

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 7037 PCB CJS 14-02 Residential Communities

**SPONSOR(S):** Judiciary Committee; Business & Professional Regulation Subcommittee; Civil Justice Subcommittee; Spano and others

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1466

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	12 Y, 0 N	Cary	Bond
1) Business & Professional Regulation Subcommittee	11 Y, 2 N, As CS	Butler	Luczynski
2) Judiciary Committee	12 Y, 2 N, As CS	Cary	Havlicak

### SUMMARY ANALYSIS

Community Association Managers (CAMs) are licensed by the Department of Business and Professional Regulation to perform community association management functions on behalf of condominium, cooperative, and homeowners' associations. Duties include controlling or disbursing funds, preparing budgets and other financial documents, assisting in noticing or conducting meetings, and coordinating maintenance and other services.

The bill amends the CAM statute to list additional duties that CAMs may perform.

The bill also provides forms for condominiums, cooperatives, and homeowners' associations relating to unpaid assessments. The bill also provides that an association may collect reasonable costs for collection services contracted for by the association.

Finally, the bill provides a duty of care owed by a community association manager or management firm to the association. The duty of care is that of a reasonably careful community association manager in like circumstances. Additionally, the bill provides conditions upon which a community association may indemnify a community manager or management firm.

The bill does not appear to have a fiscal impact on state or local governments.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Community Association Managers (CAMs) are licensed by the Department of Business and Professional Regulation (DBPR) to perform community association management functions.<sup>1</sup> The statutes define community association management as “practices requiring substantial specialized knowledge, judgment, and managerial skill. . . .”<sup>2</sup> Duties include controlling or disbursing funds, preparing budgets and other financial documents, assisting in noticing or conducting meetings, and coordinating maintenance and other services.<sup>3</sup>

CAMs are regulated by the seven-member Regulatory Council of Community Association Managers (Council). Five of the members must be licensed CAMs, one of whom may 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.<sup>4</sup>

Prospective CAMs must apply to DBPR 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 Department-approved in-person training prior to taking the exam.<sup>5</sup> CAMs are then required to complete continuing education hours as approved by the Council.<sup>6</sup>

The Florida Bar has a Standing Committee that focuses on the unlicensed practice of law. The Unlicensed Practice of Law Standing Committee (Standing Committee) held hearings in 1995 to determine if CAMs were crossing the line into the unlicensed practice of law in performing their statutory responsibilities. On certain matters, the Standing Committee determined that the CAMs were not performing legal work. Those activities included drafting meeting notices, writing board- and annual-meeting agendas, and filling out certain forms. However, the Standing Committee determined that several other duties commonly performed by CAMs did constitute the unlicensed practice of law, such as drafting lien forms and other certain forms, determining the timing and method of meeting notices, determining the votes necessary for certain actions, and advising a community association about laws or rules. The Standing Committee determined some other actions may or may not involve the unlicensed practice of law, depending on the circumstances.<sup>7</sup> The Standing Committee provided an advisory opinion to the Supreme Court for consideration. The Supreme Court adopted the Standing Committee’s recommendations the following year.<sup>8</sup>

In May of 2013, the Standing Committee proposed a subsequent advisory opinion to clarify the Court’s earlier opinion regarding CAMs. The proposed advisory opinion requested 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. Specifically, the Standing Committee proposed advisory opinion suggests that the following 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;

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<sup>1</sup> Section 468.431(4), F.S.

<sup>2</sup> Section 468.431(2), F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 468.4315(1), F.S.

<sup>5</sup> Section 468.433, F.S.

<sup>6</sup> Sections 468.4336 and 468.4337, F.S.

<sup>7</sup> *The Florida Bar re Advisory Opinion Activities of Cmty. Ass'n Managers*, 681 So.2d 1119, 1122 (Fla. 1996).

<sup>8</sup> *Id.* at 1124.

- Preparing documents concerning the right of the association to approve new prospective owners;
- Determining the votes needed to pass a proposition or amendment to recorded documents;
- Determining the number of owners' votes needed to establish a quorum;
- 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.;
- Determining 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.<sup>9</sup>

The Florida Supreme Court has not issued an opinion regarding the Standing Committee's proposed advisory opinion.<sup>10</sup>

Since 1950, through case law and advisory opinions, the Court has continued to define the boundaries of the unlicensed practice of law. There is no rule or test to determine whether an activity is considered to be the practice of law.<sup>11</sup> However, if an activity is within a profession's "sphere of activity," it is more likely that the Court will allow a non-lawyer to perform the activity, even if the activity involves drafting a legal instrument.<sup>12</sup> Furthermore, the less discretion that is involved, the more likely that a non-lawyer will be allowed to perform the activity, such as if there is a form so that the professional is merely filling in factual information such as names, addresses, figures, etc.<sup>13</sup>

### Effect of the Bill

The bill amends s. 468.431(2), F.S., to add CAM responsibilities to the definition of Community Association Management:

- Determining the number of days required for statutory notices;
- Determining the amounts due the association;
- Collecting amounts due to the association before filing a civil action;
- Calculating the votes required for a quorum or to approve a proposition or amendment;
- Completing forms related to the management of a community association that have been created by statute or by a state agency;
- Drafting meeting notices and agendas;
- Calculating and preparing certificates of assessment and estoppel certificates;
- Responding to requests for a certificate of assessment and estoppel certificates;
- Negotiating monetary or performance terms of a contract subject to approval by an association;
- Drafting prearbitration demands;
- Coordinating or performing maintenance for real or personal property and other routine services involved in the operation of a community association; and
- Complying with the association's governing documents and the requirements of law as necessary to perform such practices.

<sup>9</sup> 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. (On file with the Civil Justice Subcommittee.)

<sup>10</sup> On March 26, 2014, this case was submitted to the Florida Supreme Court without oral argument. The latest procedural information regarding this case may be found under case number SC13-889 on the Florida Supreme Court's online docket at [http://jweb.flcourts.org/pls/docket/ds\\_docket\\_search%20](http://jweb.flcourts.org/pls/docket/ds_docket_search%20) (last viewed March 31, 2014).

<sup>11</sup> See *The Florida Bar re Advisory Opinion Activities of Cmty. Ass'n Managers*, 681 So. 2d 1119, 1123 (Fla. 1996) (stating that it is generally understood that "performance of services in representing another before the courts is the practice of law," and that "the giving of legal advice and counsel to others" is likely the unlicensed practice of law, even though "such matters may not then or ever be the subject of proceedings in a court").

<sup>12</sup> See *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950) (delineating the "line of demarkation" between the sphere in which a real estate broker or agent operates and the sphere in which an attorney operates).

<sup>13</sup> See, e.g., *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Residential Leases up to One Year in Duration*, 602 So.2d 914 (Fla. 1992); *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So.2d 485 (Fla. 1993).

The bill amends ss. 718.116(5)(d), and 720.3085(1)(d), F.S., and adds s. 719.108(4)(d), F.S., to provide a release of lien form for a condominium, homeowners' association, and cooperative, respectively.

The bill amends ss. 718.121(4), 719.108(4)(a), and 720.3085(4)(a), F.S., to provide a pre-lien form for a condominium, cooperative, and homeowners' association, respectively.

The bill amends ss. 718.116(6)(b) and 720.3085(5), F.S., to provide a pre-foreclosure letter form to be sent to an owner as a warning that an association intends to foreclose on the property to collect overdue assessments.

The bill amends s. 719.108(4) and (4)(b), F.S., to match the law of cooperatives with existing condominium and homeowners' association law with respect to a claim and execution of a lien.

The bill also codifies common practice by amending ss. 718.116(3), 719.108(3), and 720.3085(3), F.S. to explicitly state that a management company may collect reasonable costs for collection services contracted for by the association.

Finally, the bill creates s. 468.4334, F.S., to provide a duty of care owed by a community association manager or management firm to the association. The duty of care is that of a reasonably careful community association manager in like circumstances. Additionally, the bill provides that an association may indemnify a manager or a management firm for ordinary negligence of a manager if the manager's or management firm's act or omission was the result of a lawful instruction of the directors or an officer of the community association. However, an indemnification may not cover an act or omission that:

- Violates a criminal law, unless the manager or management firm had reasonable cause to believe that the conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful;
- Derives an improper personal benefit, either directly or indirectly;
- Is grossly negligent; or
- Is reckless, is in bad faith, is with malicious purpose, or is in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

## B. SECTION DIRECTORY:

Section 1 amends s. 468.431, F.S., relating to definitions.

Section 2 creates s. 468.4334, F.S., relating to duty of care, liability, and indemnification.

Section 3 amends s. 718.116, F.S., relating to assessments; liability; lien and priority; interest; collection.

Section 4 amends s. 718.121, F.S., relating to liens.

Section 5 amends s. 719.108, F.S., relating to rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

Section 6 amends s. 720.3085, F.S., relating to payment for assessments and lien claims.

Section 7 provides an effective date of July 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2014, the Business & Professional Regulation Subcommittee adopted a strike-all amendment that made several technical changes to the bill language for consistency in terminology and application, including clarifying that the amended forms shall be used in the provided format to be valid.

On April 4, 2014, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removes the claim of lien forms, adds a duty of care for community association managers and management firms, and provides that a management company may collect reasonable costs for collection services contracted for by the association.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.