial purchaser of each unit for a period of 1 year from the date of closing of the purchase or the date of possession, whichever occurs first.

Additionally, the contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows:

- For a period of 3 years from the date of completion of construction of a building or improvement, a warranty as to the roof and structural components of the building or improvement and mechanical and plumbing elements serving a building or an improvement, except mechanical elements serving only one unit.

- For a period of 1 year after completion of all construction, a warranty as to all other improvements and materials.

These warranties are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.

The warranties provided by s. 718.203, F.S., inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.

False and Misleading Information

Section 718.503, F.S., requires that a sales contract prepared by a condominium developer contain certain disclosures and information. Section 718.504, F.S., requires a condominium developer to develop a prospectus that must be distributed to potential purchasers. The prospectus must contain certain disclosure and information, including descriptions of the property, future improvements, and potential future liabilities of unit owners.

Section 718.506, F.S., provides that a condominium purchaser who, in reasonable reliance upon any material statement or information that is false or misleading and published by or under authority from the developer in advertising and promotional materials, including, but not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising, pays anything of value toward the purchase of a condominium parcel located in this state, has a cause of action against the developer for damages under this section from the time of closing until 1 year after the date upon which the last of the following occurs:

- The closing of the transaction;

- The first issuance by the applicable governmental authority of a certificate of occupancy or other evidence of sufficient completion of construction of the building containing the unit to allow lawful occupancy of the unit;

- The completion by the developer of the common elements and such recreational facilities, whether or not the same are common elements, which the developer is obligated to complete or provide under the terms of the written contract or written agreement for purchase or lease of the unit; or

- In the event there is not a written contract or agreement for sale or lease of the unit, then the completion by the developer of the common elements and such recreational facilities, whether or not the same are common elements, which the developer would be obligated to complete under any rule of law applicable to the developer's obligation.

However, the cause of action created or recognized under s. 718.506, F.S., will not extend beyond 5 years after the closing of the transaction.

C. EFFECT OF PROPOSED CHANGES:

Legal Actions and Legal Fees

This bill amends s. 718.111(3), F.S., to provide that a condominium association may not bring an action for fraud or misrepresentation against a developer, sales agent, or broker on behalf of individual owners. Each owner must bring his or her own action for fraud or misrepresentation against a developer, sales agent, or broker.

This bill amends s. 718.116, F.S., to provide that no more than 50 percent of any assessment made but not yet collected by the association may be used as collateral by the association to secure financing of the association's efforts to pursue litigation or remedy construction defects.

This bill creates a new section of law which requires a prelitigation disclosure to unit owners, and and approval by owners. Before commencing any litigation or other adversarial proceeding involving amounts in controversy in excess of $100,000, an association must furnish to each owner a separate document entitled "Litigation Disclosure," which must be in a format approved by the division. This document must, in readable language, inform each owner of the basis for the association's contemplated litigation or adversarial proceeding; the professional qualifications of the person making the allegations supporting the association's claim; the response of the adverse party to the allegations; whether or not the adverse party has refused or offered to perform remedial work; the efforts made to mediate or resolve the claim; the projected attorney's fees, expert fees, and other costs of the proposed litigation or adversarial proceeding; the probability of success of the litigation or adversarial proceeding; the probability of collecting a judgment resulting from the litigation or adversarial proceeding; and the probability of association liability for attorney's fees and costs associated with the litigation or adversarial proceeding. Such litigation or such an adversarial proceeding may not be commenced unless approved in advance by a majority of the owners or by such greater number of the owners as is required by the declaration of the condominium operated by the association.

This bill adds an additional requirement that a lawsuit against a director designated by the developer, for actions taken by such director prior to the time control of the association is assumed by unit owners other than the developer, to require that such an action is not actionable unless the action resulted in the misuse or misappropriation of association funds or assets.

Warranties

This bill adds to the warranty provisions of s. 718.203, F.S., to provide that:

- A developer has no liability, under the Condominium Act or otherwise at law or in equity, to an association or to the purchaser of each unit for any construction defects or deficiencies that are within the scope of the developer's contract with the contractor and all subcontractors and suppliers, if the developer has obtained from the contractor a construction payment and performance bond in the amount of the contract with the contractor which was issued by a surety licensed to do business in this state and has assigned or otherwise made available the bond or the proceeds thereof to the association.

- A developer has no liability, under the Condominium Act or otherwise at law or in equity, to an association or to the purchaser of each unit for any defects in architectural design or architectural services that are within the scope of the developer's contract with the architect, if the developer has required the architect to maintain a professional malpractice policy that has minimum limits of $1 million and was issued by an insurer licensed to do business in this state and has assigned or otherwise made available the policy or the proceeds thereof to the association.

- The developer has no liability to the association or to the purchaser of each unit, under the Condominium Act or otherwise at law or in equity, for any defects in engineering design or engineering services that are within the scope of the developer's contract with the engineer if the developer has required the engineer to maintain a professional malpractice policy that has minimum limits of $1 million and was issued by an insurer licensed to do business in this state and has assigned or otherwise made available the policy or the proceeds thereof to the association.

False and Misleading Information

This bill amends s. 718.506, F.S., to provide that a person has no cause of action against a developer for any oral representation or information that is not contained in the developer's advertising and promotional materials, including, but not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising.

This bill further amends the sales contract requirements at s. 718.503(1)(a), F.S., to add an additional clause to the caveat that must be placed on the first page of a contract whereby a developer is selling a condominium unit to a purchaser. The caveat must be in conspicuous type, and read as follows:

> A PURCHASER HAS NO CLAIM OR CAUSE OF ACTION AGAINST THE DEVELOPER FOR THE PURCHASER'S RELIANCE ON ORAL REPRESENTATIONS OR INFORMATION NOT CONTAINED IN THIS AGREEMENT.

D. SECTION-BY-SECTION ANALYSIS:

See “Present Situation” and “Effect of Proposed Changes”.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill provides that a condominium association may not bring an action for fraud or misrepresentation against a developer, sales agent, or broker on behalf of individual owners, but that each owner must bring his or her own action for fraud or misrepresentation against a developer, sales agent, or broker. This bill also provides that no more than 50 percent of any

assessment made but not yet collected by the association may be used as collateral by the association to secure financing of the association's efforts to pursue litigation or remedy construction defects.

Article I, s. 21, Fla.Const., that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." This bill may perhaps give rise to a concern that its provisions could possibly be found to be an impermissible restriction on the access to courts. It does not appear that any case regarding a law similar to that in this bill has been challenged in the Florida. A past medical malpractice law required a plaintiff medical provider suing a member of a medical review board to post a bond in the estimated amount of the defendant's attorney's fees. In *Psychiatric Associates v. Siegel*, 610 So.2d 419 (Fla. 1992), Justice Harding described the general standard of review for questions regarding the access to courts provision:

> We find that the bond requirement does not totally abrogate a plaintiff's right of access to the courts; however, the statutes do create an impermissible restriction on access to the courts. The constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court. *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 901 (Fla. 3d DCA 1977). Although courts have upheld reasonable measures, such as filing fees, financial preconditions that constitute a substantial burden on a litigant's right to have his or her case heard are disfavored. *Id*.
>
> Article I, section 21 of the Florida Constitution expressly provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." The right to go to court to resolve our disputes is one of our fundamental rights. With the exception of the state constitution in 1868, Florida has incorporated an express provision guaranteeing a person's right of access to the courts in each of its constitutions. [footnote] The history of the provision shows the courts' intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes. As Judge Anstead noted in *Guerrero*, article I, section 21 and its predecessor, Section 4, Declaration of Rights of the Florida Constitution (1885), have been applied to "dissolution cases, interpretation of death penalty statutes, automobile negligence cases, foreclosure proceedings, probate matters, worker's compensation proceedings, and many other kinds of disputes." *Guerrero*, 548 So.2d at 1188 (Anstead, J., dissenting) (footnotes omitted). While article I, section 21 may not give a litigant a particular remedy, the right of access does guarantee the litigant a forum in which to be heard. Although courts generally oppose any burden being placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity. *Kluger*, 281 So.2d at 4; *see also Smith v. Department of Ins*., 507 So.2d 1080, 1088 (Fla.1987).

Psychiatric Associates v. Siegel, 610 So.2d 419, 423 (Fla. 1992).

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

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