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COMMUNITY ASSOCIATION NEWSLETTER

SUMMER 2014

We customarily provide our annual review of new laws which affect community associations and this year is no different.

HOUSE BILL 807

House Bill 807, which consists of fifty-four (54) pages of text was passed by the Florida Legislature and becomes effective on July 1, 2014. Below is an overview of the significant changes.

FLORIDA CONDOMINIUM ACT (CHAPTER 718)

BY: CHRISTOPHER J. SHIELDS, ESQ.

Condominium Association Assessment Liability

In 2012, The Florida Appellate decision in the case of Aventura Management v. Spiaggia held that if an association acquires title to a unit through its lien foreclosure or deed in lieu of foreclosure, the debt due and owing to the association was extinguished and the association lost the right to seek and recover contribution from any subsequent successor in title (e.g. a subsequent foreclosing lender) for any past due assessments that were owed by the previous owner. Under the Aventura decision, a condominium association was precluded from recovering any of the prior debt if a lender subsequently foreclosed its first mortgage and re-took title from the association. As such, in cases where there was a significant underlying mortgage on the property, associations were obviously hesitant to foreclose their liens and waited in many cases months and even years for lenders to foreclose their mortgages.

In 2013, the Florida legislature amended F.S. Section 720.3085 to legislatively overrule the Aventura decision and exempt a homeowners association that acquires title from extinguishing the debt owed. Now, effective July 1, 2014, F.S. Section 718.116 has been amended to extend that same exemption to condominium associations. The significant impact is that after July 1, 2014, a condominium association that takes title to a unit through its lien foreclosure or deed in lieu of foreclosure retains the right to collect the debt that was incurred prior to the association taking title. However, the association will not be able to collect assessments that actually accrued during the time the association actually is the owner of the unit.

After July 1, 2014, both homeowners associations (HOAs) and condominium associations can now foreclose their liens and take title and not be concerned that they will lose the opportunity to recover past due amounts owed if and when the underlying lender forecloses its mortgages. Of course, the safe harbor enjoyed by lenders will still apply and may limit the association's right to recover all that is due but the risks associated with a lien foreclosure are now greatly diminished and all condominiums and HOAs should strongly reconsider foreclosing their liens as taking title will no longer extinguish the prior debt.

Abandoned Condominium Units

Under F.S. Section 718.111(5) as amended, a condominium association's right of access has been expanded to specifically allow a condominium association the right to enter abandoned units (to inspect the unit, make repairs to the unit or common elements, turn on utilities and otherwise preserve the unit). Under new 718.111(5)(b), a unit is presumed to be abandoned if:

1. it is being foreclosed and no tenant appears to have resided in the unit for at least four (4) continuous weeks; or
2. no tenant appears to have resided in the unit for two (2) consecutive months.

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Except in the case of an emergency, the association may not enter an abandoned unit until it has given written notice to the owners at the address reflected in the association's records and if the owner consented to receive electronic notice (email), then email notice is sufficient.

Most importantly, the statute now provides that any expense incurred by the association is chargeable to the unit owners and is enforceable as an assessment and can be collected by lien foreclosure proceedings. Further, the new statute will now permit a condominium association to petition the court to appoint a receiver to lease out an abandoned unit for the benefit of the association to offset against the rental income, costs and expenses incurred by the Association. This new law will obviously help those condominiums which are plagued with abandoned units. However, one cannot help but wonder why the Florida legislature waited until now to enact the laws such as this and others discussed herein which were desperately needed five (5) years ago during the height of the real estate meltdown.

Property Insurance

F.S. 718.111(11)(j) has been amended to clarify that in the absence of "an insurable event", the obligation to reconstruct, repair or replacement is determined by the condominium declaration and not the statute. Damage caused by wear and tear (as opposed to damage resulting from a casualty event, e.g. fire, windstorm, flood, etc.) is not necessarily the association's responsibility even though the statute requires the association to insure the component element. Unless it is an insurable event, the responsibility to repair is dictated by the provisions in the condominium declaration and not the statute.

Owner's Directories

In what seems like an annual event, F.S. 718.111(12) has once again been amended to now provide that a condominium association will be permitted to publish all telephone number(s) of its unit owners in a directory unless the unit owner requests in writing that his or her telephone number be excluded from the directory. Furthermore, the amendment clarifies that unit owners may also consent in writing to permit the association's directory to publish other "protected" information such as their email addresses. Please note as discussed later herein, effective July 1, 2014, the law pertaining to Owner's Directories is the same for condominiums, HOAs and cooperatives. Unless owners specifically direct the association in writing otherwise, telephone numbers will be published. However, in order to publish owners' email addresses, owners must provide their consent in writing.

Official Records

F.S. 718.111(12) as now amended provides an outgoing board or committee member is required to relinquish all official records and association property in their possession to the incoming board within five (5) days after the election and failure to do so may result in the State of Florida imposing a civil penalty.

Video Conferencing

New amendments to F.S. 718.112(2)(b)5 simply clarify that condominium boards are permitted to "meet" by telephone, real-time electronic or video conferencing and that board members participating remotely are as though they were physically present.

Board Emails

F.S. 718.112(2)(c) as amended, simply clarifies existing law and provides while board members may use email to communicate with each other, the board may not act or vote on association business via email. The statute, however, does not address and is conspicuously silent on the issue of whether or not emails between board members are considered "official records" and open for inspection.

HOMEOWNERS' ASSOCIATIONS (HOAS) (CHAPTER 720)

BY: CHRISTOPHER J. SHIELDS, ESQ.

Access to HOA Board Meetings

F.S. 720.303(2) and 720.306(1) have been amended to provide that board meetings must be held at a location that is accessible to a physically handicapped person if (emphasis added) requested by a physically handicapped person who has a right to attend the meeting (i.e. a member of the HOA). Note: This new provision only applies to HOAs and does not apply to condominium associations or cooperatives.

Emergency Powers

New Section 720.316 has been added to grant an HOA emergency powers after catastrophic events including the right to implement a disaster plan, mitigate further damage, and borrow money without owner's approval.

Mailing out Amendments

Last year, the Florida legislature amended F.S. 720.306 to require an HOA to mail copies of any recorded amendment to its membership. This resulted in a significant and unnecessary expense to HOAs since the HOA members already were aware of the text of any amendment when they were asked to vote on it. Now, effective July 1, 2014, if a copy of the proposed amendment was provided to the membership before they voted and was not changed, then in lieu of providing a copy of the recorded amendment, the HOA can simply provide notice to its members that it was adopted and the recording information of where it can be located in the County Public Records and that a copy is available at no charge to the HOA member upon written request to the HOA.

Official Records

Similar to the law that applies to condominiums and cooperatives, new 720.305(5) provides that an HOA can print and distribute a directory containing name, parcel address and telephone numbers of members. An HOA member may exclude his/her telephone number from the directory by requesting so in writing. Additionally, if HOA members provide their consent, in writing, the HOA can publish other "protected" information including their email addresses.

Marketable Record Title Act (MRTA)

F.S. 712.05, as amended, clarifies that no notice is required to be published in a newspaper when an HOA is preserving its declaration of covenants from extinguishing.

MRTA is a very important statute that has far reaching impacts that every HOA needs to be concerned with because under Florida law, an HOA's declaration of covenants and restrictions will expire after 30 years and regardless whether the text of the declaration seemingly provide that it will extend beyond 30 years or even run in perpetuity. NOTE: MRTA does not apply to condominiums and will not extinguish condominium declarations but MRTA will apply to and will extinguish and otherwise impact other HOA associations that are usually created and developed in conjunction with condominiums and can take the form of and be described as "neighborhood", "commons", "recreational" or "master" associations. If your community is or has an association HOA, it is time to review MRTA and its effects with legal counsel.

COOPERATIVES (CHAPTER 719)

BY: CHRISTOPHER J. SHIELDS, ESQ.

Official Records

F.S. 719.104(2)(c) as amended, now mirrors new 718.111(12)(5) and provides that a cooperative may print and distribute a directory containing name, parcel address and telephone numbers of members.

Surrender of Official Records

In addition, new 719.104(2)(e) mirrors new 718.111(12)7(f) and requires outgoing board members or committee members to relinquish all official records to the incoming boards within five (5) days after election.

Financial Reporting

New 719.104(4) will substantially mirror the same financial reporting standards required by 718.113(13) with respect to compiled, reviewed and audited financial statements.

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Board Eligibility

Likewise, new 719.106(1)(a) is now similar to what the law has been for condominiums. Members who are delinquent in payment of any monetary obligation to the association are not eligible to be a candidate for the board and may not be listed on the ballot.

Emergency Powers

New 719.128 gives the association emergency powers after catastrophic events including giving the board the right to determine if and when the property must be evacuated and when it is safe for owners to return.

SENATE BILL 440 - CLARIFIES THAT CERTAIN SECTIONS OF CHAPTER 718 APPLY TO RESIDENTIAL CONDOMINIUMS

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Senate Bill 440 amended a number of sections of Chapter 718 to clarify that certain provisions only apply to residential condominiums. The purpose of the amendments was to clarify that the provisions in 718 that impose obligations, limitations or restrictions on or relating to letters of written inquiry, voting and proxies, election by written ballot, director certification, arbitration and hurricane shutters only apply to residential condominiums. As a result of these amendments it is now clear that nonresidential condominiums no longer have to comply with certain sections of 718.

Additionally, Senate Bill 440 amended the provision relating to fire sprinkler retrofitting. Chapter 718 now provides that no local authority may require a condominium association to complete retrofitting of a fire sprinkler system before January 1, 2020. It further provides that if a residential condominium association has not voted to waive the retrofitting requirement by December 31, 2016, then the condominium association must initiate application for a building permit and that compliance be met by December 31, 2019.

SENATE BILL 7037 - NEW STATUTORY NOTICE REQUIREMENTS AND MORE

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Community Association Managers

Senate Bill 7037 amended a number of sections of the Florida Statutes affecting community association management companies and managers. The amendment to section 468.431 expanded the definition of community association management to cover a broader range of activities. Section 468.4334 amends the statute to further define the professional standards that govern community association managers. Section 468.4334 provides that a community association management company, manager and the association may provide in their contract that the association will indemnify and hold harmless a community association manager's ordinary negligence, act or omission as a result of an instruction by a director of a community association.

Condominiums

Senate Bill 7037 further amended section 718.116 to provide for a new subsection 5(d). This new subsection provides that condominium associations are required to use a release of lien form that substantially complies with the language provided for in new subsection 5(d). The release of lien form now requires the signatures of two witnesses. We are concerned that the new requirement for two witnesses could cause title issues to arise in the future because existing law prior to July 1, 2014 imposed no such requirement.

These new statutes provide uniform language for the Pre-Lien, Notice of Intent to Foreclose and Release of Lien forms. Complying with the statutory notice requirements is not optional. Failure to comply with these requirements that take effect on July 1, 2014 could result in a condominium association having to start over an assessment lien foreclosure that was initiated without providing the proper notices as required effective July 1, 2014 or worse yet having a judgment set aside based upon the Association's failure

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to satisfy statutory conditions precedent to filing a claim of lien or foreclosing the lien.

While we have concerns about the above mentioned changes, we are most concerned about the fact that Senate Bill 7037 inadvertently repealed two very important sections that will cease to exist on June 30, 2014:

> Section 718.116(6)(c)
>
> If the unit owner remains in possession of the unit after a foreclosure judgment has been entered, the court, in its discretion, may require the unit owner to pay a reasonable rental for the unit. If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.
>
> Section 718.116(6)(d)
>
> The association has the power to purchase the condominium parcel at the foreclosure sale and to hold, lease, mortgage, or convey it.

The inadvertent repealing of these two sections of 718.116 will likely create a problem for any condominium association that does not already have language in its declaration authorizing it to foreclose on an assessment lien and take title to a unit at a foreclosure sale. A condominium association that takes title to a unit after July 1, 2014 without the underlying authority to do so could have a problem. We encourage each condominium association to have its declaration of condominium reviewed to ensure that the association has the authority to take title to a unit at its own foreclosure sale. If the declaration does not contain express authority to foreclose on assessment liens or take title to a unit at its own foreclosure sale, our offices recommend that the condominium association amend its declaration of condominium to provide for such authority.

Senate Bill 7037 also inadvertently repealed section 718.116(6)(c) which means that after July 1, 2014, a condominium association no longer has authority under Chapter 718 to petition a court for the appointment of a receiver to collect rents from occupants of a unit after entry of summary judgment in a bank foreclosure.

Cooperatives

Senate Bill 7037 amended Chapter 719.108(3)(a) similarly to Chapter 718 to provide that any Notice of Intent to Record a Claim of Lien must substantially comply with the statute. Further, a cooperative association's claim of lien is not effective for more than a year unless within the year an action to enforce the lien is commenced. The one year period is automatically extended for any length of time during which the cooperative association is prevented from filing a foreclosure action due to a bankruptcy.

New section 719.108(3)(3)(c) was added to provide that a shareholder in a cooperative may file a notice of contest of lien. This section also provides the form of statutory notice.

New section 719.108(3)(d) was added and it provides for a similar release of lien form as Chapter 718.

Homeowners Associations

Senate Bill 7037 amended section 720.3085 to provide that a homeowners association, like a condominium association, has to comply with statutory form notice requirements relating to releases of lien and notices of intent to record a claim of lien.

HOUSE BILL 1089 - CITIZENS PROPERTY INSURANCE CORPORATION PHASING OUT COVERAGE OF CERTAIN STRUCTURES

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Effective January 1, 2014 section 627.351 of the Florida Statutes pertaining to Citizens Property Insurance Corporation is amended to provide a structure with a replacement cost of $1,000,000 or more or a single dwelling combined with its contents has a replacement cost of $1,000,000 or more are no longer eligible for coverage by Citizens. January 1, 2015 the million dollar threshold is lowered to $900,000. January 1, 2016 the coverage threshold is lowered to $800,000 and then on January 1, 2017 the threshold coverage is lowered to $700,000.

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Section 627.351 was amended to add a new subsection (6) which provides as follows:

> With respect to wind only coverage for commercial lines residential condominiums, effective July 1, 2014[1] a condominium shall be deemed ineligible for coverage if 50% or more of the units are rented more than eight times in a calendar year for a rental agreement period of less than 30 days.

This amendment will have the effect of repealing Citizens' transient rental rule that provides "condominiums, cooperative or apartment risks with transient occupancy exposure, in which more than 25% of the total number of the units are used for transient purposes. Transient means rented to guests more than three times in a calendar year for periods of less than 30 days or one calendar month, whichever is less, or held out to the public as a place regularly rented out to guests for period of less than 30 days." This change to section 627.351 may be a welcome change by many condominium associations that were affected by Citizens Property Insurance Corporation's transient rental rule.

[1] The January 1, 2014 reference in the text of the amendment is likely a mistake as the amendment is effective July 1, 2014. It is unlikely that the legislature intended the provision to apply retroactively.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also specializes in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner with the Pavese Law Firm. Charles B. Capps (charles capps@paveselaw.com), is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey (kathleenberkey@paveselaw.com) is an Associate with the Pavese Law Firm. Matthew P. Gordon, Esq. (matthewgordon@paveselaw.com) is an Associate with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw. com) is an Associate with Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is an Associate with the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including but not limited to governing document interpretation, covenant enforcement, collection of assessments, lien foreclosures and general litigation matters. Please feel free to contact them via the e-mail addresses listed above.

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