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CONDO ARBITRATION AND MEDIATION UNDER SECTION 718.1255 OF THE FLORIDA STATUTES

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This article concerns the recent amendments to the alternative dispute resolution provisions of the Condominium Act. All references to sections and subsections of statutes in this article are to the Florida Statutes (2021). The Condominium Act requires arbitration of certain disputes through the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation ("Division") *before* aggrieved parties may proceed with litigation. In July 2021, amendments to the alternative dispute resolution provisions of the Condominium Act, more specifically § 718.1255(5), became effective and incorporated the presuit mediation process from the Homeowners' Association Act, § 720.311, for resolution of certain disputes between unit owners and condominium associations. Section 718.1255(5) now reads in full:

> In lieu of the initiation of nonbinding arbitration as provided in subsections (1)-(4), a party may submit a dispute to presuit mediation in accordance with s. 720.311; however, election and recall disputes are not eligible for mediation and such disputes must be arbitrated by the division or filed in a court of competent jurisdiction.

In the condominium setting, unit owners and associations now have another option, or hurdle depending on the circumstances, through which to resolve disputes before going forward with litigation. Important, however, is the nature of the dispute between the parties. The Homeowners' Association Act and the Condominium Act define "dispute" in very distinct ways. So, when it comes to effectively navigating § 718.1255, knowing whether the dispute *requires* presuit mediation or arbitration could prevent wasted time, effort, and money.

Section 718.1255(1) defines "dispute" as follows with emphasis added:

As used in this section, the term "dispute" means any disagreement between two or more parties that involves:

a) The authority of the board of directors, under this chapter or association document, to:

1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
2. Alter or add to a common area or element.

b) The failure of a governing body, when required by this chapter or an association document, to:
   1. Properly conduct elections.
   2. Give adequate notice of meetings or other actions.
   3. Properly conduct meetings.
   4. Allow inspection of books and records.

c) A plan of termination pursuant to s. 718.117.

"Dispute" does not include any disagreement that primarily involves: title to any unit or common element; the interpretation or enforcement of any warranty; the levy of a fee or assessment, or the collection of an assessment levied against a party; the eviction or other removal of a tenant from a unit; alleged breaches of fiduciary duty by one or more directors; or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.

What constitutes a dispute subject to presuit arbitration or mediation under the Condominium Act is notably distinct from the definition of a dispute subject to presuit mediation under the Homeowners' Association Act. Section 720.311(2)(a) provides in relevant part with emphasis added:

> Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas **and other covenant enforcement disputes**, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of a demand for presuit mediation served by an aggrieved party before the dispute is filed in court….Disputes subject to presuit mediation under this section shall not include the collection of any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties.

In the homeowners' association context, the catch-all phrase "and other covenant enforcement disputes," forces a myriad of disputes into presuit mediation. Only collections actions and actions for enforcement of prior mediation settlement agreements are expressly excluded from the definition of a dispute under § 720.311(2)(a). But the incorporation of presuit mediation procedures from § 720.311 into § 718.1255(5) does not expand the definition of an arbitrable dispute under § 718.1255. Instead, § 718.1255(5) specifically allows presuit mediation "[i]n lieu of the initiation of nonbinding arbitration as provided in subsections (1)-(4)." It follows that the definition of dispute in § 718.1255(1) remains the determining factor of whether alternative dispute resolution is required by the Condominium Act in any given set of circumstances between unit owners and condominium associations.

There are still many questions to be resolved as unit owners and associations attempt to mediate disputes which would not have been arbitrable in the first place. A large concern of course boils down to recovery of reasonable attorneys' fees and costs. For arbitrable disputes that are resolved by the Division, prevailing parties are entitled to recover the cost of the arbitration and reasonable attorney fees in amounts determined

by the arbitrator, including any costs and reasonable attorney fees incurred in preparing for and attending any scheduled mediation under § 718.1255(4)(k).

The reference to mediation in § 718.1255(4)(k) specifically concerns mediation under § 718.1255(4)(e) which allows any party to request that an arbitrator refer a case to mediation under the rules adopted by the Division. In other words, recovery of attorney fees for preparation and attendance at a mediation under § 718.1255(4)(k) only applies to mediations initiated *after* the Division accepts a petition for arbitration.

After a petition for arbitration is accepted by the Division and referred to mediation, if mediation is unsuccessful and the parties do not agree to continue arbitration, § 718.1255(4)(h) provides in relevant part, "The parties may seek to recover any costs and attorney fees incurred in connection with arbitration and mediation proceedings under this section as part of the costs and fees that may be recovered by the prevailing party in any subsequent litigation."

However, there is no explicit language in § 718.1255(5) that allows parties proceeding with mediation thereunder to recover costs and reasonable attorneys' fees in any subsequent arbitration or litigation. It is also not expressly clear whether the penalties for failing to mediate under § 720.311 are incorporated into § 718.1255(5). The statute allows a party to submit a dispute to presuit mediation in lieu of arbitration altogether, but it is unclear whether the other party is required to proceed with mediation once the offer is made, or if the matter may be submitted as a petition for arbitration thereafter.

Note that § 718.1255(5) does not allow for mediation of *all* arbitrable disputes. Election and recall disputes are not eligible for mediation under this subsection and must be arbitrated by the Division or filed in a court of competent jurisdiction. It is important to know which alternative dispute options are *available* under the Condominium Act before proceeding with demand letters and notices. It is also important to know which options allow for recovery of reasonable prevailing party attorney fees and costs.

Another important consideration when reviewing available alternative dispute resolution options under the Condominium Act is to double check the association's governing documents to make sure that arbitration is not specifically required for the dispute(s) at issue. Very often, association bylaws contain language that requires arbitration pursuant to § 718.1255. Even though § 718.1255 has been amended to allow for mediation of arbitrable disputes, the express language of your association's governing documents could impact whether mediation is possible.

The recent amendments to the alternative dispute resolution provisions of the Condominium Act recognize that condominium disputes are not one-size-fits-all. Condominiums throughout the State of Florida have distinct governing documents and unique residents from varying backgrounds producing the circumstances for a wide variety of disputes. It is unclear how the new provision, § 718.1255(5), will shake out as unit owners and condominium associations begin navigating presuit mediation in lieu of arbitration with the Division. Knowing which disputes *require* presuit action under the Condominium Act or the association's governing documents, and which do not, can make all the difference.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

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