

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 483 Estoppel Certificates

SPONSOR(S): Careers & Competition Subcommittee; Civil Justice & Claims Subcommittee; Donalds; Moraitis and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 398

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	15 Y, 0 N, As CS	Stranburg	Bond
2) Careers & Competition Subcommittee	12 Y, 0 N, As CS	Wright	Anstead
3) Judiciary Committee			

SUMMARY ANALYSIS

When an ownership interest in a home, cooperative, or condominium is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a homeowners', cooperative, or condominium association. Unpaid assessments may also become a lien on the parcel. An estoppel certificate certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. To protect against undisclosed financial obligations and to transfer title that is free of any lien or encumbrance, buyers often request that the seller provide an estoppel certificate from any association of which the unit or parcel is a part.

The bill amends the law governing homeowners', cooperative and condominium associations (collectively referred to herein as "association") by:

- Reducing the time that an association has to respond to a request for an estoppel certificate from 15 days to 10 business days.
- Providing standards for the issuance, form, and delivery of an estoppel certificate.
- Providing that an estoppel certificate is effective for 30 or 35 days depending upon the method of delivery.
- Providing that an association waives the right to collect moneys owed in excess of those stated in the estoppel certificate.
- Establishing the maximum fee that an association may charge for the issuance of an estoppel certificate and authorizing additional fees in limited circumstances. The base fee is \$250 and will be adjusted in the future based on the CPI;
- Providing penalties for nonpayment of a refund; and
- Standardizing the provisions over condominium, cooperative, and homeowners' association laws.

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

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominium¹ and cooperative² associations are governed internally by an association whose members are the owners of units within the association. Many, but not all, residential communities are similarly governed by a homeowners' association made up of parcel owners.³ Associations are in effect a partnership between unit or parcel owners with a common interest in real property. To operate, an association must collect regular assessments from the unit owners and parcel owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the assessment and collection of periodic and special assessments to fund an association. A unit or parcel owner is liable for all assessments that come due while he or she is the owner, and is jointly liable with past owners for any assessment owed by such previous owners.⁴ Unpaid assessments may also become a lien on the parcel or unit.⁵

To protect against undisclosed financial obligations and to ensure that title is transferred free of any lien or encumbrance, buyers in an ordinary sale of a unit or parcel usually insist that all assessments be brought current through the date of sale, and an owner's title insurance company insures the buyer should the closing agent not properly see to payment of assessments through closing.

An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. Buyers, sellers, lenders, and other entities involved in the sale or refinance of a unit or parcel rely on estoppel certificates issued by an association to ascertain the amount to be collected and applied at closing. The association is legally bound by the amount in the estoppel certificate and is barred from asserting a claim of moneys due that contradicts the information provided in the estoppel certificate against any third party who relies on such certificate.⁶

A homeowners' or condominium association may charge a fee for the preparation of an estoppel certificate as long as the fee is established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract.⁷ A cooperative association may also charge a fee, but there is currently no similar condition in ch. 719, F.S., for cooperative associations to establish such fee by written resolution. Current law also provides no limitation on the amount of the fee that may be charged by a condominium or cooperative association other than that such amount must be "reasonable."⁸ There is no reasonableness requirement for the fee charged by a homeowners' association. Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the amount of the fee charged by associations for the preparation of an estoppel certificate.

Additionally, any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate.⁹ The time for payment of the fee to a cooperative

¹ s. 718.103(2), F.S.

² s. 719.103(2), F.S.

³ s. 720.301(9), F.S.

⁴ ss. 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

⁵ ss. 718.116(5), 719.108(4), and 720.3085, F.S.

⁶ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

⁷ ss. 718.116(8)(d) and 720.30851(3), F.S.

⁸ ss. 718.116(8)(c) and 719.108(6), F.S.

⁹ ss. 718.116(8)(d) and 720.30851(3), F.S.

association is not provided in current law. As estoppel certificates are generally required to close the sale or refinancing of a home and must be requested earlier than the time of closing, the funds must be paid solely by one party to the transaction, usually the seller, rather than from the closing settlement proceeds. However, current law does provide that if the certificate was requested in conjunction with the sale or mortgage of a unit or parcel but the sale does not occur, a homeowners' or condominium association must refund the fee, but only to a non-owner payor.¹⁰ The refund becomes the obligation of the unit or parcel owner and the homeowners' or condominium association may collect it from the owner in the same manner as an assessment.¹¹ Accordingly, owners may be required to pay an estoppel fee even where closing does not occur due to the early payment requirement or the obligation to reimburse a homeowners' or condominium association for a fee refund given to a non-owner payor.

An association is required to provide an estoppel certificate within 15 days after receiving a written request¹² from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.¹³ The cooperative law does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.¹⁴ Although the certificate acts as a bar and prevents the association from later asserting a claim or right that contradicts the information in the certificate, current law is largely silent on the specific contents and form the certificate. An estoppel certificate issued by a homeowners' or condominium association must only set forth all assessments and other moneys owed to the association with respect to the unit or parcel, disclose any fee charged by the association for the preparation of such certificate, and be signed by an officer or authorized agent of the association.¹⁵ An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.¹⁶ Some associations provide the amount of assessments and other moneys owed to the association in one lump sum while others provide an itemized breakdown of assessments, late fees, interest, etc. The amount in the certificate may reflect the amount presently owed or the amount owed through a given date a few weeks or months into the future. Accordingly, the information provided in estoppel certificates varies among associations.

Any person, other than the owner of a unit or parcel, who relies upon an estoppel certificate issued by an association, is protected by the estoppel effect of the certificate.¹⁷ Accordingly, an association would be unable to assert a claim for an amount of unpaid assessments against a purchaser of a unit or parcel if that amount contradicted the amount of unpaid assessments provided by the association in an estoppel certificate during the closing of the sale. However, the protections of the estoppel effect extend only to such third parties and although an owner may pay a fee to obtain the certified amount of unpaid assessments and moneys owed to the association, the association is not estopped from asserting a contradictory claim in the future against the owner.

A unit or parcel owner may compel compliance with the provisions governing the issuance of an estoppel certificate from a homeowners' or condominium association by bringing a summary procedure pursuant to s. 51.011, F.S.¹⁸ The prevailing party is entitled to recover reasonable attorney's fees and costs.¹⁹

Effect of Proposed Changes

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., relating to estoppel certificates for condominiums, cooperatives, and homeowners' associations, respectively. These amendments make

¹⁰ *Id.*

¹¹ *Id.*

¹² s. 718.116(8), F.S.

¹³ ss. 718.116(8) and 720.30851, F.S.

¹⁴ s. 719.108(6), F.S.

¹⁵ *Id.*

¹⁶ s. 719.108(6), F.S.

¹⁷ ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

¹⁸ ss. 718.116(8)(b) and 720.30851(2), F.S.

¹⁹ *Id.*

the effect of all three provisions identical. The bill provides that the association must issue an estoppel certificate within 10 business days of receiving a request from a unit or parcel owner, a unit or parcel mortgagee, or an owner's or mortgagee's designee. Requests may be made in either written or electronic format. The certificate must be provided by hand delivery, United States mail, or electronic transmission to the requestor on the date the certificate is issued.

The bill provides that an estoppel certificate must include the following information:

- Date of issuance;
- Name of the unit or parcel owner reflected in the books and records of the association;
- Unit or parcel designation and address;
- Parking or parking garage space number reflected in the books and records of the association;
- Attorney's name and contact information if the account is delinquent and has been turned over to the attorney for collection;
- Fee for the preparation and delivery of the estoppel certificate;
- Name of the requestor;
- Assessment amount, frequency of payment, the date through which the assessment is paid, and the date upon which the next installment of the assessment is due;
- An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance of the certificate;
- An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate;
- If there are capital contribution, resale, transfer, association application or other fees due and the amount;
- Any open violations of the governing documents or rules and regulations noticed to the unit or parcel owner in the association official records;
- If the rules and regulations of the association applicable to the unit require approval by the board of directors of the association for the transfer of the unit;
- A list of, and contact information for, all other associations of which the unit is a member;
- Contact information for all insurance maintained by the association; and
- The signature of an officer or authorized agent of the association.

The bill provides an effective period for an estoppel certificate. Certificates that are hand delivered or sent by electronic means have a 30-day effective period. Certificates delivered by regular mail have a 35-day effective period. If additional information becomes available or a mistake is discovered regarding the certificate, an amended certificate may be delivered. The amended certificate becomes effective if the sale or mortgage has not been completed. A fee may not be charged for the amended certificate and the amended certificate restarts the effective period upon delivery.

The bill provides that an association waives the right to collect any moneys owed in excess of the amount specified in the estoppel certificate from any person, which would include any owner, who in good faith relies upon the certificate and from that person's successors and assigns.

The bill provides that the fee for the preparation and delivery of an estoppel certificate may not exceed \$250 if there are no delinquent fees owed by the applicable unit or parcel to the association on the date the certificate is issued. If a certificate is requested on an expedited basis and delivered within 3 business days, the association may charge an additional fee of \$100. If a certificate is requested and delivered in more expedited basis less than 3 business day, the association may charge an additional fee as the association and the party requesting the certificate may mutually agree. If a delinquent fee is owed to the association, an additional fee not to exceed \$150 may be added to the estoppel certificate. The bill provides that if an association does not provide the certificate within 10 business days of a proper request, a fee may not be charged for the preparation or delivery of the estoppel certificate.

These fees are to be adjusted every 5 years equal to the annual increases for that 5-year period in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items. The Department of Business and Professional Regulation must calculate the fees, rounded to the nearest dollar, and publish the amounts, as adjusted, on its website.

The bill provides a schedule of maximum aggregate fees if an owner of multiple units or parcels asks for estoppel certificates. The schedule only applies if there are no past due monetary obligations on any of the units or parcels and the certificates are requested simultaneously. In the aggregate, the fees may not exceed:

- For 25 or fewer units or parcels, \$750.
- For 26 to 50 units or parcels, \$1,000.
- For 51 to 100 units or parcels, \$1,500.
- For more than 100 units or parcels, \$2,500.

The bill provides that a written resolution by the board or provided by a written management, bookkeeping, or maintenance contract is required to charge a fee for the preparation and delivery of the certificate. The fee is payable at the time the certificate is ordered. If the fee is to be paid in conjunction with the sale or mortgage of a unit but closing does not occur, the fee shall be refunded to a payor other than the unit owner. The payor must make the request within 30 days after the closing date for which the certificate was sought and must be in written format accompanied by reasonable documentation that the closing sale did not occur. The fee must be refunded within 30 days of receiving the request for refund. The refund is the obligation of the unit owner and the association may collect the fee from the unit owner in the same manner as an assessment against the unit. In any action brought to enforce a right of reimbursement, the prevailing party will be awarded damages and attorney fees and costs.

The bill provides that the right to a refund may not be waived or modified by any contract or agreement.

The bill provides an effective date of July 1, 2017.

B. SECTION DIRECTORY:

Section 1 amends s. 718.116(8), F.S., relating to estoppel certificates for condominiums.

Section 2 amends s. 719.108(6), F.S., relating to estoppel certificates for cooperatives.

Section 3 amends s. 720.30851, F.S., relating to estoppel certificates for homeowners' associations.

Section 4 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides limits on the amount associations may charge for preparation and delivery of the estoppel certificate. To the extent that this limit differs from the current "reasonable" charges, associations and unit or parcel owners may realize benefits or detriments.

The bill also provides that a payor of a fee for an estoppel certificate may seek damages from an association if the association does not process a refund within 5 days after notice that it has not paid the refund in the 30 day period provided in the bill. The payor may also seek damages from an association that purports that the fee for preparing the estoppel certificate is non-refundable. To the extent that associations do not follow the provisions of the bill, associations may realize a detriment and payors may realize a benefit.

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:

Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted.

In *Allied Structural Steel Co. v. Spannaus*,²⁰ the United States Supreme Court set forth the following principles in examining a law under an impairment analysis, ruling:

[T]he first inquiry must be 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. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Referring to the *Allied* opinion, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*²¹ added the following clarification to the analysis:

²⁰ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2017, the Civil Justice & Claims Subcommittee adopted a proposed committee substitute with one amendment and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Changing the base fee for an estoppel certificate to \$250;
- Authorizing a fee mutually agreed on by the association and requesting party for a certificate requested in less than 3 business days;
- Authorizing fee adjustment every 3 years tied to the Consumer Price Index and requiring the Department of Business and Professional Regulation to publish the adjusted fees on its website;
- Requiring the association to process a refund to a payor for an estoppel certificate within 30 days of receiving a request for a refund;
- Providing that a payor provide notice to the association if the payor does not receive the refund in a timely manner and penalties if the association fails to process the refund after the notice;
- Providing that the right to a refund may not be abrogated or abridged and language to the contrary on an estoppel certificate is null and void; and
- Providing minimum damages of 3 times the original refund amount to a payor if an association delivers a certificate containing language indicating that the fee is non-refundable in full or in part.

On March 21, 2017, the Careers and Competition Subcommittee adopted one strike-all amendment and one amendment to the amendment and reported the bill favorably as a subcommittee substitute. The subcommittee substitute changes the bill in the following ways:

- Authorizes a fee adjustment every 5 years by DBPR tied to the Consumer Price Index;
- Revises information that must be on an estoppel certificate;
- Removes:
 - Provisions specifying minimum damages from reimbursement enforcement actions;
 - Timeframes from the reimbursement procedures; and
 - Language regarding proof of delivery for an estoppel certificate; and
- Lowers the maximum additional fee from \$200 to \$150 for those requesting an estoppel certificate who owe money to the association.

This analysis is drafted to the subcommittee substitute as passed by the Careers and Competition Subcommittee.

²¹ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).