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# 2011 FLORIDA LAWS IMPACTING CONDOMINIUMS, HOMEOWNERS ASSOCIATIONS AND COOPERATIVES

The 2011 Florida legislative session had several bills passed into law impacting condominiums, homeowners associations and cooperatives. The following is a detailed analysis of each bill:

1. **CS/CS/CS/HB 1195** was signed into law by Governor Scott on June 21, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-196, Laws of Florida. This law was the major community association package for the 2011 legislative session, and addressed eleven separate areas:

A. **Board Meetings and Election of Directors**. The law clarifies the notice and meeting procedures for condominium and homeowners associations and provides clarification of the procedures for uncontested elections, when the election is not contested and the certification procedures for newly elected condominium board members. The law also conforms the speaking privileges for members of a mandatory homeowners association to those of unit owners at a meeting of a condominium association board of directors.

i. Condominium Associations[1]

(1) Section 718.112(2)(b)5.:

(A) The law deletes the reference to "attending by telephone conference."

(B) The provision remaining requires that "a telephone speaker must be used so that the conversation of those members may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting.

(C) Note: This does not preclude the use of conference call facilities in conjunction with a speaker phone.

(2) Section 718.112(2)(c)3.b.:

(A) The requirement that board meetings and committee meetings be open to unit owners does not apply to board meetings held for the purpose of discussing personnel matters.

(B) Previously, the statute provides that "[a]ny unit owner may tape record or videotape meetings of the board of administration." The new statute provides that "a unit owner may tape record or videotape the meetings."

[1] Section 3 of CS/CS/CS/HB 1195.

(i) This could be interpreted to only permit one recording per meeting for all owners, and therefore have unintended consequences.

(3) Section 718.112(2)(d)4.b.:

(A) A board member is automatically suspended from service on the board if he or she fails to timely file the written certification or educational certificate.

(i) The board may temporarily fill the vacancy during the period of suspension.

(B) The secretary of the association must keep the written certification or educational certificate for inspection by the members for five years after a director's election or appointment.

(C) The validity of any appropriate action is not affected by an association's failure to have the certification on file.

(4) Section 718.112(2)(d)2.:

(A) An election is not required if the number of vacancies equals or exceeds the number of candidates.

(i) "Candidate" means an eligible person who has timely submitted his or her written notice of candidacy, as described in subparagraph 4.(a).

(B) Except in a timeshare condominium, or if the staggered term of a board member does not expire until a later annual meeting, or if all members' terms would otherwise expire but there are no candidates, the terms of all board members expire at the annual meeting, and such members may stand for re-election unless prohibited by the By-Laws.

(C) If the number of board members whose terms expire at the annual meeting equals or exceeds the number of candidates, the candidates become members of the Board effective upon the adjournment of the annual meeting.

(D) Unless the bylaws provide otherwise, any remaining vacancies shall be filled by the affirmative vote of the majority of the directors making up the newly constituted board even if the directors constitute less than a quorum or there is only one director.

(E) Any unit owner desiring to be a candidate for board membership must comply with subsection 4.a. requirements of written notice and must be eligible to serve on the board of directors at the time of the deadline for submitting a notice of intent to run in order to have his or her name listed as a proper candidate on the ballot or to serve on the board.

(5) Section 718.112(2)(d)4.b.:

(A) In lieu of the written certification that he or she has read and understands the governing documents, on or before 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered by a division approved condominium education provider within one year before or 90 days after the date of election or appointment.

(B) The written certification or election certificate is valid and does have to be resubmitted as long as the director serves on the board without interruption.

(C) Note: The post-election certification requirement is found in Section 718.112(2)(d)3., Florida Statutes.

(6) Section 718.112(2)(d)10.:

(A) Timeshare condominium associations are permitted to use general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of a timeshare condominium association.

ii. Homeowners Associations[2,3]

(1) Section 720.303(2)(b):

(A) Members have the right to attend all board meetings. The right to attend, includes the right to speak with reference to all designated items. The association may adopt reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak.

[2] Section 17 of CS/CS/CS/HB 1195.
[3] Section 19 of CS/CS/CS/HB 1195.

(B) Notwithstanding any other law, meetings between the board or a committee and the association's attorney to discuss proposed or pending litigation or meetings of the board held for the purpose of discussing personnel matters are not required to be open to the members other than directors.

(2) Section 720.306(9)(b):

(A) A person who is delinquent in the payment of any fee, fine or other monetary obligation to the association for more than 90 days is not eligible for board membership.

(B) A person who has been convicted of any felony in this state or in a United States district or territorial court, or has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least five years as of the date on which such person seeks election to the board.

(C) The validity of any action by the board is not affected if it is later determined that a member of the board is ineligible for board membership.

B. **Collection of Rents from Tenants; Delinquencies.** The law clarifies the procedures for attempting to collect rent from a tenant of a delinquent owner and provides a new form letter for providing notice to the tenant. It also provides limitations on liability of a sub-association for obligations due to a master association.

i. Condominium Associations[4]

(1) Section 718.116(1)(b)2.:

(A) An association, or its successor or assignee, that acquires title to a unit through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other association, as defined in Section 718.103(2) or Section 720.301(9), which holds a superior lien interest on that unit.

(i) This revision was stated as intending to clarify existing law.

(2) Section 718.116(11)(a):

[4] Section 6 of CS/CS/CS/HB 1195.

(A) If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay to the association the subsequent rental payments and continue to make such payments until all monetary obligations of the unit owner related to the unit have been paid in full to the association.

(B) Any payment received from a tenant must be applied first to interest, then late fees, costs, attorney's fees incurred in collection and then to the delinquent assessment.

(3) Section 718.116(11)(a)1.:

(A) The association must provide the tenant notice, by hand delivery or United States mail, in substantially the following form:

> Pursuant to Section 718.116(11), Florida Statutes, the association demands that you pay your rent directly to the condominium association and continue doing so until the association notifies you otherwise.
>
> Payment due the condominium association may be in the same form as you paid your landlord and must be sent by United States mail or hand delivery to . . . (full address) . . . , payable to . . . (name). . . .
>
> Your obligation to pay your rent to the association begins immediately, unless you have already paid rent to your landlord for the current period before receiving this notice. In that case, you must provide the association written proof of your payment within 14 days after receiving this notice and your obligation to pay rent to the association would then begin with the next rental period.
>
> Pursuant to Section 718.116(11), Florida Statutes, your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

(4) Section 718.116(11)(a)4.:

(A) A tenant is immune from any claim by the landlord unit owner relating to the rent timely paid to the association after the association has made written demand.

(5) Section 718.116(11)(b):

(A) If the tenant paid rent to the landlord unit owner for a given rental period before receiving the demand from the association and provides written evidence to the association of having paid the rent within 14 days after receiving the demand, the tenant shall begin making rental payments to the association for the following rental period and shall continue making rental payments to the association to be credited against the monetary obligations of the unit owner until the association releases the tenant or the tenant discontinues tenancy in the unit.

(6) Section 718.116(11)(c):

(A) The law changed the statute to no longer provide that the tenant is liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing at least 10 days before the date the rent is due.

(B) The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord and that the landlord shall provide the tenant a credit against rents due to the landlord in the amount of monies paid to the association.

(7) Section 718.116(11)(d):

(A) The association may issue a notice under Section 83.56, Florida Statutes and may sue for eviction as if the association were a landlord under Part II of Chapter 83 if tenant fails to pay a required payment to the association after written demand has been made to the tenant.

(B) Note: Statute continues to fail to indicate that the unit owner obtains possession through the eviction process.

ii. Homeowners Associations[5]

(1) Section 720.3085(2)(d):

(A) An association, or its successor or assignee, that acquires title to a parcel through the foreclosure of its lien for assessments is not liable for any unpaid assessments, late fees, interest, or reasonable attorney's fees and costs that came due before the association's acquisition of title in favor of any other association, as defined in Section 718.103(2) or Section 720.301(9), which holds a superior lien interest on that parcel.

(i) This revision was stated as intending to clarify existing law.

[5] Section 20 of CS/CS/CS/HB 1195

(2) Section 720.3085(8)(a):

(A) If the parcel is occupied by a tenant and the parcel owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay to the association the subsequent rental payments and continue to make such payments until all monetary obligations of the parcel owner related to the unit have been paid in full to the association.

(B) Any payment received from a tenant must be applied first to interest, then late fees, costs, attorney's fees incurred in collection and then to the delinquent assessment.

(3) Section 720.3085(8)(a)1:

(A) The association must provide the tenant notice, by hand delivery or United States mail, in substantially the following form:

> Pursuant to Section 720.3085(8), Florida Statutes, the association demands that you pay your rent directly to the condominium association and continue doing so until the association notifies you otherwise.
>
> Payment due the condominium association may be in the same form as you paid your landlord and must be sent by United States mail or hand delivery to . . . (full address) . . . , payable to . . . (name). . . .
>
> Your obligation to pay your rent to the association begins immediately, unless you have already paid rent to your landlord for the current period before receiving this notice. In that case, you must provide the association written proof of your payment within 14 days after receiving this notice and your obligation to pay rent to the association would then begin with the next rental period.
>
> Pursuant to Section 720.3085(8), Florida Statutes, your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

(B) Note: The provisions of Sections 718.116(a)2. and 3. were not incorporated into Section 720.3085(8)(a); said sections provided that association must mail notice to (unit) owner of the association's demand that the tenant make payments to the association and provide the tenant with receipts for payments made.

iii. Cooperatives[6]

(1) Section 719.108(4):

(A) The law deletes the 2010 amendment relating to a lien for "reasonable costs for collection services for which the association has contracted against the unit owner of the cooperative parcel."

(2) Section 719.108(10)(a):

(A) If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay to the association the subsequent rental payments and continue to make such payments until all monetary obligations of the unit owner related to the unit have been paid in full to the association.

(B) Any payment received from a tenant must be applied first to interest, then late fees, costs, attorney's fees incurred in collection and then to the delinquent assessment.

(3) Section 719.108(10)(a)1.:

(A) The association must provide the tenant notice, by hand delivery or United States mail, in substantially the following form:

> Pursuant to Section 719.108(10), Florida Statutes, the association demands that you pay your rent directly to the condominium association and continue doing so until the association notifies you otherwise.
>
> Payment due the condominium association may be in the same form as you paid your landlord and must be sent by United States mail or hand delivery to . . . (full address) . . . , payable to . . . (name). . . .
>
> Your obligation to pay your rent to the association begins immediately, unless you have already paid rent to your landlord for the current period before receiving this notice. In that case, you must provide the association written proof of your payment within 14 days after receiving this notice and your obligation to pay rent to the association would then begin with the next rental period.

[6] Section 14 of CS/CS/CS/HB 1195.

Pursuant to Section 719.108(10), Florida Statutes, your payment of rent to the association gives you complete immunity from any claim for the rent by your landlord for all amounts timely paid to the association.

(4) Section 719.108(10)(a)4.:

(A) A tenant is immune from any claim by the landlord unit owner relating to the rent timely paid to the association after the association has made written demand.

(5) Section 719.108(10)(b):

(A) If the tenant paid rent to the landlord unit owner for a given rental period before receiving the demand from the association and provides written evidence to the association of having paid the rent within 14 days after receiving the demand, the tenant shall begin making rental payments to the association for the following rental period and shall continue making rental payments to the association to be credited against the monetary obligations of the unit owner until the association releases the tenant or the tenant discontinues tenancy in the unit.

(6) Section 719.108(10)(c):

(A) The law changed the statute to no longer provide that the tenant is liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing at least 10 days before the date the rent is due.

(B) The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord and that the landlord shall provide the tenant a credit against rents due to the landlord in the amount of monies paid to the association.

(7) Section 719.109(10)(d):

(A) The association may issue a notice under Section 83.56, Florida Statutes and may sue for eviction as if the association were a landlord under Part II of Chapter 83 if tenant fails to pay a required payment to the association after written demand has been made to the tenant.

(B) Note: Statute continues to fail to indicate that owner obtains possession through the eviction process.

C. **Condominium Associations - Agreements and Leases.**[7] Section 718.114 was amended to provide that subsequent to the recording of the declaration, agreements acquiring these leaseholds, memberships, or other possessory or use interests which are not entered into within 12 months following the recording of the declaration are a material alteration or substantial addition to the real property that is association property, and the association may not acquire or enter into such agreements except upon a vote of, or written consent by, a majority of the total voting interests or as authorized by the declaration as provided in Section 718.113.

D. **Condominium Associations – Hurricane Protection.**[8] Section 718.113(5)(a) was amended to provide that the board of directors may, with approval of a majority of the voting interests of the condominium and subject to Section 718.302(6), require not only hurricane shutters or hurricane protection that complies with or exceeds the applicable building code, but also impact glass or other code compliant windows. However, a vote of the owners is not required if the maintenance, repair, and replacement of hurricane shutters, impact glass, or other code compliant windows are the responsibility of the association pursuant to the declaration of condominium.

E. **Distressed Condominium Relief Act.**[9] The Distressed Condominium Relief Act (Section 718.701 et seq.) came into existence July 1, 2010. 2011 revisions were made to clarify and improve various portions of the act.

i. <u>Eligibility for Bulk Assignee and Bulk Buyer Status</u> (Section 718.707): This provision is amended to explicitly state that bulk assignee and bulk buyer status is available only as to condominium parcels acquired on or after the effective date of the original Distressed Condominium Relief Act law (July 1, 2010). The original sunset date of July 1, 2012 is retained.

ii. <u>Definitions of Bulk Assignee and Bulk Buyer</u> (Section 718.703):

(1) The definition of "bulk assignee" in Section 718.703(1) was amended to make the following clarifications and changes:

(A) A bulk assignee cannot also be a bulk buyer.

(B) The acquired condominium parcels being acquired by the bulk assignee must be located within a single condominium.

[7] Section 5 of CS/CS/CS/HB 1195.
[8] Section 4 of CS/CS/CS/HB 1195.
[9] Sections 9-13 of CS/CS/CS/HB 1195.

(C) A bulk assignee must acquire developer rights other than those rights that may be assumed by a bulk buyer, but a bulk assignee may also acquire those rights.

(D) The assignment of rights to a bulk assignee can also occur pursuant to a final judgment or certificate of title issued through a foreclosure sale.

(E) A mortgagee or its assignee will not be deemed a bulk assignee or developer following the acquisition of condominium units and developer rights unless the mortgagee or assignee exercises any of those rights.

(2) The definition of "bulk buyer" in Section 718.703(2) was amended to make the following clarifications:

(A) The acquired condominium parcels must be located within a single condominium.

(B) A bulk buyer is not required to receive an assignment of any developer rights at all.

iii. <u>Assignment of Developer Rights to a Bulk Assignee</u> (Section 718.704):

(1) Section 718.704(1): A bulk assignee is deemed to have assumed developer duties and obligations "upon its acquisition of title to the units and continuously thereafter."

(2) Section 718.704(1)(a): A bulk assignee may now assume warranties of the developer under Sections 718.203(1) and 718.618 if expressly provided (i) by the bulk assignee in the prospectus or unit purchase contract or (ii) for design, construction, development, or repair work performed by the bulk assignee.

(3) Section 718.704(1)(b): A bulk assignee may now provide implied warranties in the prospectus. Previously, this was only authorized (i) in the unit purchase contract or (ii) for the design, construction, development, or repair work performed by the bulk assignee.

(4) Section 718.704(1)(c): A bulk assignee must provide an audit for association finances during which that bulk assignee elects or appoints a majority of the board of directors. The original language only spoke in terms of an election, but with a bulk assignee being able to control of the board of directors , the actual means of seating those directors was through appointment, hence the change.

(5) Section 718.704(1)(d):

(A) A bulk assignee's liability for actions taken by the board of directors begins when the bulk assignee elects or appoints a majority of the board of directors.

(B) A bulk assignee's obligation to deliver documents and materials is now limited to only the provisions of Section 718.705(3).

(6) Section 718.704(2):

(A) If a bulk assignee assumes the developer's right to guarantee assessments and fund budgetary deficits pursuant to Section 718.116, the bulk assignee's liability for that guarantee obligation now begins upon its acquisition of title to the units.

(i) Previously, the language could have been interpreted as requiring the bulk assignee to assume all such liability, including the obligations of the previous holder of the guarantee right.

(B) If a bulk assignee does *not* assume the developer's right to guarantee assessments and fund budgetary deficits pursuant to Section 718.116, it is still obligated to pay assessments in the same manner as other unit owners, but now only those assessments coming due on or after the bulk assignee's acquisition of units or as otherwise provided by Section 718.116.

(7) Section 718.704(5):

(A) The list of parties eligible to assign developer rights to a bulk assignee is expanded to include a mortgagee or assignee who has acquired title to the units and received an assignment of such rights.

(B) A court acting on behalf of the developer or a previous bulk assignee may still assign developer rights to a new bulk assignee, but now only if the developer rights assigned by the court were previously held by the predecessor in title to the new bulk assignee.

(C) Clarifications are made to the provision concerning a situation in which a single bulk assignee must be determined after developer rights are assigned concurrently to multiple bulk purchasers.

(i) The provision is made consistent with the definition of bulk assignee by explicitly stating that the assignment instrument must be recorded in the public records of the county in which the condominium is located.

(ii) Also, this provision now explicitly states that any party that fails to become a bulk assignee because of its failure to record its assignment of rights first may still qualify as a bulk buyer.

iv. **Control of the Association** (Section 718.705)

(1) Section 718.705(1):

(A) This subsection has been reworded to clarify how units acquired by a bulk assignee are counted when determining the obligation to transfer control of the association (assuming such transfer of control has not yet occurred at the time the bulk assignee acquires title to its units and receives an assignment of developer rights).

(B) Specifically, a unit owned by a bulk assignee is not deemed "conveyed to a purchaser[] or owned by an owner other than the developer" until conveyed to an owner other than the bulk assignee.

(2) Section 718.705(3):

(A) Clarification has been made to indicate that, during turnover, a bulk assignee is not required to deliver items and documents that it does not possess, even when those items "were or should have been in existence before the bulk assignee's acquisition of the units."

(B) Another minor revision also clarifies that a bulk assignee's obligation to provide an audit of association finances commences as of the date when that bulk assignee elected or appointed a majority of the board of directors.

v. **Sale of Units** (Section 718.706)

(1) Section 718.706(1):

(A) Previously, before offering any units for sale or for a lease term exceeding five years, a bulk assignee or bulk buyer was required to file certain documents with the division and provide those documents to a prospective purchaser or tenant.

(B) The threshold of "any units" has now been changed to "more than seven units in a single condominium."

(2) Section 718.706(1)(d):

(A) Previously, a bulk assignee or bulk buyer was excused from providing the financial information required by Section 718.111(3) for the fiscal year preceding its acquisition of the units when the financial information (or the underlying records needed to prepare it) were unavailable.

(B) This exception (and the related conspicuous type disclosure) is expanded to include any fiscal year.

(3) Section 718.706(2):

(A) Previously, before offering any units for sale or for a lease term exceeding five years, a bulk assignee was required to (1) prepare a statement disclosing the assumed developer rights and providing certain conspicuous type disclosures; (2) file that statement with the division; and (3) provide that statement to prospective purchasers (but not tenants).

(B) This requirement has now been expanded to apply to bulk buyers and to the offering of more than seven units in a single condominium (rather than "any units"). Distribution to prospective tenants is also now explicitly required.

(4) Section 718.706(4): The provision concerning association contracts is clarified as to the applicability of Section 718.302.

(5) Section 718.706(5):

(A) The law removes the provision requiring the bulk buyer's compliance with all requirements in the governing documents as to any transfer of a unit and stating that a bulk buyer is ineligible for any transfer-related exemptions afforded to a developer or successor developer.

(B) A new provision has been added to indicate that the filing and disclosure requirements in Subsections (1)–(2) do not apply if the bulk assignee or bulk buyer conveys all the units it owns to a single purchaser in a single transaction. Presumably, this is intended to mean all of the units it owns *in a single condominium*.

F. **Enforcement Actions.**

i. Condominium Associations[10]

(1) Section 718.303(3):

(A) The law deletes the suspension of rights of unit owner delinquent for more than 90 days to be restated in subsection (a).

(B) The law restates that a fine may not become a lien against a unit and that a fine may not exceed $100.00 per violation, or $1,000.00 in the aggregate.

(2) Section 718.303(3)(a) and (b):

(A) An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property for failure to comply with any provision of the declaration, the association by-laws, or reasonable rules of the association.

(B) Fines may not exceed $100.00 per violation, or $1,000 in the aggregate, and may not be the subject of a lien.

(C) A fine or suspension may not be imposed unless the association first provides at least 14 days' written notice and an opportunity for a hearing to the unit owner and, if applicable, its occupant, licensee, or invitee.

(i) The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household.

(ii) If the committee does not agree, the fine or suspension may not be imposed.

(3) Section 718.303(4): If a unit owner is more than 90 days delinquent in paying a monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the monetary obligation is paid in full.

[10] Section 8 of CS/CS/CS/HB 1195.

(A) This subsection does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.

(B) The notice and hearing requirements under subsection (3) do not apply to suspensions imposed under this subsection.

(4) Section 718.303(5):

(A) Existing law provides that the association may suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent.

(B) A voting interest or consent right allocated to a unit or member which has been suspended by the association may not be counted towards the total number of voting interests necessary to constitute a quorum, the voting interests required to conduct an election, or the number of voting interests required to approve an action under this chapter or pursuant to the declaration, articles of incorporation, or by-laws.

(C) The suspension ends upon full payment of all obligations currently due or overdue the association.

(D) The notice and hearing requirements under subsection (3) do not apply to a suspension imposed under this subsection.

(5) Section 718.303(6):

(A) All suspensions imposed pursuant to subsection (4) or subsection (5) must be approved at a properly noticed board meeting.

(B) Upon approval, the association must notify the unit owner and, if applicable, the unit's occupant, licensee, or invitee by mail or hand delivery.

ii. Homeowners Associations[11]

(1) Section 720.305(2): The subsection was amended to provide reasonable fines of up to $100.00 per violation against a member or any members' tenant, guest or invitee for failure of the owner of the parcel, or its occupant,

[11] Section 18 of CS/CS/CS/HB 1195.

licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

(2) Section 720.306(9)(b):

(A) A person who is delinquent in the payment of any fee, fine, or other monetary obligation to the association for more than 90 days is not eligible for board membership.

(B) A person who has been convicted of any felony in Florida or in a United States district or Territorial Court, or has been convicted of any offense in another jurisdiction which would be considered a felony if committed in Florida, is not eligible for board membership unless such felon's civil rights have been restored for at least five years as of the date on which such person seeks election to the board.

(C) The validity of any action by the board is not affected if it is later determined that a member of the board is ineligible for board membership.

(D) Note: Clarifies that when voting rights are suspended, the suspended vote does not count towards quorum or the vote required to approve proposal.

iii. Cooperatives[12]

(1) Section 719.303(3):

(A) This subsection was amended to provide reasonable fines of up to $100.00 per violation against a member or any members' tenant, guest or invitee for failure of the owner of the parcel, or its occupant, licensee, or invitee, to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association.

(B) However, the fine may not exceed $1,000.00 in the aggregate unless otherwise provided in the governing documents.

(C) A fine of less than $1,000.00 may not become a lien against a parcel.

(2) Section 719.303(3)(a): An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest, or invitee, to use the common elements, common facilities, or any other association property

[12] Section 15 of CS/CS/CS/HB 1195.

for failure to comply with any provision of the declaration, the association by-laws, or reasonable rules of the association.

G. **Fire Alarm Systems.**[13] Section 633.0215(14) (which was signed into law per Chapter 2010-174, Laws of Florida) was amended to provide that, in addition to condominiums, cooperatives or multifamily residential buildings that are less than four stories in height are exempt from installing and maintaining a manual fire alarm system if the building has an exterior corridor providing a means of egress. Note, however, that a conflicting provision was enacted in Chapter 2010-176, Laws of Florida., which is what was contained in the current statute. This law is noted as intending to clarify existing law.

H. **Homeowners Associations - Bulk Communications Contracts.**[14] Section 720.309(2) was created to deal with a homeowners association contract for bulk communications services:

i. If the governing documents provide for the cost of communications services as defined in Section 202.11, information services, or internet services obtained pursuant to a bulk contract shall be deemed an operating expense of the association.

ii. If the governing documents do not provide for such services, the board may contract for such services, and the cost shall be deemed an operating expense of the association but must be allocated on a per parcel basis rather than a percentage basis, notwithstanding that the governing documents provide for other than an equal sharing of operating expenses.

iii. Any contract entered into by the board may be cancelled by a majority of the voting interests present at the next regular or special meeting of the association, whichever occurs first.

iv. Any contract entered into by the board must provide, and shall be deemed to provide if not expressly set forth therein, that a hearing impaired or legally blind parcel owner who does not occupy the parcel with a non-hearing impaired or sighted person, or a parcel owner who receives supplemental security income under Title XVI of the Social Security Act or food assistance as administered by the Department of Children and Family Services pursuant to Section 414.31, Florida Statutes, may discontinue the service without incurring disconnect fees, penalties, or subsequent service charges.

[13] Section 1 of CS/CS/CS/HB 1195.
[14] Section 21 of CS/CS/CS/HB 1195.

v. A resident of any parcel, whether a tenant or parcel owner, may not be denied access to available franchised, licensed, or certified cable or video service providers if the resident pays the provider directly for services.

I. **Homeowners Associations – Definitions.**[15] Section 720.301(4) was amended to indicate that there may be one or more recorded written instruments which comprise the "declaration of covenants" or "declaration."

J. **Official Records.** The law clarifies the confidential records requirement for condominium and mandatory homeowners associations and permits waiver by owners for disclosure of information for uses such as community directories.

i. <u>Condominium Associations</u>[16]

(1) Section 718.111(2)(12)(a)7.:

(A) Electronic mailing addresses and facsimile numbers are not accessible to unit owners if consent to receive notice by electronic transmission is not provided in accordance with subsection (c)5.

(B) However, the association is not liable for an inadvertent disclosure of the electronic mail address or facsimile number for receiving electronic transmission of notices.

(2) Section 718.111(12)(a)11.:

(A) This subsection was amended to provide that the defacement or destruction of records specifically relates to the accounting records that are required to be maintained for seven years.

(B) The law deletes redundant language relating to the records that are required to be created or maintained by Chapter 718 of the Florida Statutes during the period such records are required to be maintained.

(C) The law deletes the prohibition in Section 718.111(12)(c) relating to the defacement or destruction of accounting records or official records, including the provision for a civil penalty as provided in Section 718.501(1)(d)6. The deleted provision is

[15] Section 16 of CS/CS/CS/HB 1195.
[16] Section 2 of CS/CS/CS/HB 1195.

substantially similar to an existing prohibition in Section 718.111(12)(a)11 which is not deleted by this bill.

(3) Section 718.111(12)(c)1.: The law clarifies attorney/client privileged documents to include those prepared in anticipation of litigation or proceedings (deleting adversarial or administrative) until the conclusion of the litigation or proceedings.

(4) Section 718.111(12)(c)3.: Personnel records of association or management company employees, including, but not limited to, disciplinary, payroll, health and insurance records, are not accessible to unit owners. "Personnel records" do not include written employment agreements with an association employee or management company, or budgetary or financial records that indicate the compensation paid to an association employee.

(5) Section 718.111(12)(c)5.:

(A) Addresses, e-mail addresses and facsimile numbers provided to the association to fulfill the association's notice requirements are accessible.

(B) A unit owner may consent in writing to the disclosure of the protected information described above.

(C) The association is not liable for the inadvertent disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by an owner and not requested by the association.

(D) This provision is consistent with Section 718.111(12)(a)(7), which provides that the association is not liable for the erroneous disclosure of e-mail addresses and facsimile numbers.

ii. Homeowners Associations[17]

(1) Section 720.303(5)(c)1.: Any records protected by the lawyer/client privilege as described in Section 90.502, Florida Statutes and any record protected by the work-product privileges, including, but not limited to, a record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and which was prepared exclusively for civil or criminal litigation or for

[17] Section 17 of CS/CS/CS/HB 1195.

adversarial administrative proceedings or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

(2) Section 720.303(5)(c)3.: Personnel records of the association's employees, including, but not limited to, disciplinary, payroll, health, and insurance records are not accessible by members. The term "personnel records" does not include written employment agreements with an association employee or budgetary or financial records that indicate the compensation paid to an association employee.

(3) Section 720.303(5)(c)5.:

(A) An owner may consent in writing to the disclosure of protected information described in this subparagraph.

(B) The association is not liable for the disclosure of information that is protected under this subparagraph, if the information is included in an official record of the Association and is voluntarily provided by an owner and not requested by the association.

K. **Termination of Condominium.**[18]

i. Partial Termination. Section 718.117 underwent minor revisions in 2010 in an effort to address the problem of "phantom units" (condominium units that exist *legally* but that have not been *constructed)*. The 2011 amendments go much further towards addressing this problem by updating multiple provisions of Section 718.117 to explicitly establish a "partial termination" process by which certain portions of an existing condominium can be terminated without disturbing the remaining units and their mortgages. Changes applying to partial termination include:

(1) Section 718.117(3): The optional termination provision now allows termination "for all or a portion of the condominium property."

(2) Section 718.117(4): If the units remaining after a partial termination continue to share ownership of the common elements in the same proportion that they did prior to the partial termination, the plan of (partial) termination does not require approval of all the unit owners pursuant to Section 718.110(4).

(3) Section 718.117(11)(a): The plan of termination must identify the units that will survive the partial termination and specifically provide that those

[18] Section 7 of CS/CS/CS/HB 1195.

units will remain in the condominium form of ownership pursuant to an amendment to the declaration of condominium or an amended and restated declaration.

(A) Presumably, the plan of termination should also specify which common elements are remaining in the condominium, but the statute does not require it.

(B) It would be nonsensical to argue that only condominium units—but not common elements—may be partially terminated in light of the amended language of Section 718.117(3), which allows partial termination of "condominium property."

(4) Section 718.117(11)(a)-(b): Title to the units and common elements that survive a partial termination remains unchanged[19] and does not pass to the termination trustee.

(A) Note, however, that the language of subsection (11)(a) states that "title to the surviving units and common elements . . .remain[s] vested in the ownership shown in the public records."

(B) As a matter of black letter law, the transfer of ownership of real property is effective upon delivery of the deed to the new owner, not the new owner's recordation of that deed. So, if the record owner of a unit has properly transferred title to a new owner by delivering a deed to the condominium unit, but the new owner has not yet recorded the deed, literal application arguably vests title in the *record owner*—rather than the legal owner.

(5) Section 718.117(12)(a): The value of the units and common elements being terminated must be separately determined, and the plan of termination must specify the allocation of proceeds for those units and common elements.

(6) Section 718.117(12)(b): Liens that encumber a terminated unit must be allocated to the proceeds of sale attributable to that unit.

[19] Note, however, that the language of Subparagraph (11)(a) states that "title to the surviving units and common elements . . .remain[s] vested in the ownership shown in the public records." As a matter of black letter law, the transfer of ownership of real property is effective upon delivery of the deed to the new owner—not the new owner's recordation of that deed. So, if the record owner of a unit has properly transferred title to a new owner by delivering a deed to the condominium unit, but the new owner has not yet recorded the deed, literal application arguably vests title in the *record owner*—rather than the legal owner.

(7) Section 718.117(18): The condominium association may continue as the condominium association for the surviving property that remains subject to the declaration of condominium.

(8) Section 718.117(19):

(A) The termination trustee or its successor in interest may record a new declaration of condominium for some or all of the terminated property.

(B) As to the surviving property, the partial termination of a condominium may provide for the simultaneous filing of an amendment to the surviving declaration of condominium or an amended and restated declaration of condominium.

ii. Timeshare Property[20]

(1) Section 718.117(2)(c):

(A) The law creates a procedure for the termination of a condominium that includes both condominium units and timeshare estates upon the total destruction or demolition of the improvements.

(i) Interestingly, the legislative analysis uses the term "shared condominium and timeshare property."

(B) A unit owner (including a timeshare estate owner) can initiate such termination by (1) filing of a petition in court seeking equitable relief; (2) recording a proposed plan of termination; and (3) mailing a copy of the petition to certain individuals (including the association, managing entity, each unit owner, each timeshare estate owner, and each holder of a recorded mortgage lien affecting a unit or timeshare estate).

(C) The new provision also provides procedures by which the proposed plan of termination can be contested, explains the relation to other provisions within Section 718.117, and requires that a court enter a final judgment finding that the proposed plan of termination is fair and reasonable and authorizing implementation of the plan.

2. **CS/CS/CS/HB 408 (Insurance)** became effective on May 17, 2011, and is now known as Chapter 2011-039, Laws of Florida. This bill was the major law pertaining to insurance across many areas.

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[20] Section 7 of CS/CS/CS/HB 1195.

A. The law provides for significant change to the regulatory scheme for property insurance, particularly with regard to sinkhole insurance, wind insurance and the role of public adjusters.

i. Section 626.854 regulates public insurance adjusters and is intended to prevent their unauthorized practice of law.

(1) Previously, the provisions of subsections (5)-(13), which relate to certain specific aspects of public insurance adjusters regulations, apply only to "residential property insurance policies and condominium policies as defined in s. 718.111(11)."

(2) Effective as of June 1, 2011, the reference to "condominium association policies" has been revised to "condominium unit owner policies."

(3) Further, effective as of January 1, 2012, additional regulations on public insurance adjusters will be added.

B. Loss in the Florida Hurricane Catastrophe Fund

i. Section 215.555 has been amended to expand the exclusions from the definition of "loss" in the Florida Hurricane Catastrophe Fund.

ii. Such additional excluded items from "loss" now encompasses amounts "paid to reimburse a policyholder for condominium association or homeowners' association loss assessments or under similar coverages for contractual liabilities."

C. Mitigation

i. Section 627.0629(1) has been amended to permit insurers to adjust rates upward, or reduce mitigation credits, depending upon actuarial analysis.

(1) Note: An association receiving or planning to receive mitigation discounts should consult with its insurance agent to determine if their insurance budget must be adjusted.

D. Claims Period

i. Section 95.11(2)(e) has been revised to indicate that the 5 year limitations time period for a breach of a property insurance contract commences from the date of the loss.

(1) Note: An association must act swiftly to discover, evaluate and proceed with claims procedures to avoid the passage of time barring a claim.

E. Payment Reduction

i. Section 627.7011(3)(a) has been revised to provide that after a loss, until a dwelling is reconstructed, the insurer is not required to pay the insured more than actual cash value of the insured loss, less any deductible.

ii. Remaining insurance funds need not be paid until work is completed.

(1) Note: An association will want to consult with their insurance agent to determine what funds should be anticipated to be paid immediately in case of a loss, if any, and then consider whether or create or increase reserves kept for insured losses.

3. **CS/CS/CS HB 883 (Vacation Rentals)** was signed into law by Governor Scott and became effective on June 2, 2011, and is now known as Chapter 2011-119, Laws of Florida. This law deals with vacation rentals, public lodging establishments and resort condominiums.

A. Section 509.242(1): The definition of a public lodging establishment has been amended to remove from its scope the terms "resort condominium" and "resort dwelling" and to add "vacation rental."

B. Section 509.242(1)(c): "Vacation Rental" is defined as "any unit or group of units in a condominium, cooperative, or timeshare plan or any individually or collectively owned single-family, two-family, three-family, or four-family dwelling house or dwelling unit that is also a transient public lodging establishment."

C. Section 509.032(7)(b): Local governments are prohibited from restricting the use of or prohibiting vacation rentals or regulating vacation rentals based solely on their classification, use, or occupancy. The new law removes authority for local governments to ban or restrict vacation rentals; however, local law, ordinance or rule adopted on or before June 1, 2011 will be grandfathered in. Consequently, there are reports that several local governments that did not have short-term rental laws, including the Town of Surfside and villages of Key Biscayne and Bal Harbour, adopted ordinances to regulate vacation rental by the June 1st deadline.[21]

[21] See *Before Law Takes Effect, Some Cities Hope to Adopt Ordinances Governing Short-Term Vacation Rentals,* Daily Business Review.Com (published May 24, 2011).

4. **CS/HB 59 (Process Server Access to Gated Communities)** was signed into law by Governor Scott on June 17, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-159, Laws of Florida. This law deals with service of process within gated residential communities.

A. Section 48.031(7):

i. This subsection was created to address service of process on a person who resides within or is known to be within a gated residential community.

ii. Under this new statutory provision, a gated residential community, including a condominium association or a cooperative, must grant unannounced entry into the community, including its common areas and common elements, to a person who is attempting to serve process on a defendant or witness who resides within or is known to be within the community.

B. Problems with the New Law.

While the new Section 48.031(7) is purported to help plaintiffs in litigation to obtain service of process on those defendants who use gated communities to hide themselves and evade process, the ambiguity in the language of the new law leaves open for interpretation numerous of important issues.

i. Obligees of the New Statute

(1) The new law states that a "gated residential community, including a condominium association or a cooperative, shall grant unannounced entry into the community . . . "

(2) The law does not work as it is drafted, because a community cannot grant access; rather, individuals grant access.

(A) Therefore, arguably, an individual who refuses to allow a process server to enter a gated community will not be held liable under Section 48.031(7) because the statute never imposes any obligations on individuals.

ii. Unannounced Entry

(1) Section 48.031(7) does not provide a definition for "unannounced entry."

(2) Consequently, it is unclear if a security guard at the guard gate has any obligation to let the process server enter the premises automatically.

(3) More troubling is the scenario where there is no guard (as noted below, this is the case with the vast majority of Florida gated communities).

(A) For instance, in a gated subdivision that has a keypad for owners and guests to use to open and close the gate, how can there be unannounced access?

(4) The statute also fails to address what happens if an owner grants entry to the process server but then alerts the subject individual that a process server is in the community.

(A) It is unclear if this type of practice creates liability, such as a criminal prosecution or a contempt of court charge, as a result of the violation of unannounced entry.

(B) Section 48.031 does not contain any provision stating the liability for noncompliance.

iii. Belief in Residency

(1) Section 48.031(7) requires that access be granted to "a person who is attempting to serve process on a defendant or witness who resides within or is known to be within the community."

(2) As an overarching statement, the statute has no requirement for the person attempting to serve process to show the basis by which the "belief in residency" has been satisfied.

(3) From the language of the statute, all that the process server has to say is that a specific person is believed to be in the community, access must be granted, and there is no requirement to produce such evidence of residency.

(A) It is one thing to see someone enter or exit the community or to have obtained property tax records indicating ownership (which does not necessarily mean residency), but the phrase "is known to be within the community" inevitably invites the making of an educated (or even uneducated) guess.

(4) Any person can easily claim that he is trying to serve someone whom he believe is in the community even though he has no true or real basis for doing so, and he cannot be denied entry into the community.

(A) The primary purpose of gated communities is to provide security and protection for residents; yet the standard for entry in Section 48.031(7) allows the potential for unfettered access in a manner contrary to the nature of the gated community.

(5) Furthermore, given the lack of a requirement for proof of residency, the statute in a sense implies that the owners in the community have a duty to know who is in the community at all times so that they recognize if the person to be served is really in the community.

(A) This implied obligation evidently creates an undue burden on residents in a gated community.

iv. Proof of Identity of Process Server

(1) Section 48.031(7) does not specify who has the obligation to check and confirm that the person making the request for entry really is a process server.

(2) Process servers are not licensed by state agency.

(3) There is a concept of a "certified process server" that is appointed by the local sheriff, but not all process servers are so appointed (as noted in s. 48.021(1), "[c]ivil witness subpoenas may be served by any person authorized by rules of civil procedure").

(4) Is there a requirement for someone attempting to serve process to confirm his or her identity to be able to gain entry?

(5) Even if identity is proven, who is to say that this person is really there to attempt to serve process?

(6) What if a resident questions the validity of the person attempting to serve process and refuses to grant entry to the community – is there liability upon that person for denying entry?

(7) What happens if an owner lets someone into the community who says he is a process server and that person then proceeds to commit a crime – does the owner now have liability for the injury to person or property?

(8) There are no answers to these questions in the statute.

v. Unmanned Gated Community

(1) The vast majority of Florida gated communities are unmanned and allow access through electronic controls, thus making the question of who decides to provide entry of tremendous importance.

(2) The statute fails to specify or address a number of important issues related to unmanned gated communities, including:

(A) who makes the decision, or is obligated, to let the process server in;

(B) whether every unit owner in a condo building has a duty to let a process server into the building unannounced or such an obligation is applicable only to agents and employees of the condominium association;

(C) whether the statutory mandate extends to a landscaping company who is working inside the gate, a pool contractor who has come to clean the high-rise pool, or a service man who has been given access by the owner for work at a house and is now leaving the community, etc.;

(D) whether someone attempting to serve process can call the management company and demand to be given an access code to the gate to the community or to the front door of a high-rise condo building; and

(E) whether the management company has to go to the site to let the process server in unannounced.

vi. Scope of Access within a Gated Community

(1) Under Section 48.031(7), the access by process servers appears to be granted through the common areas or common elements of a community.

(2) Therefore, the statute, at least on its surface, will lead to the conclusion that the process server cannot go across the driveway or yard of a subdivided lot to reach the house to render service on the occupant.

(3) This would presumably mean that the process server could not go beyond the common area roads and rights-of-way onto a subdivided lot.

vii. Access by Non-Government Personnel

(1) Section 48.031(7) allows non-government personnel access to privately-owned areas, in contravention of existing covenants to which the property owner to title took subject.

(A) It is one thing for the government to mandate access for its personnel, but it is wholly another for the government to mandate access by independent third parties.

(2) The statutory mandate for unannounced entry to a gated community conflicts with the concept of security for a building such as a condominium or a gated residential subdivision.

(3) It would seem that there may be questions of constitutionality to be explored.

5. **CS/CS/CS/HB 849 (Elevator Retrofit Requirement Repealed)** was signed into law by Governor Scott on June 24, 2011, and became effective on July 1, 2011, and is now known as Chapter 2011-222, Laws of Florida. This law repeals Section 553.509(2) which required that residential multi-family buildings, including condominium buildings, at least 75 feet high and having a public elevator, were required to retrofit at least one elevator to operate on an alternate power source for emergency purposes.

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