HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1507 Condominiums
SPONSOR(S): Evers
TIED BILLS: None **IDEN./SIM. BILLS:** SB 298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Current law does not require that any specific procedure be followed before a condominium association may bring a lawsuit.

Under this bill, before a condominium association may bring a suit where the amount in controversy exceeds $100,000 and does not involve a title dispute or the collection of a fee or assessment, the association must provide each unit owner other than the developer with a "Litigation Disclosure Notice" in a standard format to be adopted by rule promulgated by the Department of Business and Professional Regulation's Division of Florida Land Sales, Condominiums and Mobile Homes. This Litigation Disclosure Notice must contain numerous disclosures about presuit activity and prospects for success, and must be approved by at least a majority of the non-developer unit owners before suit may be commenced by the association.

Current law provides that until a developer relinquishes control of a condominium association, it is liable to third parties for any violation the Condominium Act, or of the rules implementing it.

This bill provides that actions taken by board members appointed by the developer are considered actions of the developer, and the developer is responsible to the association and its members for all such actions.

Finally, current law provides that a person who pays anything of value toward the purchase of a condominium unit in reasonable reliance upon a material statement or information that is false or misleading published by or under the authority of the developer has a cause of action for damages, as well as a cause of action to rescind the contract if suit is brought prior to closing on the sale. Such statements or information may include, but are expressly not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising. In a suit pursuant to such a cause of action, the prevailing party is entitled to costs and reasonable attorneys' fees.

This bill provides that a person has no cause of action for oral representations by a developer, or for information not contained in the developer's promotional material, including, but not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising. The bill also requires that a form disclaimer to this effect be conspicuously included in contracts for the sale of condominium units by developers.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

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

This bill could be described as diminishing personal responsibility because it immunizes certain entities against causes of action for which they might currently be liable.

B. EFFECT OF PROPOSED CHANGES:

Section 1: Prelitigation Disclosure

Neither ch. 718, F.S., the Condominium Act, nor any other current law, requires that any specific procedure be followed before a condominium association may bring a lawsuit.

Proposed Changes

This bill creates a new s. 718.3027, F.S., requiring certain disclosure procedures before a condominium association may bring certain types of lawsuits. Under this bill, before a condominium association may bring a suit where the amount in controversy exceeds $100,000 and does not involve a title dispute or the collection of a fee or assessment, the association must provide each unit owner other than the developer with a "Litigation Disclosure Notice" in a standard format to be adopted by rule promulgated by the Department of Business and Professional Regulation's Division of Florida Land Sales, Condominiums and Mobile Homes ("the Division"). The Litigation Disclosure Notice must inform each recipient of:

- the basis for the contemplated litigation;
- the professional qualifications of the person making the allegations supporting the claim;
- the response of the adverse party and whether the adverse party has refused or offered to perform remedial work;
- efforts made to mediate or resolve the claim;
- projected attorney's fees, expert fees, and other costs of the proposed litigation;
- the probability of success;
- the probability of collecting on a judgment from a successful claim; and
- the probability of the association being liable for attorneys' fees and costs associated with the proposed litigation.

Under this bill, litigation based on the matter described in a Litigation Disclosure Notice may not be commenced unless approved in advance by a majority of the unit owners other than the developer, or by a greater majority if required by the declaration of condominium. The adverse party may be excluded from an association meeting to consider the litigation in the Litigation Disclosure Notice, and the adverse party's units do not count against the quorum requirement. If the developer is a party, developer-appointed directors may similarly be excluded from a board meeting.

The Litigation Disclosure Notice must state in conspicuous type on the top of its first page: THIS DOCUMENT HAS BEEN PREPARED BY THE ASSOCIATION AND ITS ATTORNEYS IN ANTICIPATION OF LITIGATION, AND IS A PROTECTED LAWYER-CLIENT COMMUNICATION.

This bill specifies that a Litigation Disclosure Notice is confidential, exempt from discovery by a developer, and inadmissible in any trial or hearing. Confidentiality may be waived only by the association's board, not by a unit owner.

Section 2: Transfer of Association Control

Section 718.301, F.S., provides that condominium unit owners gradually acquire a greater percentage of the directorships on a condominium association's board from the developer as units are sold. Under s. 718.301(1), F.S., in pertinent part:

> 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:
>
> (a) Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
>
> (b) Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
>
> (c) 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;
>
> (d) 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
>
> (e) 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.

Pursuant to s. 718.301(4), F.S., when the unit owners obtain a majority of the seats on a condominium association's board, the unit owners assume control of the association from the developer. Section 718.301(5), F.S., provides that until the developer relinquishes control of the association, it is liable to third parties for any violation of ch. 718, F.S., the Condominium Act, or rules implementing it.

Proposed Changes

This bill amends s. 718.301, F.S., to provide that actions taken by board members appointed by the developer are considered actions of the developer, and the developer is responsible to the association and its members for all such actions.

Section 3: Developer Disclosure Prior to Sale

Under s. 718.503, F.S., contracts for the sale of condominium units must include certain specified disclosures to the prospective purchaser. These disclosures vary according to whether the unit is being sold by the developer or by a current unit owner. When sold by a developer, s. 718.503(1)(a)2., F.S., currently requires that the following caveat appear in conspicuous type on the first page of the contract:

ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT AND THE DOCUMENTS REQUIRED BY SECTION 718.503, FLORIDA STATUTES, TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE.

Proposed Changes

This bill adds the following additional language to the caveat required by s. 718.503(1)(a)2., F.S., to be included in conspicuous type on the first page of a contract for the sale of a condominium unit by a developer:

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 CONTRACT OR IN THE PROSPECTUS. A PURCHASER MAY MAKE A CLAIM OR INSTITUTE A CAUSE OF ACTION AGAINST THE DEVELOPER ONLY FOR THE PURCHASER'S RELIANCE ON THE TERMS OF THIS CONTRACT OR ON MATTERS SET FORTH IN THE PROSPECTUS.

This language is a disclosure of substantive legal changes made in Section 4; see below.

Section 4: False and Misleading Information

Under s. 718.506(1), F.S., a person who pays anything of value toward the purchase of a condominium unit in reasonable reliance upon a material statement or information that is false or misleading published by or under the authority of the developer has a cause of action for damages, as well as a cause of action to rescind the contract if suit is brought prior to closing on the sale. Such statements or information may include, but are expressly not limited to, a prospectus, the items required as exhibits to a prospectus, brochures, and newspaper advertising. In a suit pursuant to such a cause of action, the prevailing party is entitled to costs and reasonable attorneys' fees.[1]

Proposed Changes

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

C. SECTION DIRECTORY:

Section 1. Creates s. 718.3027, F.S., requiring certain disclosure procedures before a condominium association may bring certain types of lawsuits.

Section 2. Amends s. 718.301, F.S., to provide that actions taken by board members appointed by the developer are considered actions of the developer, and that the developer is responsible to the association and its members for all such actions.

Section 3. Amends s. 718.503, F.S., to require additional disclosures by developers in contracts for the sale of condominium units.

Section 4. Amends s. 718.506, F.S., to provide for the lack of a cause of action for reliance on certain information.

[1] *See* s. 718.506(2), F.S.

Section 5. Provides an effective date of July 1, 2004.

II. 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:

The disclosures in this bill's required Litigation Disclosure Notice may require more extensive investigation by associations before they file suit. The fiscal impact, if any, is unknown.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   Access to Courts

   Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[2] Because this bill immunizes developers from liability for certain false or misleading statements, it is possible in some cases that it may violate this access to courts provision.

[2] *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.

In *Kluger v. White*,[3] the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded $550.[4] The court determined that the statute violated the access to courts provision of the state constitution, holding that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[5] Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision of the state constitution.

The court applied the *Kluger* test in *Smith v. Department of Insurance*.[6] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages.[7] The cap on damages was challenged on the basis that it violated the access to courts provision of the state constitution. The Florida Supreme Court found that a right to sue for unlimited noneconomic damages existed at the time the constitution was adopted.[8] The *Smith* court held that the Legislature had not provided an alternative remedy or commensurate benefit in exchange for limited the right to recover damages and noted that the parties did not assert that an overwhelming public necessity existed.[9] Accordingly, the court held that the $450,000 cap on noneconomic damages violated the access to courts provision of the Florida Constitution.

By immunizing developers against suits based on reasonable reliance upon certain false or misleading statements, this bill may, at least in some cases, abolish causes of action which predate the adoption of the access to courts provision in the 1968 state constitution, such as, for example, the common-law cause of action for conversion by fraud; thus a litigant might argue that this bill violates the state constitution's guarantee of access to the courts. Applying the *Kluger* test, it does not appear that this bill provides any alternative remedy to bringing such suits, but simply extinguishes the causes of action they are premised on. Therefore, whether a court would find that this bill, as applied in some cases, violates the access to courts provision appears to hinge on whether the Legislature demonstrated both an overwhelming public necessity and an absence of any alternative means to address that necessity.

Impairment of Contracts

Both Article I, section 10 of the United States Constitution and Article I, section 10 of the Florida Constitution forbid state impairment "of the obligation of contracts."[10] Florida courts have generally treated the requirements of the state and federal Contract Clauses as identical, although they have suggested that the provision in the state constitution is probably stronger.[11]

Documents creating some private legal entities have been treated as contracts under the Contracts Clause since at least 1819. That year, in *Trustees of Dartmouth College v. Woodward*,[12] the Supreme Court of the United States ruled that, by attempting to transform Dartmouth College into a

[3] 281 So. 2d 1 (Fla. 1973).
[4] *See* ch. 71-252, s. 9, L.O.F.
[5] *See Kluger* at 4.
[6] 507 So. 2d 1080 (Fla. 1987).
[7] *See* ch. 86-160, s. 59, L.O.F.
[8] *See Smith* at 1087.
[9] *See id.* at 1089.
[10] *See generally* 16 AM. JUR. 2D CONSTITUTIONAL LAW §§ 708-744; 10 FLA. JUR. 2D CONSTITUTIONAL LAW §§ 348-373.
[11] *See, e.g.*, *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980) (accepting as persuasive an interpretation of the federal Contract Clause by the Supreme Court of the United States in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)).
[12] 17 U.S. (4 Wheat.) 518 (1819).

public university, the State of New Hampshire had unconstitutionally impaired the obligations of contract—obligations the state had inherited as successor-in-interest to the British Crown, which granted Dartmouth's corporate charter in 1769.

Under longstanding case law in this state, a corporate charter or articles of incorporation, such as a declaration of condominium, becomes a contract between the shareholders of the corporation and the state upon being granted—a contract governed by the law in force at the time it was made.[13] However, courts have also ruled that the Legislature's express reservation, in s. 607.0102, F.S., of its power to amend or repeal the Florida Business Corporations Act, prevents a corporation from asserting unalterable contractual rights in its charter or articles of incorporation.[14] Because ch. 718, F.S., the Condominium Act, does not contain such a reservation, it is possible that amending this chapter to limit vested rights, such as the power to sue and be sued,[15] may only be prospective in nature, i.e., such amendments might only apply against condominium associations created after this bill's effective date. Declaration of condominium typically include language to the effect that they shall be governed by the Condominium Act as the Legislature may from time to time amend it (a "reservation clause");[16] however, there is nothing requiring such language.

Applying this bill's limitation on the right to sue to declarations of condominium filed before its effective date, and lacking reservation clauses, may raise concerns about legislative impairment of these declarations as contracts between the association and the state, which might thus be held subject to prior law. Courts use a balancing test to determine whether particular legislation violates the Contract Clause, measuring the severity of contractual impairment against the importance of the interest advanced by the regulation, and also looking at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.[17]

B. RULE-MAKING AUTHORITY:

This bill authorizes the Department of Business and Professional Regulation's Division of Florida Land Sales, Condominiums and Mobile Homes to develop a form by rule for the Litigation Disclosure Notice required by this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

[13] *See Marion Mortgage Co. v. State ex rel. Davis*, 145 So. 222 (Fla. 1932); *Ex parte Amos*, 114 So. 760 (Fla. 1927); *Columbia County Comm'rs v. King*, 13 Fla. 451 (1869).
[14] *See Aztec Motel, Inc. v. State*, 251 So.2d 849 (Fla. 1971); *Hopkins v. The Vizcayans*, 582 So.2d 689 (Fla. 3d DCA 1991).
[15] *See* s. 718.111(2), F.S.
[16] *See, e.g.*, *Coral Isle East Condominium v. Snyder*, 395 So.2d 1204 (Fla. 3d DCA 1981).
[17] *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Ruhl v. Perry*, 390 So.2d 353 (Fla. 1980); *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980); *Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982).