

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 1172

INTRODUCER: Judiciary Committee; Regulated Industries Committee and Senator Latvala

SUBJECT: Termination of a Condominium Association

DATE: April 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oximendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Caldwell</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1172 revises the requirements for the optional termination of condominiums.

Current law permits a condominium to be terminated at any time if a plan of termination is approved by 80 percent of the condominium's total voting interests and 10 percent or more of the total voting interests reject the termination. The bill provides that, if 10 percent or more of the voting interests of a condominium reject a plan of termination, another termination may not be considered for 18 months.

The bill prohibits condominiums that have been created pursuant to the condominium conversion procedures in Part VI of ch. 718, F.S., from undertaking an optional plan of termination until 5 years after the conversion.

The bill provides the following conditions and limitations for the termination of a condominium if at the time the plan of termination is recorded at least 80 percent of the total voting interests are owned by a bulk owner which would be considered an insider under s. 726.102, F.S., and no sale of the terminated condominium property to an unrelated third party is contemplated:

- Unit owners must be allowed to retain possession of units and lease their former units;
- Any unit owner whose unit was granted homestead exemption must be paid a relocation payment equal to 1 percent of the termination proceeds allocated to the unit;
- Unit owners other than the developer must be paid at least 100 percent of the fair market value of their units as determined by one or more independent appraisers;

- The fair market value for a unit of an owner who was an original purchaser from the developer and who dissented or objected to the plan of termination may not be less than the original purchase price paid for the unit; and
- The plan of termination must provide the manner by which each first mortgage on a unit will be satisfied in full at the time the plan is implemented.

The bill provides timeframes for objections to the plan of termination, including plans approved at a meeting and plans approved by a written consent or joinder.

The bill permits unit owners to contest a plan of termination by petitioning the Division of Florida Condominiums, Timeshares, and Mobile Homes for mandatory nonbinding arbitration. It deletes the unit owners' right to contest the plan of termination in a court by initiating a summary procedure pursuant to s. 51.011, F.S. It provides that unit owners may contest the fairness and reasonableness of the apportionment of the proceeds from the sale, that the first mortgages of unit owners will not be fully satisfied, or that the required vote was not obtained.

The bill provides an effective date of July 1, 2015.

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.”¹ A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.² 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.³

A declaration “may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.”⁴ A declaration of condominium may be amended as provided in the declaration.⁵ 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.⁶ Condominiums are administered by a board of directors referred to as a “board of administration.”⁷

Section 718.103(3), F.S., defines the term “association property” to mean:

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

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

⁴ Section 718.104(5), F.S.

⁵ See s. 718.110(1)(a), F.S.

⁶ 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.

⁷ Section 718.103(4), F.S.

that property, real and personal, which is owned or leased by, or is dedicated by a recorded plat to, the association for the use and benefit of its members.

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(13), F.S., defines the term “condominium property” to mean:

the lands, leaseholds, and personal property that are subjected to condominium ownership, whether or not contiguous, and all improvements thereon and all easements and rights appurtenant thereto intended for use in connection with the condominium.

Section 718.103(16), F.S., defines a developer as one “who creates a condominium or offers condominium [units] for sale or lease in the ordinary course of business” There are two classes of developers: those who create the condominium by executing and recording the condominium documents and those who offer condominium units for sale or lease in the ordinary course of business.

Section 718.103(10), F.S., defines “voting interests” to mean:

the voting rights distributed to the association members pursuant to s. 718.104(4)(j).⁸ In a multicondominium association, the voting interests of the association are the voting rights distributed to the unit owners in all condominiums operated by the association. On matters related to a specific condominium in a multicondominium association, the voting interests of the condominium are the voting rights distributed to the unit owners in that condominium.

Community Associations – Penalties and Suspension of Voting Right

Condominium associations may levy fines against members of the association who violate the association’s rules or other governing documents.⁹ After consideration by a committee of other members who are not board members or persons residing in the board member’s household, the association may issue a fine that may not exceed \$100 per violation, or \$1000 in the aggregate. If a member is more than 90 days delinquent on a monetary obligation, which may include a fine, unpaid assessments, or other monetary obligation, the association may suspend the unit owner’s right to use common elements, facilities, or areas and may also suspend his or her voting rights.¹⁰

⁸ Section 718.104(4)(j), F.S., requires the declaration of condominium to include unit owners’ membership and voting rights in the association.

⁹ Section 718.303(3), F.S.

¹⁰ *Id.*

Termination of a Condominium

Termination Because of Economic Waste or Impossibility

Section 718.117, F.S., provides for the termination of condominiums when the continued operation of the condominium would constitute economic waste or would be impossible to operate or reconstruct a condominium. To terminate the condominium, the required vote is the lesser of the lowest percentage of voting interests needed to amend the declaration or as otherwise provided in the declaration for termination of the condominium.¹¹ The criteria for economic waste or impossibility are:

- The total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or
- It becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.

If 75 percent or more of the condominium units are timeshare units, the condominium may be terminated by a plan of termination that is approved by 80 percent of the total voting interests of the association and the holders of 80 percent of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium, unless the declaration provides for a lower voting percentage.¹²

Optional Termination

Section 718.117(3), F.S., provides an optional termination procedure with a lower vote threshold. Regardless of whether continued operation would constitute economic waste or would be impossible, the condominium may be terminated if approved by at least 80 percent of the total voting interests of the condominium, provided that not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto.

Exemption

Section 718.117(4), F.S., provides that a plan of termination is not an amendment subject to s. 718.110(4), F.S., which relates to amendments that may change the configuration or size of any unit in any material fashion, materially alter or modify the appurtenances to the unit, or change the proportion or percentage by which the unit owner shares the common expenses of the condominium and owns the common surplus of the condominium.

Plan of Termination

Section 718.117(9), F.S., provides the plan for termination must be a written document executed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee. The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the

¹¹ Section 718.117(2)(a), F.S.

¹² Section 718.117(2)(b), F.S.

plan must specify the conditions of possession.¹³ In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed have been recorded that confirm the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests.¹⁴ The provisions required in the plan of termination are provided in ss. 718.117(10) and (11), F.S.

The plan of termination must be recorded before it can take effect and is effective only when recorded or at a later date specified in the plan.

A plan of termination that fails to receive the required approval cannot be recorded and a new attempt to terminate the condominium may not be proposed at a meeting or by solicitation for joinder and consent for 180 days after the date that the failed plan of termination was first given to all unit owners.

Allocation of Proceeds of Sale of Condominium Property

Section 718.117(12), F.S, provides for the distribution of the proceeds of sale. Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination. The market values are to be determined by one or more independent appraisers selected by the association or termination trustee. The value of the common elements is to be paid to the owners according to their proportionate share in the common elements.

Right to Contest

Section 718.117(16), F.S., provides that a unit owner or lienor may contest a plan of termination by initiating a summary procedure pursuant to s. 51.011, F.S.,¹⁵ within 90 days after the date the plan is recorded. If not contested within 90 days, a unit owner or lienor is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.

The person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. The apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in s. 718.117(12), F.S. The court is required to determine the rights and interests of the parties and order the plan of termination to be implemented if it is fair and reasonable. If the court determines that the plan of termination is not fair and reasonable, it may

¹³ Section 718.117(11)(a), F.S.

¹⁴ Section 718.117(11)(b), F.S.

¹⁵ Section 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within 5 days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within 5 days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.

void the plan or may modify the plan to apportion the proceeds in a fair and reasonable manner. The prevailing party is entitled to recover reasonable attorney fees and costs.

Distressed Condominium Relief Act

The “Distressed Condominium Relief Act”¹⁶ in Part VII of ch. 718, F.S., defines the extent to which successors to the developer, including the construction lender after a foreclosure and other bulk buyers and bulk assignees of condominium units, may be responsible for implied warranties. Enacted in 2010,¹⁷ the act was intended to relieve developers, lenders, unit owners, and condominium associations from specified provisions of ch. 718, F.S., including warranty provisions, in order to enable economic opportunities for successor purchasers of distressed condominiums.¹⁸

Section 718.703(1), F.S., defines the term “bulk assignee” to mean a person who acquires more than seven condominium parcels in a single condominium as provided in s. 718.707, F.S., and receives an assignment of some or substantially all of the rights of the developer as an exhibit in the deed, as a separate instrument recorded in the public records in the county where the condominium is located, or pursuant to a final judgment or certificate of title at a foreclosure sale.

Section 718.703(2), F.S., defines the term “bulk buyer” as a person who acquires more than seven condominium parcels in a single condominium but who does not receive an assignment of developer rights other than the rights specified in this section.

Section 718.704(1), F.S., provides that a bulk assignee assumes all the duties and responsibilities of the developer, and specifies obligations for which the bulk assignee is not liable.

Section 718.707, F.S., specifies a time limit for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels are acquired prior to July 1, 2016. The date of acquisition is based on the date that the deed or other instrument of conveyance is recorded.

Division of Florida Condominiums, Timeshares, and Mobile Homes

Condominiums and cooperatives are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) in accordance with ch. 718, F.S., and ch. 719, F.S. 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 associations that are still under developer control.¹⁹ The division also has the authority to investigate complaints against developers involving improper turnover or failure to turnover control to the association, pursuant to ss. 718.301 and 719.301, F.S., respectively.²⁰ After control of the condominium or cooperative is transferred from the developer to the unit owners, the division’s jurisdiction is limited to

¹⁶ Sections 718.701 – 718.708, F.S.

¹⁷ Chapter 2010-174, L.O.F.

¹⁸ See s. 718.702, F.S.

¹⁹ Section 718.501(1), F.S., s. 719.501(1), F.S.

²⁰ *Id.*

investigating complaints related to financial issues, elections, and unit owner access to association records.²¹

As part of the division's authority to investigate complaints, ss. 718.501(1) and 719.501(1), F.S., authorize the division to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

III. Effect of Proposed Changes:

The bill amends s. 718.117, F.S., to revise the requirements for the optional termination of condominiums.

Optional Termination

The bill amends s. 718.117(3)(a), F.S., to provide that, in a vote on a plan of termination, the total voting interests of the condominium include all voting interests²² for the purpose of considering a plan of termination, and a voting interest of the condominium may not be suspended during the consideration of a plan of termination.

It provides that if 10 percent or more of the total voting interests of the condominium reject a plan of termination, another optional plan of termination may not be considered for 18 months after the date of rejection.

Optional Terminations Following a Condominium Conversion

Section 718.117(3)(b), F.S., is created to prohibit a condominium that has been created pursuant to the condominium conversion procedures in Part VI of ch. 718, F.S.,²³ (conversion condominium) from undertaking an optional plan of termination until 5 years after the conversion. The bill deletes the provision that optional termination provisions do not apply to condominiums in which 75 percent or more of the units are timeshare units.

Optional Terminations and Bulk Owners

Section 718.117(3)(c), F.S., is created and defines the term "bulk owner" to mean the single owner of such voting interests or an owner with a related entity or entities that would be considered insiders, as defined in s. 726.102, F.S.²⁴

²¹ *Id.*

²² Pursuant to s. 718.103(10), F.S., voting rights are those rights distributed to the unit owners in that condominium under the declaration of condominium.

²³ Part VI of ch. 718, F.S., provides the process for converting real property into the condominium form of ownership.

²⁴ Section 726.102, F.S., defines an "Insider" to include: "(a) If the debtor is an individual: 1. A relative of the debtor or of a general partner of the debtor; 2. A partnership in which the debtor is a general partner; 3. A general partner in a partnership described [above]. A corporation of which the debtor is a director, officer, or person in control; (b) If the debtor is a corporation: 1. A director of the debtor; 2. An officer of the debtor; 3. A person in control of the debtor; 4. A partnership in which the debtor is a general partner; 5. A general partner in a partnership described [above]. A relative of a general partner, director, officer, or person in control of the debtor. (c) If the debtor is a partnership: 1. A general partner in the debtor; 2. A relative of a general partner in, a general partner of, or a person in control of the debtor; 3. Another partnership in which the debtor is a general partner; 4. A general partner in a partnership described [above]. A person in control of the debtor. (d) An affiliate, or an insider of an affiliate as if the affiliate were the debtor. (e) A managing agent of the debtor."

Sections 718.117(3)(c)1. – 5., F.S., are created to provide the conditions and limitation in a plan of termination of a condominium if at least 80 percent of the total voting interests at the time of recording the plan of termination are owned by a bulk owner. The conditions and limitations include the former unit owner's right to:

- Possess and lease the former unit;
- Relocation payments for homestead property;
- Compensation at fair market value as determined by an independent appraiser; and
- Mandated disclosures in the plan of termination.

Right of Possession and Lease Former Unit

Section 718.117(3)(c)1., F.S., provides procedures that permit a unit owner to maintain possession of his or her unit after a plan of termination has been approved. After the termination, if the units are offered for lease, each unit owner may lease his or her former unit and remain in possession of the unit for 12 months after the termination. The unit owner must make a written request to the termination trustee to rent the former unit. Any unit owner who fails to make a written request and sign a lease within 90 days after the approved plan of termination is recorded waives his or her right to retain possession of the unit. The unit owner must also sign the lease within 15 days after being presented with the lease or he or she also waives his or her right to retain possession of the unit, unless otherwise provided in the plan of termination.

Relocation Payments for Homestead Property

Section 718.117(3)(c)2., F.S., provides that any former unit owner whose unit was granted homestead exemption as of the date of the recording of the plan of termination must be paid a relocation payment equal to 1 percent of the termination proceeds allocated to the owner's former unit. The relocation payment must be paid by the single entity or related entities owning at least 80 percent of the voting interests. The relocation payment is in addition to any termination proceeds and must be paid within 10 days after the unit owner vacates the unit.

It is not clear whether this provision applies if the unit owners retains possession after termination as provided in s. 718.117(3)(b)1., F.S., in which case the relocation payments would be due within 10 days after the end of the unit owners post-termination lease.

Compensation

Section 718.117(3)(c)3., F.S., requires that all unit owners other than the bulk owner must be compensated with at least 100 percent of the fair market value of their units.

The fair market value for a unit of an owner who was an original purchaser from the developer and who dissented or objected to the plan of termination may not be less than the original purchase price paid for the unit. The fair market value must be determined by an independent appraiser. The independent appraiser must be selected by the termination trustee as of a date that is no earlier than 90 days before the date that the plan of termination is recorded.

The bill defines the term "fair market value" to mean the price of a unit that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction based on

similar units sold in other condominiums, including units sold in bulk purchases but excluding units sold at wholesale or distressed prices.

Section 718.117(3)(c)4., F.S., provides that a plan of termination must provide the manner by which each first mortgage on a unit will be satisfied so that each unit owner's obligation under the first mortgage is satisfied in full at the time the plan of termination is implemented.

Mandated Disclosures in the Plan of Termination

The bill creates s. 718.117(3)(c)5., F.S., to require, before the plan of termination is presented to the unit owners, a written and sworn statement that includes the following disclosures:

- The identity of the person or entity that owns 50 percent or more of the units and if an artificial entity owns such units, the name of the natural person who manages or controls the entity;
- The identity of the person or entity that owns or controls, directly or indirectly, 20 percent or more of the bulk owners and if an artificial entity constitutes a bulk owner, the name of the natural person who manages or controls the entity;
- The units acquired by any bulk owner, the date of their acquisition, and the total amount of compensation paid to each prior unit owner by the bulk owner, regardless of whether attributed to the purchase price of the unit; and
- The relationship of any board member to the bulk owner or any person or entity affiliated with the bulk owner whose identity must be disclosed.

Exemption

Section 718.117(4), F.S., is amended to provide that an amendment to a declaration to conform the declaration to s. 718.117, F.S., is not an amendment subject to the notice and vote requirements in s. 718.110(4), F.S., and may be approved by the lesser of 80 percent of the voting interests or the percentage of the voting interests required to amend the declaration.

Plan of Termination

The bill amends s. 718.117(9), F.S., which provides the process for a unit owner to reject or object to a plan of termination.

If the vote on the plan of termination is at a meeting of the unit owners, a vote to reject the plan must be made in person or by proxy, or by delivering a written rejection to the association before or at the meeting.

If the plan of termination is approved by written consent or joinder without a meeting of the unit owners, an objection to the plan must be made by written objection within 20 days after the date the association notifies the non-consenting owners that the plan of termination was approved by written action in lieu of a unit owner meeting.

The bill amends s. 718.117(11), F.S., to provide that, unless the plan of termination expressly authorizes a unit owner or other person to retain the exclusive right to possess the unit and to use the common elements of the condominium after termination, all such rights in the unit or

common elements automatically terminate on the effective date of termination. All leases, occupancy agreements, subleases, licenses, or other agreements for the use or occupancy of any unit or common elements of the condominium automatically terminate on the effective date of termination unless the plan expressly provides otherwise. The plan must specify the terms and conditions of occupancy if the plan expressly authorizes a unit owner or other person to retain exclusive right of possession after termination.

The bill deletes the provision that, in a partial termination, title to the surviving units and common elements that remain part of the condominium property and vested in the ownership shown in the public records and do not vest in the termination trustee.

The bill creates s. 718.117(11)(c), F.S., to permit a plan of termination to be withdrawn or amended by the same percentage required for approval.

The bill creates s. 718.117(11)(d), F.S., to permit a termination trustee to correct a scrivener's error in the plan of termination, and to require that the amended plan be executed in the same manner as a deed.

Allocation of Proceeds of Sale

The bill amends s. 718.117(12)(a), F.S., to provide that the plan of termination may require separate valuations for the common elements. It deletes the requirement that the declaration expressly provide for the allocation of the proceeds of sale of condominium property and apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair market values immediately before the termination by an independent appraiser. The bill provides that if the common elements are not separated, it is presumed that the common elements have no independent value and are included in the valuation of the unit.

The bill amends s. 718.117(12)(d), F.S., to require the lienholder of a unit to provide the termination trustee, within 30 days of the trustee's written request, with a statement confirming the outstanding obligations of the unit owner secured by the lien.

The bill amends s. 718.117(12)(e), F.S., to permit the termination trustee to setoff against, and reduce the share of, termination proceeds allocated to a unit by the following amounts, which may include attorney fees and costs:

- Unpaid assessments, taxes, late fees, interest, fines, charges, and other amounts owed for the unit;
- Costs of clearing title to the unit;
- Costs of removing persons from the unit;
- Costs related to breaches of the plan of termination by the owner and others related to the owner;
- Costs related to the removal of personal property; and
- Costs related to the appointment of a receiver or attorney ad litem acting for the unit owner if the unit owner cannot be located.

Right to Contest a Plan of Termination

Section 718.117(16), F.S., permit unit owners contest a plan of termination by petitioning the division for mandatory nonbinding arbitration pursuant s. 718.1255, F.S., which provides for the mediation and arbitration of disputes between the condominium association and unit owners.

The bill deletes the option for unit owners to contest the termination by initiating a summary procedure pursuant to s. 51.011, F.S.

The bill provides that a unit owner or lienor's right to contest a plan of termination is limited to contesting only the fairness and reasonableness of the apportionment of the proceeds from the sale, that the first mortgages of all unit owners have not or will not be fully satisfied at the time of termination, or that the required vote to approve the plan was not obtained. The contesting party bears the burden of proof.

Current law permits the court in a summary procedure to apportion the proceeds if it determines that the plan of termination is not fair and reasonable. The bill permits the arbitrator to void a plan of termination if it is determined that the plan was not properly approved. Any challenge to a plan, other than a challenge that the required vote was not obtained, does not affect title to the property or the vesting of the condominium property in the trustee. Challenges to the plan are limited to claims against the proceeds of the plan.

The bill amends s. 718.1255(1)(a), F.S., to include a plan of termination under s. 718.117, F.S., within the types of disputes that the division may arbitrate.

Effective Date

The bill provides an effective date of July 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Condominium declarations are contracts. If this bill has the effect of re-writing previously recorded declarations that have termination provisions or that implement the protections provided by s. 718.110(4), F.S., the bill may be an unconstitutional

impairment of obligation of contract, under s. 10, Art. I, Fla. Const., which provides in relevant part, “No . . . law impairing the obligation of contracts shall be passed.” This provision empowers the courts to strike laws that retroactively burden or alter contractual relations. Article I, s. 10 of the United States Constitution provides in relevant part that “No state shall . . . pass any . . . law impairing the obligation of contracts.”

In *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors in balancing whether the state law has in fact operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. The court stated that if there is minimal alteration of contractual obligations the inquiry can end at its first stage. Severe impairment can push the inquiry to a careful examination of the nature and purpose of the state legislation. The factors to be considered are:

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive.²⁵

The court in *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984), also adopted the method used in *Pomponio*. The court stated that the method required a balancing of a person’s interest not to have his contracts impaired with the state’s interest in exercising its legitimate police power.

- Adopting the method of analysis used by the U.S. Supreme Court, the court outlined the main factors to be considered in applying this balancing test. The threshold inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.”²⁶ The severity of the impairment increases the level of scrutiny.
- In determining the extent of the impairment, the court considered whether the industry the complaining party entered has been regulated in the past. This is a consideration because if the party was already subject to regulation at the time the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.²⁷
- If the state regulation constitutes a substantial impairment, the state needs a significant and legitimate public purpose behind the regulation.²⁸

²⁵ *Pomponio*, 378 So. 2d at 779.

²⁶ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).

²⁷ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n 13).

²⁸ *Id.*

- Once the legitimate public purpose is identified, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation.²⁹

The bill addresses termination of a condominium and is therefore permanent and retroactive in nature because it could change a plan of termination originally entered into in the declaration. Thus, as to the threshold inquiry, at least on an as-applied-basis, the bill might operate as a substantial impairment of a contractual relationship. However, the bill does so by providing an equitable method of termination following a natural disaster or in other circumstances that fully values the interests of each unit, as well as the common elements. The bill also eliminates the ability of an owner or a small minority of owners from extracting an excessive portion of the termination proceeds at the expense of the other unit owners in the community.

Condominiums were created by statute and therefore the law operates in an area that is already subject to extensive regulation.

The legislative purpose of the statute seems to indicate that the law was enacted to deal with broad economic problems by stating that the Legislature finds that it is contrary to the public policy of the state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation.

The last inquiry, whether the adjustment of the rights and responsibilities of the contracting parties are appropriate to the public purpose justifying the legislation, could to be true for the “economic waste or impossibility” method of approving a plan of termination. Where there are situations involving economic waste or impossibility, the adjustments of the rights of condominium owners concerning approval of termination of the condominium form of ownership may seem as reasonable and of a character appropriate to the Legislature’s findings for this legislation. The other methods for approving a plan of termination may be considered unreasonable because in some circumstances they could be used for any reason to override the provisions of the declaration. Nevertheless, the adjustment of the rights and responsibilities of the contracting parties may be reasonable and appropriate because these other methods address deficiencies in the current law. As previously discussed, the current law, s. 718.117(7), F.S., places unit holders in the position of not being able to receive the market value of their investments and allowing one or more owners to withhold approval for the sale of the property³⁰ (after termination of the condominium) to obtain a disproportionate share of the proceeds.

²⁹ *Id.*

³⁰ After termination of the condominium form of ownership, the current law, s. 718.117(7), F.S., provides that the property is owned by the unit owners in the same shares as each owner previously owned in the common elements, which is typically based on the square footage of the unit, not the market value. Because all of the property is owned as tenants in common after the termination of the condominium form of ownership, one or more owners could withhold approval for the sale of the property to extract a disproportionate share of the proceeds.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Section 718.117(3)(d)2., F.S., entitles any former unit owner whose unit was granted homestead exemption as of the date of the recording of the plan of termination to be paid a relocation payment equal to 1 percent of the termination proceeds allocated to the owner's former unit. Section 718.117(3)(d)3., F.S., requires that all unit owners who are not a bulk owner must be compensated at least 100 percent of the fair market value of their units. The allocation of the proceeds of the sale of condominium property to dissenting or objecting owners must be 110 percent of the purchase price, or 110 percent of fair market value, whichever is greater.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The changes to the first sentence in s. 718.117(3), F.S., appear to have a scrivener's error. The intent of the underlying law and the bill seems to be that a plan of termination may proceed if fewer than 10 percent of the voting interests of a condominium object to the plan. By striking the phrase "no more than" in existing law, the first sentence of s. 718.117(3), F.S., has become ambiguous. One option to correct the bill would be to replace the words "if ~~no more than~~ 10 percent or more" with "fewer ~~no more~~ than 10 percent."

On lines 345 through 348, the sentence should read:

If the arbitrator determines that the plan was not properly approved, or that the procedures to adopt the plan were not properly followed, he or she may void the plan or grant other relief he or she deems just and proper.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 718.117 and 718.11255 of the Florida Statutes.

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 7, 2015:

The committee substitute (CS):

- Revises the threshold defining the amount of voting interests that are necessary to reject a plan of termination.
- Revises the restriction on the termination of a condominium that was converted to a condominium from a preexisting improvement, such as an apartment complex. Under the amendment these condominiums may not terminate within 5 years, rather than 7 years, after the recording of the declaration of condominium unless there are no objections to the plan of termination.
- Revises the provision regarding allocation of proceeds of the sale of condominium property to owners of units dissenting or objecting to the plan at 110 percent of the unit price or fair market value, whichever is greater. Instead, original purchasers from the developer who dissent or object to the plan, fair market value may not be less than the original purchase price for the unit.
- Revises the language regarding the manner by which each first mortgage on a unit is satisfied so that the unit owner's obligation is satisfied in full when the termination plan is implemented.
- Changes "or" to "and" in the provision "providing that all such rights in the unit and common elements automatically terminate on the effective date of termination" unless the plan expressly authorizes otherwise.

CS by Regulated Industries on March 24, 2015:

The committee substitute (CS):

- Revises the title of the bill from an "act relating to condominiums" to an "act relating to termination of a condominium association;"
- Amends s. 718.117(3), F.S., to provide that, if more than 10 percent of the voting interests of a condominium to reject a plan of termination, another termination may not be considered for 18 months instead of 36 months in the bill;
- Deletes the provision in s. 718.117(3)(c), F.S., that optional termination provisions do not apply to condominiums in which 75 percent or more of the units are timeshare units;
- Creates s. 718.117(3)(d), F.S., to define the term bulk owner;
- Amends s. 718.117(3)(d), F.S., to provide conditions for the termination of a condominium if at least 80 percent of the total voting interests at the time of recording the plan of termination are owned by a bulk owner. It does not limit the condition to when at least 80 percent of the voting interests are owned by bulk buyer or assignee or a related entity which would be considered an insider under and no sale of the terminated condominium property to an unrelated third party is contemplated;
- Amends s. 718.117(3)(d)3., F.S., to require that all unit owners other than the bulk owner must be compensated at least 100 percent of the fair market value of their units. It deletes the reference to third-party unit owners;

- Amends s. 718.117(3)(d)3., F.S., to require that the fair market value must be determined by an independent appraiser, selected by the termination trustee, as of a date that is no earlier than 90 days before the date that the plan of termination is recorded;
- Creates s. 718.117(3)(d)5., F.S., to require a written and sworn statement of disclosures before the plan of termination is presented to the unit owners;
- Amends s. 718.117(9), F.S., and does not amend s. 718.117(3), F.S., to provide the process for a unit owner to reject or object to a plan of terminations;
- Amends s. 718.117(11), F.S., to provide for the termination of possession rights by the former unit owner, including occupancy agreements, subleases, licenses, or other agreements, after the approval of a plan of termination, unless expressly authorized in the plan of termination. It also deletes the provision that, in a partial termination, title to the surviving units and common elements that remain part of the condominium property and vested in the ownership shown in the public records and do not vest in the termination trustees;
- Creates s. 718.117(11)(c), F.S., to permit a plan of termination to be withdrawn or amended by the same percentage required for approval;
- Creates s. 718.117(11)(c), F.S., to permit a termination trustee to correct a scrivener's error in the plan of termination, and to require that the amended plan must be executed in the same manner as a deed;
- Amends s. 718.117(12), F.S., to provide that the plan of termination may require separate valuations for the common elements. It deletes the requirement that the declaration must expressly provide for the allocation of the proceeds of sale of condominium property and apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair market values immediately before the termination by an independent appraiser;
- Amends s. 718.117(12)(d), F.S., to require the lienholder of a unit to provide the termination trustee, within 30 days of the trustee's written request, with a statement confirming the outstanding obligations of the unit owner secured by the lien;
- Amends s. 718.117(12)(e), F.S., to permit the termination trustee to setoff against and reduce the share of, termination proceeds allocated to a unit by the amounts provided, which may include attorney fees and costs;
- Amends s. 718.117(16), F.S., to permit unit owners to contest a plan of termination by petitioning the division for mandatory nonbinding arbitration pursuant s. 718.1255, F.S. It deletes the option for unit owners to contest the termination by initiating a summary procedure pursuant to s. 51.011, F.S.; and
- Amends s. 718.1255(1)(a), F.S., to include a plan of termination under s. 718.117, F.S., within the types of disputes that the division may arbitrate.

B. Amendments:

None.