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FLORIDA'S NEW ESTOPPEL LAW: HOW IT WILL IMPACT CONDOMINIUMS, COOPERATIVES AND HOAs IN FLORIDA AND WHAT YOU NEED TO KNOW

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On June 14th Governor Scott signed Senate Bill 398 which now becomes law and takes effect on July 1, 2017. The new law was sponsored by The Florida Land Title Association which consists of title and closing agents throughout the State of Florida, and which was intended to address their industry's needs and desires. However, this new law will dramatically shift and place burdens upon Florida Condominiums, Cooperatives and HOAs, and each of these communities need to be prepared to comply with these new legal requirements.

First, the time constraints to respond to estoppel requests has been reduced from fifteen (15) regular or consecutive days to ten (10) business days. Further, the law will now require each association to designate on its website a person or entity with a street or email address to receive estoppel requests, all of which presumes that each association has its own dedicated website when, in fact, there is no current law requiring any association to have and maintain a website. (Note that House Bill 1237, which only pertains to condominiums and which is scheduled to also take effect on July 1, 2017, only requires condominium associations with 150 or more units to have their own dedicated website by July 1, 2018.) So that is the first potential glitch. Let's call this Issue Number One.

Next, whereas estoppel certificates historically provided straightforward payoff information to closing agents, lenders, etc., the new law now requires associations to respond to a wide array of legal of questions and to provide a considerable amount of information that does not necessarily lend itself to simple "yes" or "no" answers. For instance, under the new law, associations will need to identify the "parking or garage space number, as reflected on the books and records of the association". This is a seemingly innocuous piece of information until you realize that there is a significant legal difference between numbered parking spaces that are limited common elements which automatically pass with title to the underlying unit when it is sold to a third party, and numbered parking spaces which are simply common elements. There is a significant legal difference. Be sure you understand this difference. Let's call this Issue Number Two.

Next, the association is now obligated to respond with a simple "yes" or "no" to the question of "whether there is a capital contribution fee, resale fee, transfer fee or other fee due", but is not asked to specify or otherwise identify to whom the fee is paid. This begs the question of whether the association is simply required to respond on its own behalf, or whether it needs to respond to and include information on any other association to which the unit or lot may also be a member. Let's call this Issue Number Three.

Next, each association will now be required to respond either "yes" or "no" to the following question: "Is there any open violation of rule or regulation noticed to the unit owner in the association's official records?" Please read the question again. If you are not sure how to answer it, I bet you are not alone. Let's call this Issue Number Four.

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Next, each association will now be required to respond either "yes" or "no" to the following questions: a) "Do the rules and regulations of the association applicable to the unit require approval by the board for the transfer of the unit?" and b) "Is there a right of first refusal provided to the members of the association?"

Next, the new law will now require the association to provide a list of and contact information for all other associations of which the unit is a member and provide contact information for all insurance maintained by the association. Again, the closing industry now wants Associations to do their work for them. Is your association prepared to do this? If not, you need to be.

Now, here's the best part. The association is only allowed to charge up to, but not exceeding $250.00 (plus an additional $150.00 if the owner was delinquent), but only if the association completes the estoppel certificate and timely responds within ten (10) business days after receiving a written or electronic request from a unit owner or their designee, or the unit's mortgagee (lender) or their designee. If ten (10) business days has expired, the association is still required to respond and furnish the estoppel certificate. However, it can no longer charge any fee for filling out the paperwork which, if done correctly, can be a voluminous task, especially for those units that are seriously delinquent, in the process of being liened or foreclosed (either by the association, another association to which the unit is a member, or by a lender(s) – and yes, it is not unusual to come across more than one lender involved). This says nothing about the complications that occur frequently when the account is actively litigated with pending court proceedings or when delinquent owners also file and seek bankruptcy protection.

In the best of all worlds, responding with payoff information may not be an inconvenience under garden variety cases. However, the problems occur when responding to and completing estoppel requests for delinquent units, because many of the questions do not lend themselves to simple "yes" or "no" answers and often require retrieval of information from other parties involved, including our firm if the account has been sent to our office to collect the delinquent account. Therefore, collecting the information and responding within ten (10) business days can be difficult at best.

In light of all of these issues, it is critical that the recipient of the estoppel request understands the significance of the information that needs to be provided and the ten (10) business day deadline that must be met. Otherwise, the association will still have to complete the form and return the estoppel certificate, but it will not ever be able to charge up to the $250.00 for this service. This shortened timeline and the requirement to provide and furnish more detailed information will be problematic for unprepared associations and many will be forced to respond without ever being compensated or reimbursed for the expenses they have incurred.

Further, the completed estoppel certificate that is hand delivered or emailed back will now be required to be valid for thirty (30) days, and for thirty-five (35) days if sent back by regular mail. This means that the association cannot amend or supplement the estoppel certificate for 30 or 35 days, as the case may be.

Finally, if the estoppel certificate is requested in conjunction with a sale or mortgage on a unit and the sale or loan does not occur or close, the person who requested and received the estoppel certificate and who paid the estoppel fee is entitled to request and receive a refund, provided the request is made within thirty (30) days of the proposed sale or loan closing, and so long as the person who made the request and paid the estoppel fee is not the owner. The new law further provides that the refund is the obligation of the parcel owner, but that the association may collect it from that owner as an assessment. This essentially means that the person who requested the estoppel certificate and paid a seemingly paltry amount for all the effort the association exerted in timely responding in ten (10) business days will now be entitled to receive a refund, and the association will then be forced to attempt to recover the refund from the owner (who may be in arrears and whose home may be "under water"). Of course, this brings little solace to the association that will be forced to add the estoppel certificate refund to the delinquent owner's account ledger, with perhaps little or no viable chance of ever recovering it.

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So, what should your association do? First, contact and work with your attorney to review your governing documents and to create a template so that when the association receives estoppel requests either the board or its CAM can complete the rest of the form. Due to the severe time constraints, associations need to make sure that its CAM (or its board if self-managed), understands the significance of this task and that each person who is furnishing the information understands their role and provides it timely.

Finally, readers of this article may note that many of the questions the association will now be required to answer have also appeared in Fannie Mae or lenders questionnaires. On many occasions, this firm has and still encourages our clients not to respond to questions that can expose the association to unnecessary liability. The reason is that under Florida law, associations can be sued for negligent misrepresentation by anyone who relies upon these answers. Under current law, associations are not required to respond to or complete Fannie Mae or lender questionnaires. However, if the association chose to complete Fannie Mae or lender questionnaires, the association is granted limited immunity if the association's response was made in good faith and to the best of their ability as to their accuracy. However, this same limited immunity afforded to associations when completing Fannie Mae or lender questionnaires has not been extended to associations when completing these new estoppel certificates. As such, associations should operate with extreme caution, seek and receive legal advice from their legal counsel as early as possible when framing responses to questions posed in their estoppel certificate requests and coordinate the processing and delivery of these estoppel certificate responses.

Please feel free to contact us and let us begin reviewing your governing documents and creating an estoppel certificate template so that when you receive an estoppel request, it can be processed in a timely manner and as required by law.

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