

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Regulated Industries

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BILL: CS/SB 1462

INTRODUCER: Regulated Industries Committee and Senator Stargel

SUBJECT: Residential Properties

DATE: March 20, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1462 relates to the liability of condominium associations, homeowners' associations, and persons, including mortgageholders, who acquire title to a condominium unit or a parcel for unpaid assessments.

For condominium associations, the bill provides that the association is not considered a previous owner, for purposes of the liability of the previous unit owner for unpaid assessments. An association that acquires title to a unit through foreclosure, or by a deed in lieu of foreclosure, would not be liable for unpaid assessments that came due before the association acquired the title to the unit. The bill would limit the liability of the unit owner to any assessments that came due before the association acquired title. This limitation of liability is comparable to that provided for homeowners' associations in current law in s. 720.3085(2)(b), F.S.

For condominium associations and homeowners' associations, the bill increases the liability of a first mortgagee, or its successor or assignee, who acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure. It increases the first mortgagee's liability to include the amount of unpaid common expenses and regular periodic assessments and other costs. It also increases the liability period from the 12 months to the 24 months immediately preceding the acquisition of title.

The bill provides that 24-month period of liability is for the period immediately preceding the acquisition of title by the first mortgageholder or the acquisition of title by the association, whichever occurs first.

The bill also increases the alternative liability limitation from 1 percent to 2 percent of the original mortgage amount. However, this liability applies to a unit or parcel if the titleholder was the first mortgagee who acquired title by foreclosure.

The bill limits the amount of attorney fees for which the first mortgagee or his or her successor or assignee who acquires title to a unit by foreclosure or by deed in lieu of foreclosure. The bill limits liability for attorney fees to \$4,000, unless a court of competent jurisdiction finds exceptional circumstances that justify a greater amount.

For condominium associations, the bill requires that the person who acquires title must pay, within 30 days after transfer of title, late fees and interest charges. Current law requires only the payment of the unpaid assessments.

## II. Present Situation:

### Condominium

A condominium is a “form of ownership of real 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.”<sup>1</sup> A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.<sup>2</sup> A declaration is like a constitution in that it:

Strictly governs the relationships among condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.<sup>3</sup>

A declaration “may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.”<sup>4</sup> A declaration of condominium may be amended as provided in the declaration.<sup>5</sup> If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.<sup>6</sup> Condominiums are administered by a board of directors referred to as a “board of administration.”<sup>7</sup>

Section 718.103(8), F.S., defines the term “common elements” to mean the portions of the condominium property not included in the units.

Section 718.103(12), F.S., defines the term “condominium parcel” to mean a unit, together with the undivided share in the common elements appurtenant to the unit.

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<sup>1</sup> Section 718.103(11), F.S.

<sup>2</sup> Section 718.104(2), F.S.

<sup>3</sup> *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

<sup>4</sup> Section 718.104(5), F.S.

<sup>5</sup> See s. 718.110(1)(a), F.S.

<sup>6</sup> Section 718.110(1)(a), F.S. *But see*, s. 718.110(4) and (8), F.S., which provides exceptions to the subject matter and procedure for amendments to a declaration of condominium.

<sup>7</sup> Section 718.103(4), F.S.

Section 718.103(19), F.S., defines the term “limited common elements” to mean those common elements that are reserved for the use of a certain unit or units to the exclusion of all other units, as specified in the declaration.

### **Homeowners’ Associations**

Florida law provides statutory recognition to corporations that operate residential communities in this state and procedures for operating homeowners’ associations, and protects the rights of association members without unduly impairing the ability of such associations to perform their functions.<sup>8</sup>

A “homeowners’ association” is defined as a:

Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.<sup>9</sup>

Homeowners’ associations are also governed by ch. 607, F.S., relating to for-profit corporations, or by ch. 617, F.S., relating to not-for-profit corporations.<sup>10</sup>

Section 720.301(4), F.S., defines the terms "declaration of covenants," or "declaration," to mean:

a recorded written instrument in the nature of covenants running with the land which subjects the land comprising the community to the jurisdiction and control of an association or associations in which the owners of the parcels, or their association representatives, must be members.

Homeowners’ associations are administered by a board of directors whose members are elected.<sup>11</sup> The powers and duties of homeowners’ associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents.<sup>12</sup> The officers and members of a homeowners’ association have a fiduciary relationship to the members who are served by the association.<sup>13</sup>

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<sup>8</sup> See s. 720.302(1), F.S.

<sup>9</sup> Section 720.301(9), F.S.

<sup>10</sup> Section 720.302(5), F.S.

<sup>11</sup> See ss. 720.303 and 720.307, F.S.

<sup>12</sup> See ss. 720.301 and 720.303, F.S.

<sup>13</sup> Section 720.303(1), F.S.

## State Regulation of Homeowners' Associations

Unlike condominium and cooperative associations,<sup>14</sup> which are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation (department), homeowners' associations are not regulated by a state agency.

Section 720.302(2), F.S., expresses the legislative intent regarding the regulation of homeowners' associations:

The Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations. However, in accordance with s. 720.311, the Legislature finds that homeowners' associations and their individual members will benefit from an expedited alternative process for resolution of election and recall disputes and presuit mediation of other disputes involving covenant enforcement and authorizes the department to hear, administer, and determine these disputes as more fully set forth in this chapter. Further, the Legislature recognizes that certain contract rights have been created for the benefit of homeowners' associations and members thereof before the effective date of this act and that ss. 720.301-720.407 are not intended to impair such contract rights, including, but not limited to, the rights of the developer to complete the community as initially contemplated.

The number of homeowners' associations or persons living in homeowners' associations in Florida is unknown. Although homeowners' associations are required to file articles of incorporation with the Division of Corporations (division) in the Department of State, the division cannot identify corporations that are homeowners' associations under ch. 720, F.S.<sup>15</sup> However, a greater understanding of the number of homeowners' association may become available in consequence of s. 720.303(13), F.S., which requires community association managers, or the association if there is no manager, to report the following information to the division:

- The legal name of the association;
- The Federal Employee Identification Number of the association;
- The mailing and physical addresses of the association;
- The number of parcels; and
- The total amount of revenues and expenses from the annual budget of the association.

For associations in which the developer retains control, the following additional information is required:

- The legal name of the developer;
- The mailing address of the developer; and
- The number of parcels the developer owns as of the date of reporting.

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<sup>14</sup> See chs. 718 and 719, F.S., respectively.

<sup>15</sup> Homeowners' Association Task Force, *Final Report of the Homeowners' Association Task Force*, February 2004, page 5. A copy of the report is available on the internet at <http://www.ccfj.net/DBPRTFfinalreport.pdf> (last visited March 15, 2014).

This reporting requirement became effective on November 22, 2013.<sup>16</sup> The reporting requirement is a continuing obligation on each association to report until the required information is submitted. An association is required to submit the required information only once. The department is required to prepare an annual report of the data reported pursuant to this subsection and present it to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 1, 2013, and each year thereafter.<sup>17</sup>

This requirement will expire on July 1, 2016, unless reenacted by the Legislature.<sup>18</sup>

### **Division of Florida Condominiums, Timeshares, and Mobile Homes**

The division is afforded complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., and ch. 719, F.S., with respect to condominium and cooperative associations that are still under developer control.<sup>19</sup> The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit owners, the division's jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.<sup>20</sup>

In regards to homeowners' associations, the division's authority is limited to arbitration of recall election disputes.<sup>21</sup>

### **Condominium – Assessments and Foreclosures**

Section 718.103(1), F.S., defines an "assessment" as the "share of the funds which are required for the payment of common expenses, which from time to time is assessed against the unit owner." Section 718.103(24), F.S., defines a "special assessment" to mean "any assessment levied against a unit owner other than the assessment required by a budget adopted annually."

A unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.<sup>22</sup>

Section 718.116(1)(b), F.S., provides that if a first mortgagee, e.g., the mortgage lending financial institution, or its successor or assignee, acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt,

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<sup>16</sup> Section 720.303(13), F.S.

<sup>17</sup> Section 720.303(13)(e), F.S.

<sup>18</sup> Section 720.303(12)(g), F.S.

<sup>19</sup> Section 718.501(1), F.S., and s. 719.501(1), F.S., respectively.

<sup>20</sup> Section 718.501(1), F.S. See Peter M. Dunbar, *The Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 12 ed. (2010-2011) s. 14.2.

<sup>21</sup> See s. 720.303(10)(d), F.S.

<sup>22</sup> Section 718.116(1), F.S.

whichever is less. However, this limitation applies only if the first mortgagee is joined by the association as a defendant in the foreclosure action. This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding. A first mortgagee who acquires title to a foreclosed condominium unit is exempt from liability for all unpaid assessments if the first mortgage was recorded prior to April 1, 1992.<sup>23</sup>

The successor or assignee, in respect to the first mortgagee, includes only a subsequent holder of the first mortgage.

Section 718.116(3), F.S., provides for the payment of assessments, including late fees and interest. The subsection provides:

Assessments and installments on assessments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest accrues at the rate of 18 percent per year. If provided by the declaration or bylaws, the association may, in addition to such interest, charge an administrative late fee of up to the greater of \$25 or 5 percent of each delinquent installment for which the payment is late. Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to chapter 687 or s. 718.303(4).

### **Homeowners' Associations – Assessments and Foreclosures**

Section 720.301(1), F.S., defines an “assessment” or “amenity fee” to mean:

a sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

A parcel owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.<sup>24</sup>

Section 720.3085(1), F.S., limits the priority of any lien, mortgage, or certified judgment of record on July 1, 2008, to the priority it had before July 1, 2008.

Section 720.3085(2), F.S., provides a limitation on the liability of a first mortgagee, e.g., the mortgage lending financial institution, for unpaid assessments by a parcel owner that is similar to

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<sup>23</sup> Section 718.116(1)(e), F.S.

<sup>24</sup> Section 720.3085(2)(b), F.S.

that provided in s. 718.116, F.S., for condominiums. If a first mortgagee acquires title to a parcel by foreclosure or by deed in lieu of foreclosure, the first mortgagee's liability for unpaid assessments is limited to the amount of assessments that came due during the 12 months immediately preceding the acquisition of title or one percent of the original mortgage debt, whichever is less. However, this limitation applies only if the first mortgagee is joined by the association as a defendant in the foreclosure action. This gives the association the right to defend its claims for unpaid assessments in the foreclosure proceeding.

Section 720.3085(3)(b), F.S., provides that any payment received by an association and accepted must be applied to any interest accrued, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment.

### **Liability of the Association as an Owner**

In *Aventura Management, L.L.C., v. Piaggia Ocean Condominium Association, Inc.*,<sup>25</sup> the Third District Court of Appeal held that a condominium association that had acquired title to a unit through foreclosure, was a previous owner for purposes of liability under s. 718.116(1), F.S. Consequently, the present owner of the unit, who had acquired the title from the association, was not liable for the unpaid assessments for time before the association acquired title.

Section 720.3085(2)(d), F.S., provides that a homeowners' association, or its successor or assignee, that acquires title to a parcel through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other homeowners' association or condominium association, as defined in s. 718.103(2), F.S., or s. 720.301(9), F.S., which holds a superior lien interest on the parcel.

### **Fannie Mae and Freddie Mac**

The underwriting standards of the Federal National Mortgage Association (Fannie Mae)<sup>26</sup> requires that mortgage lenders consider the state's liability limitations for common expense assessments, which Fannie Mae refers to as "permitted priority of common expense assessments."<sup>27</sup> Fannie Mae requires that mortgage lenders consider the "permitted priority" for common assessment when determining the eligibility of a mortgage loan secured by a condominium unit or parcel in a homeowners' association. Fannie Mae's policy supports a maximum six-month limited priority for common expense assessments. Fannie Mae considers the six-month period to be clear and provide a discrete and measurable risk exposure for mortgage lending on units and homeowners' association projects. However, Fannie Mae's policy permits underwriting in states that have a priority limit of greater than six months if the state's limit was in effect on January 14, 2014. Fannie's Mae's policy permits lenders to make loans in in Florida with its 12-month "permitted priority." The governing documents of the condominium

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<sup>25</sup> *Aventura Management, L.L.C., v. Piaggia Ocean Condominium Association, Inc.*, 105 So. 3d 637 (Fla. 3<sup>rd</sup> D.C.A. 2013).

<sup>26</sup> Fannie Mae is a leading source of residential mortgage credit in the U.S. secondary market. It guarantees and purchases loans from mortgage lenders. See <http://www.fanniemae.com/portal/about-us/company-overview/about-fm.html> (Last visited March 18, 2014).

<sup>27</sup> Fannie Mae, *Selling Guide Announcement SEL-2014-02, Priority of Common Assessments*, January 14, 2014. A copy is available at: <https://www.fanniemae.com/content/announcement/sel1402.pdf> (Last visited March 18, 2014).

or homeowners' association must evidence that the unit or parcel do not exceed the 12-month priority limit.

The servicing guidelines of the Federal Home Loan Mortgage Corporation (Freddie Mac),<sup>28</sup> require that its servicers to pay any community association regular assessments that are assessed prior to the foreclosure sale date. For Florida mortgages with notes dated prior to February 14, 2014, Freddie Mac will continue to reimburse servicers for community association regular assessments in an amount equal to the lesser of:

- The actual amount of regular assessments advanced by the servicer;
- The maximum amount of regular assessments that, pursuant to the project declaration or bylaws, would take priority over the mortgage; or
- The maximum amount of regular assessments that, pursuant to applicable state statute, would take priority over the mortgage.

For mortgages with notes dated on or after February 14, 2014, Freddie Mac will reimburse its servicers for community association regular assessments in an amount equal to the lesser of:

- The actual amount advanced, or
- Twelve months or any lesser amount provided by state statute.<sup>29</sup>

Freddie Mac refers to Florida and Connecticut, which has a lien priority of nine months, as “super lien states.”<sup>30</sup>

### III. Effect of Proposed Changes:

#### Condominiums

The bill amends s. 718.116(1)(a), F.S., to provide that, for purposes of the liability of the previous unit owner for unpaid assessments, the association is not considered a previous owner. An association that acquires title to a unit through foreclosure, or by a deed in lieu of foreclosure, would not be liable for unpaid assessments that came due before the association acquired the title to the unit. The bill would limit the liability of the unit owner to any assessments that came due before the association acquired title. This limitation of liability is comparable to that provided for homeowners' associations in s. 720.3085(2)(b), F.S.

The bill also provides that the present unit owner's payments must be applied consistent with s. 718.116(3), F.S.

The bill amends s. 718.116(1)(b)1.a., F.S., to increase the liability of a first mortgagee, or its successor or assignee, who acquires title to a condominium unit by foreclosure or by deed in lieu of foreclosure. It increases the first mortgagee's liability to include the amount of unpaid

<sup>28</sup> Freddie Mac is a public government-sponsored enterprise. It is a leading source of residential mortgage credit in the U.S. secondary market. It guarantees and purchases loans from mortgage lenders. It finances one out of every four home loans. See [http://www.freddie.com/corporate/company\\_profile/faqs/?intcmp=AFCPFA](http://www.freddie.com/corporate/company_profile/faqs/?intcmp=AFCPFA) (Last visited March 19, 2014).

<sup>29</sup> Freddie Mac, Bulletin 2014, February 14, 2014. A copy is available at: <http://www.freddie.com/singlefamily/guide/bulletins/pdf/bll1402.pdf> (Last visited March 20, 2014).

<sup>30</sup> *Id.* However, Connecticut is limited to 9 months.



common expenses and regular periodic assessments and other costs. It also increases the liability period from the 12 months to the 24 months immediately preceding the acquisition of title.

The bill also provides that 24-month period of liability is for the period immediately preceding the acquisition of title by the first mortgageholder or the acquisition of title by the association, whichever occurs first.

The bill also amends s. 718.116(1)(b)1.b., F.S., to increase the alternative liability limitation from 1 percent to 2 percent of the original mortgage amount.

The bill creates s. 718.116(1)(b)4., F.S., to limit the amount of attorney fees for which the first mortgagee or his or her successor or assignee who acquires title to a unit by foreclosure or by deed in lieu of foreclose. The bill limits liability for attorney fees to \$4,000, unless a court of competent jurisdiction finds exceptional circumstances that justify a greater amount.

The bill amends s. 718.116(1)(c), F.S., to include other charges authorized by s. 718.116(3), F.S., which include late fees and interest charges, among the amounts owed to the association that the person acquiring title must pay after acquiring title. Current law requires only the payment of the unpaid assessments.

### **Homeowners' Association**

The bill amends s. 720.3085(2)(a), F.S., to provide that the parcel owner's payments must be applied consistent with s. 720.3085(3)(b), F.S. It also amends s. 720.3085(2)(b) F.S., to provide that the present parcel owner's payments must be applied consistent with s. 720.3085(3)(b), F.S.<sup>31</sup>

The bill amends s. 720.3085(2)(c)1.a., F.S., to increase the liability of a first mortgagee, or its successor or assignee, who acquires title to parcel by foreclosure or by deed in lieu of foreclosure. It increases the first mortgagee's liability to include the amount of unpaid common expenses and regular periodic assessments and other costs. It also increases the liability period from the 12 months to the 24 months immediately preceding the acquisition of title.

The bill also provides that 24-month period of liability is for the period immediately preceding the acquisition of title by the first mortgageholder or the acquisition of title by the association, whichever occurs first.

The bill also amends s. 720.3085(2)(c)1.b., F.S., to increase the alternative liability limitation from 1 percent to 2 percent of the original mortgage amount if the titleholder was the first mortgagee who acquired title by foreclosure.

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<sup>31</sup> Section 720.3085(3)(b), F.S., provides that "any payment received by an association and accepted shall be applied first to any interest accrued, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. This paragraph applies notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment. A late fee is not subject to the provisions of chapter 687 and is not a fine."

The bill creates s. 720.3085(2)(c)2., F.S., to limit the amount of attorney fees for which the first mortgagee or his or her successor or assignee who acquires title to a unit by foreclosure or by deed in lieu of foreclosure. The bill limits liability for attorney fees to \$4,000, unless a court of competent jurisdiction finds exceptional circumstances that justify a greater amount.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 718.116 and 720.3085.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Regulate Industries on March 20, 2014:**

The committee substitute (CS) amends s. 718.116(1)(b)1.a., F.S., to replace the term “mortgageholder” with the term “mortgagee.”

The CS amends s. 718.116(1)(b)1.b., F.S., to provide that the liability limitation of 2 percent of the original mortgage amount applies if the titleholder was the first mortgagee who acquired title by foreclosure to conform with the same provisions for liens in homeowners’ associations in s. 720.3085(2)(c)2., F.S.

- B. **Amendments:**

None.