

STORAGE NAME: h0251s1.fs

DATE: November 19, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FINANCIAL SERVICES
ANALYSIS**

BILL #: CS/HB 251

RELATING TO: Condominiums/Unpaid Assessments

SPONSOR(S): Committee on Real Property and Probate and Representative Detert

TIED BILL(S): none

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REAL PROPERTY AND PROBATE YEAS 5 NAYS 0
 - (2) FINANCIAL SERVICES
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

In general, a purchaser of a condominium unit is jointly and severally liable with the previous owner of the condominium unit for all outstanding condominium association assessments which are due at the time of purchase. However, the liability of a first mortgagee, or its successor or assignee, who takes title by foreclosure or deed in lieu of foreclosure is limited. Generally, parties who are jointly and severally liable are each independently responsible for the full amount of a debt or damages and may be sued jointly or separately for recovery. The liability of certain persons or groups, or for certain kinds of damages, may be limited by state enactments.

This bill states that the provisions limiting the liability of a first mortgagee, or its successor or assignee, are not applicable to a third party purchaser at a foreclosure sale. Accordingly, a third party purchaser is jointly and severally liable with the previous owner for all condominium association assessments due at the time of purchase.

This bill also defines "third party purchaser" as "anyone other than a first mortgagee or a successor or assignee of a first mortgagee."

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Current Law

Condominium associations assess fees against each unit for maintenance of the common areas of the association. If an owner does not pay these fees, an association has a lien right in the owner's unit. An association can file a lien against a unit, and if that lien remains unpaid the association can sue to foreclose the lien.

Under s. 718.116(1)(a), F.S., a purchaser of a condominium unit is jointly and severally liable, with the previous owner of the condominium unit, to the condominium association for all assessments that were due from the previous owner.¹ For example, if "Seller" owned a condominium unit and owes \$500 to the condominium association in unpaid assessments, but sold the condominium unit to "Buyer" without paying the assessments, then both "A" and "B" are liable for the \$500, and either can be sued to recover that amount.

However, pursuant to s. 718.116(1)(b), F.S., when a first mortgagee or its successor² or assignee³ acquire title to a unit by foreclosure or by deed in lieu of foreclosure, the liability for prior condominium association assessments is limited to the lesser of:

1. Unpaid common expenses and regular periodic assessments which accrued or came due during the six months prior to the date the first mortgagee takes title; or

¹In practice, a purchaser at a regular sale would normally require the seller of the condominium unit to bring all association fees current.

²Black's Law Dictionary defines "successor" to mean: "One that succeeds or follows; one who takes that place that another has left, and sustains the like part or character, one who takes the place of another by succession . . . with reference to corporations, generally means another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with [the] rights and assumes [the] burdens of [the] first corporation."

³Black's Law Dictionary defines "assignee" to mean: "A person to whom an assignment is made; grantee." An assignment is the transfer of property, interests, rights, or responsibilities from one party to another.

2. One percent of the original principal amount of the mortgage.

If the mortgage was recorded prior to April 1, 1992, the first mortgagee or its successor or assignee may have no liability for prior assessments. See s. 718.116(1)(e), F.S. In short, the law treats mortgage creditors who take title under foreclosure differently than typical purchasers by limiting their liability for unpaid condominium assessments.

When any unpaid share of common expenses or assessments is extinguished by foreclosure of a superior lien or by a deed in lieu of foreclosure, the unpaid share of common expenses or assessments are common expenses collectible from all the unit owners in the condominium in which the unit is located. See s. 718.115(1)(d), F.S.

When the winning bidder at a foreclosure sale is a person who was not a party to the foreclosure action, that winning bidder is commonly referred to as a "third party purchaser".

A proponent of this bill comments that third party purchasers at mortgage foreclosure sales are utilizing the provisions at s. 718.116(1)(b), F.S., or s. 718.116(1)(e), F.S., to limit their liability for assessments due at the time of purchase.⁴ The third party purchasers claim that they stand in the position of the first mortgage holder, and thus are similarly eligible for the limitations set forth at s. 718.116(1)(b), F.S., or s. 718.116(1)(e), F.S., citing Quinn Plumbing Co., Inc. v. New Miami Shores Corp., 129 So. 690 (Fla. 1930).

In Quinn Plumbing, a first mortgage on real property was foreclosed and the property was sold at the foreclosure sale to a third party purchaser.⁵ Sometime later, it was discovered that a second mortgage holder had not been named as a defendant in the foreclosure action. The purchaser filed suit against the holder of the second mortgage to foreclose the rights of the second mortgagee. The court stated:

It is well established in this jurisdiction that the purchaser of mortgage property at a foreclosure sale, *when for any reason the foreclosure proceedings are imperfect or irregular*, becomes subrogated to all the rights of the mortgagee in such mortgage and to the indebtedness that it secured. Such purchaser becomes virtually an equitable assignee of the mortgage and of the debt it secured, with all rights of the original mortgagee The purchaser at such a foreclosure sale occupies the same position as the first mortgagee, having become equitably subrogated to his rights

Quinn at 692 (emphasis added). The Quinn case did not involve unpaid condominium association assessments. How the holding in the Quinn case, regarding imperfect or irregular foreclosure proceedings, could sustain an argument that a third party purchaser in a regular foreclosure proceeding is effectively an assignee of the first mortgagee for purposes of not paying outstanding association assessments is unclear.

Statutory History

⁴Letter from Kevin T. Wells, Esquire, dated September 13, 1999.

⁵The court did not use the phrase "third party purchaser." The purchaser at the foreclosure sale was a corporation that was not a party to the lawsuit and was not otherwise related to any of the parties to the lawsuit.

The original condominium statute, Chapter 76-222, Laws of Florida, contained a similar limitation on the liability of a purchaser through foreclosure, stating in pertinent part:

718.116 Assessments; liability; lien and priority; interest; collection. --

(6) When the mortgagee of a first mortgage of record, **or other purchaser**, of a condominium unit obtains title to the condominium parcel as a result of foreclosure of the first mortgage . . . such acquirer of title and his successors and assigns shall not be liable for the share of common expenses or assessments by the association pertaining to the condominium parcel or chargeable to the former unit owner of the parcel which became due prior to acquisition of title as a result of the foreclosure [emphasis added]

In 1991, pursuant to CS/CS/HB 1465, Chapter 91-103, Laws of Florida, s. 718.116, F.S., was amended to read in pertinent part:

[A] first mortgagee who acquires title to the unit by foreclosure or by deed in lieu of foreclosure is not liable for the share of common expenses or assessments attributable to the condominium parcel

The new language eliminates reference to "or other purchaser." Arguably, that deletion accomplished the same purpose as this bill, namely, that the limitation on liability of certain purchasers of condominium units for prior unpaid condominium association assessments may not be utilized by a third party purchaser at a foreclosure sale. The House of Representatives, Committee on Judiciary Final Bill Analysis & Economic Impact Statement on CS/CS/HB 1465, dated May 7, 1991, supports this interpretation. It states in pertinent part:

Section 9 amends section 718.116, F.S., relating to assessments and liens. Subsection (1) addresses the issue of liability for unpaid assessments. Currently, when mortgagees of a first mortgage of record or other purchasers obtain title at a foreclosure sale, they are not liable for unpaid assessments prior to their acquisition of title. The other unit owners are then forced to absorb those costs for the unpaid assessments for the unit. Subsection (1) provides that mortgagee of a first mortgage of record continues to be exempt from liability for those assessments as long as the mortgagee either records a deed in lieu of foreclosure or institutes a foreclosure action within six months after the last payment received by the mortgagee. If the mortgagee fails to act within this six month period, the mortgagee's liability for unpaid assessments is limited to six months. . . . [The provision] is deleted which exempts the acquirer of title in a foreclosure action from unpaid assessments.

The current statutory language resulted from amendments made in 1994 pursuant to HB 2493, Chapter 94-350, Laws of Florida. The law reads in pertinent part, as amended:

718.116 Assessments; liability; lien and priority; interest; collection. --

(1)(a) A unit owner, regardless of how his title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.

(b) The liability of a first mortgagee or its **successor or assignees** who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due prior to the mortgagee's acquisition of title is limited to the lesser of:

1. The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 6 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

2. One percent of the original mortgage debt. The provisions of this paragraph shall not apply unless the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location which was known to or reasonably discoverable by the mortgagee. [emphasis added]

(e) Notwithstanding the provisions of paragraph (b), a first mortgagee or its **successor or assignees** who acquire title to a condominium unit as a result of the foreclosure of the mortgage or by deed in lieu of foreclosure of the mortgage shall be exempt from liability for all unpaid assessments attributable to the parcel or chargeable to the previous owner which came due prior to acquisition of title if the first mortgage was recorded prior to April 1, 1992. If, however, the first mortgage was recorded on or after April 1, 1992, or on the date the mortgage was recorded, the declaration included language incorporating by reference future amendments to this chapter, the provisions of paragraph (b) shall apply. [emphasis added]

The new language added "successor or assignees." The House of Representatives, Committee on Judiciary, Final Bill Analysis & Economic Impact Statement on HB 2493, dated April 26, 1994, explains the changes to the statute:

Section 718.116, F.S., relates to the liability of a purchaser of a condominium unit for the unpaid assessments of the previous unit owner. It is reported that the language in this section is ambiguous in a number of respects and therefore has created difficulty for practitioners. The Condominium and Mortgage Law Committees of the Real Property Section of the Florida Bar have worked together to address the ambiguities in the statute and the language in the bill is the result of their joint efforts. . . . Section 10 amends section 718.116, F.S. to: clarify that the liability of a **first mortgagee** who acquires a title to a condominium unit is limited to the lesser of one percent of the original mortgage debt or the unpaid common expenses and regular periodic assessments which came due during the six months immediately preceding the acquisition of title; provide that a mortgagee must join the association as a defendant in the foreclosure action to take advantage of the limited liability provided in s. 718.116(1)(b), F.S.; provide that a person acquiring title must pay the amount due to the association within 30 days; clarify that the provisions relating to the liability of **first mortgagees** are only to be applied prospectively to first mortgages recorded after April 1, 1992 unless at the time the mortgage was recorded, the declaration included language incorporating future amendments to Chapter 718; [bold emphasis added, underlining in original text]

Neither the chapter law nor the related analysis mention third party purchasers, nor do they explain the purpose for including the "successor or assignees" language.

C. EFFECT OF PROPOSED CHANGES:

This bill expressly provides that the provisions of s. 718.116(1)(b), F.S., or s. 718.116(1)(e), F.S., which limit the liability of a "first mortgagee or its successor or assignees" for condominium association assessments incurred prior to the time the first mortgagee or its successor or assignee takes title pursuant to foreclosure or deed in lieu of foreclosure, do not apply to a third party purchaser at a foreclosure sale. A third party purchaser is defined as "anyone other than a first mortgagee or a successor or assignee or a first mortgagee."

This bill does not affect the limitations at s. 718.116(1)(b), F.S., or s. 718.116(1)(e), F.S., when a first mortgagee, or its successor or assignee, takes title to property by foreclosure or by deed in lieu of foreclosure.

In other words, in the event of a mortgage foreclosure, a lender's liability for the borrower's unpaid condominium association assessments is limited. If the lender sells or assigns the mortgage contract to another party, that party enjoys the same limited liability upon foreclosure. However, under this bill, a party purchasing the condominium at a foreclosure sale does not benefit from this limited liability. Like any other purchaser, the third-party purchaser of a condominium at a foreclosure sale is jointly and severally liable for all of the assessments owed by the previous owner.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes" herein.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

none

2. Expenditures:

none

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

none

2. Expenditures:

none

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C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may lower condominium association assessments to the extent that third party purchasers have utilized the limitations at s. 718.116(1)(b), F.S., or s. 718.116(1)(e), F.S., which thereby resulted in increased assessments to other association members pursuant to s. 718.115(1)(d), F.S.

D. FISCAL COMMENTS:

none

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

The Coalition of Florida Community Associations (COFCA) has indicated its support for this bill.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Real Property and Probate met on November 2, 1999. The sponsor of the bill introduced a remove everything after the enacting clause amendment that was adopted. The bill as amended was reported out favorably as a committee substitute.

The committee substitute does not amend s. 718.116(1)(b), F.S., and s. 718.116(1)(e), F.S., as the original bill does, but creates a new s. 718.116(1)(g), F.S. The committee substitute states that s. 718.116(1)(b), F.S., and s. 718.116(1)(e), F.S., do not apply to a "third party purchaser at a foreclosure sale", whereas the original bill amended both those sections to provide the same. The committee substitute further defines a third party purchaser, the original bill does not.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY AND PROBATE:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

J. Marleen Ahearn, Ph.D, J.D.

AS REVISED BY THE COMMITTEE ON FINANCIAL SERVICES:

Prepared by:

Staff Director:

William C. Garner

Susan F. Cutchins