

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.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 1466

INTRODUCER: Judiciary Committee; Regulated Industries Committee; and Senators Lee and Evers

SUBJECT: Residential Communities

DATE: April 9, 2014

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1466 expands the services that may be performed by community association managers and community association management firms on behalf of condominiums, cooperatives, and homeowners' associations. The bill authorizes community association managers and management firms to perform duties in 12 categories that are currently not provided in statute. However, the bill also specifies several circumstances in which a community association manager or community association management firm may be liable for monetary damages for a breach or failure to perform a duty.

The bill provides a release of lien form, a notice of intent to record a claim of lien form, and a delinquent assessment form for condominium, cooperative, and homeowners' associations. The bill also provides a notice of contest of lien form for cooperative associations.

The bill provides that the claim of lien of a cooperative association is not effective 1 year after the claim of lien is recorded unless, within that time, an action to enforce the lien is commenced. It provides that the 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. This conforms the requirements for a claim of lien by cooperative associations with the claim of lien requirements for condominium associations.

II. Present Situation:

Community Association Management

Community association managers (CAMs) are licensed and regulated by the Department of Business and Professional Regulation pursuant to ch. 468, F.S. According to the department, 16,312 individuals are currently licensed as community association managers as well as 1,612 firms.¹

Section 468.431(2), F.S., defines “community association management” to mean:

any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of \$100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

A license is not required for persons who perform clerical or ministerial functions under the direct supervision and control of a licensed manager or who only perform the maintenance of a community association and do not assist in any of the management services.²

Community association managers are regulated by the seven-member Regulatory Council of Community Association Managers. Five of the members must be licensed CAMs, one of whom must be a CAM for a timeshare. The other two must not be CAMs. Members are appointed to 4-year terms by the Governor and confirmed by the Senate.³

To become licensed as a CAM, a person must apply to the department to take the licensure examination and submit to a background check. Upon determination that the applicant is of good moral character, the applicant must attend a department-approved in-person training prior to taking the examination.⁴ Community association managers must successfully complete an exam and pay a fee to become licensed. They must also complete continuing education hours as approved by the council to maintain their licenses.⁵

¹ E-mail from Daniel Olson, Deputy Director, Office of Legislative Affairs, Department of Business and Professional Regulation (April 2, 2014) (on file with the Senate Committee on Judiciary).

² Section 468.431(2), F.S.

³ Section 468.4315(1), F.S.

⁴ Section 468.433, F.S.

⁵ Sections 468.4336 and 468.4337, F.S.

Unlicensed Practice of Law

The Florida Bar has a Standing Committee that focuses on the unlicensed practice of law.⁶ The committee is authorized to issue advisory opinions to individuals or organizations seeking guidance as to whether certain activities constitute the unlicensed practice of law. In 1995, a CAM requested an advisory opinion to determine if certain practices constituted the unlicensed practice of law. The committee held hearings and issued a proposed advisory opinion which was then reviewed by the Florida Supreme Court.

The court issued its opinion in 1996 and determined that performance of the following activities by CAMs were ministerial in nature and did not constitute the unlicensed practice of law because they did not require significant legal expertise and interpretation to complete; completing the Secretary of State form CR2EO45 (Statement of Change of Registered Office or Registered Agent or Both for Corporations), and drafting certificates of assessments, first notices of date of election, second notices of date of election, ballots, written notices of annual meeting, annual meeting or board meeting agendas, affidavits of mailing notices of board meetings, and board meeting agendas.⁷

The standing committee determined that the following other duties commonly performed by CAMs did constitute the unlicensed practice of law:

- Completing department form BPR 33-032 (Frequently Asked Question and Answers Sheet);
- Drafting a Claim of Lien, Satisfaction of Claim of Lien, and Notice of Commencement form;
- Determining the timing, method, and form of giving notice of meetings;
- Determining the votes necessary for certain actions which would entail interpretation of certain statutes and rules; and
- Answering a community association's question about the application of law to a matter being considered or advising a community association that an action or course of action may not be authorized by law or rule.⁸

The Standing Committee determined the following actions exist in a grey area and may or may not involve the unlicensed practice of law, depending on the circumstances:

- Modifying form BPR 33-033 (Limited Proxy Form);
- Drafting a limited proxy form; and
- Drafting documents required to exercise the community association's right of approval or right of first refusal on the sale or lease of a parcel.⁹

The Supreme Court noted that there is no generally comprehensive definition of what constitutes the unlicensed practice of law, and relied on the following to guide its opinion:

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the

⁶ See Florida Supreme Court, Standing Committees, Unlicensed Practice of Law, at: <https://www.floridabar.org/DIVEXE/BD/CMStanding.nsf/2021e58ed0c7505585256e45004b060d/494974ec1e28b2a785256c5b0055481e?OpenDocument> (Last visited March 19, 2014).

⁷ *The Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119, 1123 (Fla. 1996).

⁸ *Id.*, at 1123.

⁹ *Id.*, at 1124.

giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.¹⁰

On May 15, 2013, the Standing Committee, in response to a 2012 request for an advisory opinion regarding CAMs, proposed a subsequent advisory opinion to clarify the Court's earlier opinion regarding the unlicensed practice of law. The proposed advisory opinion recommended that the 1996 Court opinion remain in effect, but also requested that the Court consider other common practices by CAMs that were not fully addressed in the 1996 opinion. The Florida Supreme Court has not issued an opinion regarding the Standing Committee's proposed advisory opinion.

Specifically, the Standing Committee's proposed advisory opinion suggests that the following acts, when prepared by a nonlawyer, should constitute the unlicensed practice of law:

- Drafting amendments to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;
- Determining the number of days to be provided for statutory notice;
- Modifying limited proxy forms promulgated by the state if there is any discretion involved;
- Preparing documents concerning the right of the association to approve new prospective owners, if the preparation requires the exercise of discretion or the interpretation of statutes or legal documents;
- Determining the votes needed to pass a proposition or amendment to recorded documents if it requires the interpretation and application of statutes and governing documents;
- Determining the number of owners' votes needed to establish a quorum, if it requires the interpretation and application of statutes and governing documents;
- Preparing construction lien documents;
- Preparing, reviewing, drafting, and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;
- Making a legal determination of who is the owner of a property that is to receive a statutory pre-lien letter; and
- Any activity that requires statutory or case law analysis to reach a legal conclusion.¹¹

Condominiums

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."¹² A condominium is

¹⁰ *Id.* at 1123, quoting *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

¹¹ The Florida Bar Standing Committee on the Unlicensed Practice of Law, FAO #2012-2, *Activities of Community Association Managers*, Proposed Advisory Opinion, May 15, 2013. (See pages 11-21.)

¹² Section 718.103(11), F.S.

created by recording a declaration of condominium in the public records of the county where the condominium is located.¹³ 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.¹⁴

A declaration “may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.”¹⁵ A declaration of condominium may be amended as provided in the declaration.¹⁶ 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.¹⁷ Condominiums are administered by a board of directors referred to as a “board of administration.”¹⁸

Section 718.116(5)(a), F.S., provides that the claim of lien is not effective 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. It provides that the 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel.

Cooperative Associations

Section 719.103(12), F.S., defines a “cooperative” to mean:

That form of ownership of real property wherein legal title is vested in a corporation or other entity and the beneficial use is evidenced by an ownership interest in the association and a lease or other muniment of title or possession granted by the association as the owner of all the cooperative property.

A cooperative differs from a condominium because, in a cooperative, no unit is individually owned. Instead, a cooperative unit’s occupants receive an exclusive right to occupy the unit. The cooperative holds the legal title to the unit and all common elements. The cooperative association may assess costs for the maintenance of common expenses.¹⁹

Section 719.108(4), F.S., provides that the cooperative association has a lien on each cooperative parcel for any unpaid rents and assessments, plus interest, and any authorized administrative late fees. If the cooperative documents attorney’s fees, the lien also secures reasonable attorney’s fees incurred by the association incident to the collection of the rents and assessments or

¹³ Section 718.104(2), F.S.

¹⁴ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003) (internal citations omitted).

¹⁵ Section 718.104(5), F.S.

¹⁶ *See* s. 718.110(1)(a), F.S.

¹⁷ 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.

¹⁸ Section 718.103(4), F.S.

¹⁹ *See* ss. 719.106(1)(g) and 719.107, F.S.

enforcement of the lien. The lien is effective from and after recording a claim of lien in the public records in the county in which the cooperative parcel is located which states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. The association's lien expires if a claim of lien has not been filed within 1 year after the date the assessment was due. The lien also does not continue for longer than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien has been commenced. The association must wait 30 days after the date a notice of intent to file a lien has been delivered to the owner before it can file a lien against a cooperative parcel.

Homeowners' Associations

The purpose of ch. 720, F.S., is to give statutory recognition to corporations not for profit that operate residential communities in this state. Chapter 720, F.S., also provides procedures for operating homeowners' associations and for protecting the rights of association members without unduly impairing the ability of associations to perform their functions.²⁰

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.²¹

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.²²

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.²³ 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.²⁴ The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.²⁵

²⁰ See s. 720.302(1), F.S.

²¹ Section 720.301(9), F.S.

²² Section 720.302(5), F.S.

²³ See ss. 720.303 and 720.307, F.S.

²⁴ See ss. 720.301 and 720.303, F.S.

²⁵ Section 720.303(1), F.S.

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.²⁶ 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.²⁷ In regards to homeowners' associations, the division's authority is limited to arbitration of recall election disputes.²⁸

III. Effect of Proposed Changes:

Additional Services

The bill amends s. 468.431(2), F.S., to expand the list of duties or activities that constitute "community association management." The bill permits CAMs to provide the following additional services to residential communities:

- Determine the number of days required for statutory notices;
- Determine the amounts due the association;
- Collect amounts due to the association before filing a civil action;
- Calculate the votes required for a quorum or to approve a proposition or amendment;
- Complete forms related to the management of a community association which have been created by statute or by a state agency;
- Draft meeting notices and agendas;
- Calculate and prepare certificates of assessment and estoppel certificates;
- Respond to requests for certificates of assessment and estoppel certificates;
- Negotiate monetary or performance terms of a contract subject to approval by an association;
- Draft prearbitration demands;
- Coordinate or perform maintenance for real or personal property and other routine services involved in the operation of a community association; and
- Comply with the association's governing documents and the requirements of law as necessary to perform such practices.

Liability for Community Association Managers and Firms

A new section is created, s. 468.4334, F.S., which provides that a community association manager and a community association management firm are liable for monetary damages to the same extent as an officer or director of a nonprofit corporation as provided in s. 617.0834, F.S.²⁹

²⁶ Section 718.501(1), F.S., and s. 719.501(1), F.S., respectively.

²⁷ 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.

²⁸ See s. 720.303(10)(d), F.S.

²⁹ Section 617.0834, F.S., states, generally, that an officer or director of certain nonprofit organizations recognized under the Internal Revenue Code of 1986 is not personally liable for monetary damages to any person for certain actions or failure to take actions regarding organizational management or policy unless he or she breached or failed to perform duties as an officer

if either person or entity breached or failed to perform necessary duties and the breach or failure constitutes:

- A violation of criminal law as provided in s. 617.0834(1)(b)1.;
- A transaction from which improper personal benefit is derived, either directly or indirectly; or
- Recklessness or an act or omission that was in bad faith, with malicious purpose, or in a way that exhibits wanton and willful disregard of human rights, safety, or property.

Statutory Forms

Release of Lien Form

The bill amends ss. 718.116(5)(d), and 720.3085(1)(d), F.S., and creates s. 719.108(4)(d), F.S., to provide a release of lien form for a condominium, homeowners' association, and cooperative, respectively. It is not clear whether the "release of lien" form provided in the bill is a form "related to the management of a community association that have been created by statute or by a state agency," within the meaning of s. 468.431(2), F.S. It is also unclear whether a CAM who completes the "claim of lien" engages in an activity that constitutes the unlicensed practice of law as has been previously determined by the Florida Supreme Court in regards to the drafting of a satisfaction of a claim of lien by a CAM.³⁰ As with the claim of lien, the Supreme Court found that the drafting a satisfaction of a claim of lien required a legal description of the property when it determined that drafting the satisfaction of a claim of lien is the unlicensed practice of law. The forms in the bill also require a legal description of the property.

Delinquent Assessment Form

The bill amends ss. 718.116(6)(b), 719.108(5), and 720.3085(5), F.S., to provide a "delinquent assessment" form for condominium and homeowners' associations, respectively.

Notice of Intent to Record a Claim of Lien Form

The bill amends s. 718.121(4), 719.108(4)(a), 720.3085(4)(a), to create a "notice of intent to record a claim of lien" form. It is not clear whether the "notice of intent to record a claim of lien" form provided in the bill is a form "related to the management of a community association that have been created by statute or by a state agency," within the meaning of s. 468.431(2), F.S. It is also unclear whether a CAM who completes the claim of lien form engages in an activity that constitutes the unlicensed practice of law.

Notice of Contest of Lien Form

The bill creates s, 719.108(4)(c), F.S., to create a "notice of contest of lien" form. Current law provides a comparable "notice of contest of lien" for condominium and homeowners' associations in ss. 718.116(5)(c) and 720.3085(1)(b), respectively.

or director and that breach or failure to perform constitutes a violation of the criminal law, a transaction from which he or she derived an improper benefit, or recklessness or an act of bad faith or with malicious purpose or a manner exhibiting wanton and willful disregard of human rights, safety, or property. Please see the statute in its entirety for a complete statement of the law.

³⁰ *Id.*

Charges and Liens

Authorization

The bill amends ss. 718.116(3), 719.108(3), and 720.3085(3)(a), F.S., to permit condominium, cooperative, and homeowners' associations, respectively, to recover from the delinquent owner any reasonable charges imposed upon the association under a written contract with its management or bookkeeping company, or collection agent, incurred in connection with collecting a delinquent assessment.

Distribution of Payments

The bill amends ss. 718.116(3), 719.108(3), and 720.3085(3)(b), F.S., to include the reasonable costs of collection services contracted by an association in the schedule that assigns how an association must apply payments it receives from a delinquent owner. The bill requires that payment received by the association be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney fees incurred in collection, then to any reasonable costs for collection services contracted by the association, and then to the delinquent assessment.

Claim of Lien

The bill amends ss. 718.116(5)(b), F.S., to provide that a condominium association's claim of lien secures unpaid assessments and administrative late fees, including reasonable costs for collection services contracted by the association.

Deleting Expiration of Lien Provision

The bill amends s. 719.108(4), F.S., to delete the provision that the cooperative association's lien expires if a claim of lien has not been filed within 1 year after the date the assessment was due, and that the lien also does not continue for longer than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien has been commenced.

Application of Claim of Lien

The bill amends s. 719.108(4)(b), F.S., to provide that a cooperative association's claim of lien is not effective 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. It provides that the 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. This conforms the requirements for a claim of lien for cooperative associations with the requirements in s. 718.116(5)(b), F.S., for a claim of lien by condominium associations.

The bill provides an effective date of July 1, 2014.

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: 468.431, 718.116, 718.121, 719.108, 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/CS by Judiciary on April 8, 2014:

The committee substitute differs from the original bill by removing the newly created claim of lien forms for condominiums, cooperative associations, and homeowners' associations. A liability section is added that makes community association managers and

firms liable for monetary damages if certain events occur. Finally, a delinquent assessment form is added to the cooperative association statute that conforms the provision to the one contained in the condominium statutes.

CS by Regulated Industries on March 26, 2014:

The committee substitute (CS) differs from the bill as follows:

- The CS removes from s. 468.431(2), F.S., the authorization for CAM's to draft demand letters, pre-lien letters, and letters of intended action, and to prepare statutory construction lien documents for association projects. It also amends this section to permit CAM's to prepare certificates of assessment and estoppel certificates instead of for estoppel letters. It also permits CAM's to respond to requests for certificates of assessment and estoppel certificates instead of for estoppel letters.
- The CS amends ss. 718.116(3), 719.108(3), and 720.3085(3)(a), F.S., to permit condominium, cooperative, and homeowners' associations, respectively, to recover from the unit owner any reasonable charges imposed upon the association under a contract with its management or bookkeeping company, or collection agent, incurred in connection with collecting a delinquent assessment.
- The CS amends ss. 718.116(3), 719.108(3), and 720.3085(3)(b), F.S., to include the reasonable costs of collection services contracted by association in the schedule that assigns how an association must apply payments it receives from a member.
- The CS amends the claim of lien form in ss. 718.116(5)(b) and 720.3085(1)(a) F.S., for condominium and homeowners' associations, respectively, to include the dates of delinquency on the form, and provides that the lien may include any other amounts which a lien may secure pursuant to ch. 718, F.S., and ch. 720, F.S., respectively.
- The CS amends ss. 718.116(5)(b), F.S., to provide that a condominium association's claim of lien secures administrative late fees and fees incurred by the association incident to the collection process include any reasonable costs for collection services contracted by the association.
- The CS amends ss. 18.116(6)(b) and 720.3085(5), F.S., to provide a "delinquent assessment" form.
- The CS amends ss. 718.121(4), 719.108(4)(a), 720.3085(4)(a), F.S., to create a "notice of intent to record a claim of lien" form.
- The CS amends the Release of Lien form for cooperative associations in s. 719.108(4)(d), F.S., to reference the "cooperative parcel" "instead of the "unit." It also deleted the portion of the form that provides that the description of the cooperative parcel includes, but is not limited to, all appurtenances to the cooperative unit.

B. Amendments:

None.