

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/CS/SB 840

INTRODUCER: Judiciary Committee, Community Affairs Committee, Regulated Industries Committee, Senator Sobel, and others

SUBJECT: Community Associations

DATE: April 8, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.	Howes	Yeatman	CA	Fav/CS
3.	Treadwell	Maclure	JU	Fav/CS
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill creates the “Distressed Condominium Relief Act” to clarify the obligations and responsibilities of persons who acquire title to condominium parcels or property from the developer, including warranty obligations and responsibilities.

The bill defines the terms “bulk assignee” and “bulk purchaser.” The bulk assignee is the person who acquires more than seven condominium parcels and receives an assignment of some or substantially all of the rights of the developer. A bulk buyer is the person who acquires more than seven condominium parcels in a single condominium but who receives a limited assignment of developer rights, such as the right to conduct sales, leasing, and marketing activities within the condominium. The bill includes bulk assignees and bulk buyers within the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (department) jurisdiction to investigate complaints and enforce compliance with the provisions of ch. 718, F.S.

The bill requires the division to establish procedures to provide notice to bulk assignees and bulk buyers if the division is considering the issuance of a declaratory statement regarding the declaration of condominium or any related document governing the condominium community.

The bill provides that a bulk assignee assumes all the duties and responsibilities of the developer. However, it also provides exceptions and clarifies the developer's responsibilities and obligations for which the bulk assignee is not liable.

The bill provides the circumstances in which developer rights may be assigned to a bulk assignee and provides limitations on the assignment of developer rights. It clarifies when the unit owners other than the developer can assume control of the condominium board if the bulk assignee is entitled to elect a majority of the board members.

The bill also provides for the bulk assignee's and bulk purchaser's responsibilities and duties with regard to:

- The sale or lease of parcels;
- Maintenance and transfer of association records to the unit owner-controlled board;
- The waiver of reserves or reduction of reserve funding and the use of reserve expenditures; and
- Contracts entered into by the association during the period the assignee or buyer maintains control of the association board of administration.

The bill provides that a person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels were acquired prior to July 1, 2011, as evidenced by the date that the deed or other instrument of conveyance is recorded.

The bill provides that an assignment of developer rights does not release the developer from any liabilities under the condominium declaration or ch. 718, F.S., for claims brought by unit owners, bulk assignees, or bulk buyers for violations of ch. 718, F.S., unless specifically excluded.

The bill also does not waive, release, compromise, or limit the liability of any participant in the design or construction of a condominium, including contractors, subcontractors, materialmen, manufacturers, architects, or engineers, for any claim brought by the association, unit owners, bulk assignees, or bulk buyers relating to the design, construction defects, misrepresentations, or violations of ch. 718, F.S., except as provided in the act.

This bill substantially amends sections 718.103 and 718.501, Florida Statutes.

This bill creates the following sections of the Florida Statutes: 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708.

II. Present Situation:

Condominiums

A condominium is a “form of ownership of real property created pursuant to [ch. 718, F.S.], which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.”¹ A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.² A declaration is like a constitution in that it:

strictly governs the relationships among the condominium unit owners and the condominium association. Under the declaration, the Board of the condominium association has broad authority to enact rules for the benefit of the community.³

A declaration may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.⁴ A declaration of condominium may be amended as provided in the declaration. If the declaration does not provide a method for amendment, it may generally be amended as to any matter by a vote of not less than the owners of two-thirds of the units.⁵ Condominiums are administered by a board of directors referred to as a “board of administration.”⁶

Department Jurisdiction

Condominiums are regulated by the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) of the Department of Business and Professional Regulation (department), in accordance with ch. 718, F.S.

The division is afforded the complete jurisdiction to investigate complaints and enforce compliance with ch. 718, F.S., with respect to associations that are still under developer control.⁷ It also has the authority to investigate complaints against developers involving improper turnover or failure to turnover, pursuant to s. 718.301, F.S. After control of the condominium is transferred from the developer to the unit owners, the division’s jurisdiction is limited to investigating complaints related to financial issues, elections, and unit owner access to association records pursuant to s. 718.111(12), F.S.

As part of the division’s authority to investigate complaints, s. 718.501(1), F.S., provides the division with the authority to subpoena witnesses, take sworn statements from witnesses, issue cease and desist orders, and impose civil penalties (fines) against developers and associations.

¹ Section 718.103(11), F.S.

² Section 718.104(2), F.S.

³ *Neuman v. Grandview at Emerald Hills*, 861 So. 2d 494, 496-97 (Fla. 4th DCA 2003).

⁴ Section 718.104(5), F.S.

⁵ Section 718.110(1)(a), F.S.

⁶ Section 718.103(4), F.S.

⁷ Section 718.501(1), F.S.

Condominiums – Implied Warranties

One of the effects of the downturn in the housing market is the large number of uncompleted condominium buildings, some of which have outstanding purchase contracts. Some of the completed buildings have a large number of unfinished units within the building. Generally, these assets, typically condominium units, are acquired by investors as bulk acquisitions, and the acquisitions take place in one of two forms:

- The assets are purchased from developers or banks that have foreclosed on the development loan or on the property; or
- The assets are acquired through the purchase of discounted debt from lenders.

The purchase and sale of condominium units can involve additional expenses, construction delays, rescinded purchase contracts, regulatory and legal actions, slower sales, third-party claims, reduced rental rates, failed financial models, and the retention of developer rights by the bulk acquisition agent. Other considerations are the liabilities and obligations that the purchaser may incur for construction defects and warranty claims.

The developer of a condominium is deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for three years beginning with the completion of the building containing the unit, and a warranty for the same period that is provided by the manufacturer for personal property transferred with or appurtenant to the unit.⁸ For all other improvements, the implied warranty is for three years beginning with the date of completion of the improvements. For the roof and structural components of a building or other improvements, or for the mechanical, electrical, and plumbing elements serving a building or improvement, the warranty is for a three-year period beginning with the completion of construction of the building or improvement, or for one year after the developer transfers control of the condominium association. In no event may the warranty extend for more than five years.

Unit owners have a right to bring an action for an implied warranty claim,⁹ and the association has a right to act on behalf of the unit owners in matters of common interest.¹⁰

In *Chotka v. Fidelco Growth Investors*,¹¹ the defendant construction lender had foreclosed against the developer for defaulting on the construction loan. The plaintiff condominium residents association sued the construction lender for damages and defects or omissions relating to construction defects of the condominium building and common areas. The trial court dismissed the implied warranty claim of the condominium association. The Second District Court of Appeal reversed and held that where a lender obtains title to a condominium project, completes construction, while holding itself out as the developer and owner of the project, and advertises and sales units, the lender is a developer of the project to the extent that it might be liable for performance of express representations made to purchasers for patent construction defects and for breach of any warranties attributable to those defects.¹²

⁸ Section 718.203, F.S.

⁹ *Rogers & Ford Constr. Corp., etc., et al v. Carlandia Corp.*, 626 So. 2d 1350 (Fla. 1993).

¹⁰ *Charley Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n, Inc.*, 658 So. 2d 922 (Fla. 1994).

¹¹ *Chotka v. Fidelco Growth Investors*, 383 So. 2d 1169 (Fla. 2d DCA 1980).

¹² *Id.* at 1169.

III. Effect of Proposed Changes:

The bill creates part VII of ch. 718, F.S., consisting of ss. 718.701, 718.702, 718.703, 718.704, 718.705, 718.706, 718.707, and 718.708, F.S. Section 718.701, F.S., provides that part VII of ch. 718, F.S., may be cited as the “Distressed Condominium Relief Act.”

The bill creates s. 718.702, F.S., to provide legislative findings and legislative intent. It provides the legislative finding that potential successor purchasers of condominium parcels are unwilling to accept the risk of purchase because the potential liabilities inherited from the original developer are imputed to the successor purchaser, including the foreclosing mortgagee. The bill provides the statement of legislative intent that it is the public policy of this state to protect the interests of developers, lenders, unit owners, and condominium associations with regard to distressed condominiums.

The bill amends s. 718.501(1), F.S., to include bulk assignees and bulk buyers within the division’s jurisdiction to investigate complaints and enforce compliance with the provisions of ch. 718, F.S. It also includes bulk assignees and bulk buyers within the division’s authority to investigate complaints regarding turnover of control from a bulk buyer or bulk-assignee-controlled association to a unit-owner-controlled association.

The bill amends s. 718.501(8)(g), F.S., to require the division to establish procedures to provide notice to bulk assignees and bulk buyers during the time in which the bulk assignee or bulk buyer controls the association if the division is considering the issuance of a declaratory statement regarding the declaration of condominium or any related documents governing the condominium community.

Definitions

In order to incorporate the creation of the bulk buyer provision in part VII of ch. 718, F.S., the bill revises the definition of “developer” in s. 718.103(16), F.S., to include bulk assignees and bulk buyers.

The bill creates s. 718.703, F.S., to define “bulk assignee” as a person who acquires more than seven condominium parcels¹³ as provided in s. 718.707, F.S., and receives an assignment of some or substantially all of the rights of the developer as an exhibit in the deed or as a separate instrument recorded in the public records in the county where the condominium is located.

It also defines “bulk buyer” as a person who acquires more than seven condominium parcels in a single condominium, but who does not receive an assignment of developer rights other than the right to:

- Conduct sales, leasing, and marketing activities within the condominium;

¹³ Section 718.103(27), F.S., defines the term “unit” to mean “a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration.” Section 718.103(12), F.S., defines the term “condominium parcel” to mean “a unit, together with the undivided share in the common elements appurtenant to the unit.”

- Be exempt from making working capital contributions that arise out of or in connection with the bulk buyer's acquisition of a bulk number of units; and
- Be exempt from any rights of first refusal which may be held by the association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to any third-party purchaser concerning one or more units.

Assignment and Assumption of Developer Rights

The bill creates s. 718.704, F.S., relating to the assignment and assumption of developer rights, to provide that a bulk assignee assumes all the duties and responsibilities of the developer. The bulk assignee is not liable for:

- The warranties of a developer under s. 718.203(1), or 718.618, F.S. However, the bulk assignee would assume the warranties for design, construction, development, or repair work performed by or on behalf of the bulk assignee;
- The obligation to fund converter reserves for a unit not acquired by the bulk assignee;
- The obligation to provide converter warranties on any portion of the condo property except as provided in a contract for sale between the assignee and a new purchaser;
- Provide the condo association with a cumulative audit of the association's finances from the date of formation, except for the period that the bulk assignee elects a majority of the board; and
- The developer's failure to fund previous assessments or resolve budget deficits, but the bulk assignee must provide an audit for the period in which the assignee elects a majority of the board members, except when the bulk assignee receives the assignment of rights of the developer to guarantee assessment levels and fund budget deficits.

The bulk assignee is responsible for delivering documents and materials as required by s. 718.705(3), F.S., which the bill creates to require the bulk assignee to comply with the nondeveloper disclosures in s. 718.503(2), F.S., before offering any parcels for sale or lease for a term exceeding five years.

A bulk assignee that does not receive an assignment of the right of the developer to guarantee the level of assessments and fund budgetary deficits or a bulk buyer is not liable for the obligations of the developer with respect to the guarantee. However, the bulk assignee or bulk buyer is responsible for payment of assessments in the same manner as all other owners of condominium parcels. If the bulk assignee or bulk buyer does guarantee the level of assessments, then he or she is responsible for all the obligations of the developer in respect to the guarantee.

An acquirer of condominium parcels is not considered a bulk assignee or a bulk buyer if the transfer of parcels was done to hinder, delay, or defraud any purchaser, unit owner, or the association, or if the acquiring person or entity is considered an insider for purposes of fraudulent transfers under s. 726.102(7), F.S.

Developer rights may be assigned to a bulk assignee by the developer, by a previous bulk assignee, or by a court of competent jurisdiction acting on behalf of the developer or previous bulk assignee. The bill provides the following limitations on the assignment of developer rights:

- There may be more than one bulk buyer but not more than one bulk assignee within a condominium at any particular time.
- If more than one acquirer of condominium parcels receives an assignment of development rights from the same person, the bulk assignee is the acquirer who first records the assignment in the applicable public records.

Transfer to Unit Owner-Controlled Board

The bill creates s. 718.705, F.S., to provide for the transfer of control of the condominium board of administration to the unit owners other than the developer, if a bulk owner is entitled to elect a majority of the board members. The bill provides that the condominium parcel acquired by the bulk assignee is not deemed to be conveyed to a buyer, or to be owned by anyone other than the developer, until the parcel is conveyed to a buyer who is not the bulk assignee.

The bill provides that all items required under s. 718.301(4), F.S.,¹⁴ must be delivered by the bulk assignee to the board of administration.

If the bulk assignee is not in possession of these documents and materials during the period in which the assignee owned the majority of the condominium parcels, the assignee must undertake a good faith effort to obtain and deliver the documents and materials,¹⁵ and must certify in writing to the association an itemized list of documents and materials that could not be obtained by the assignee. The delivery of the certified list relieves the bulk assignee of all responsibility to deliver such documents and materials.

In a conflict between the provisions of s. 718.705, F.S., and s. 718.301, F.S., the provisions of s. 718.705, F.S., prevail.

If a bulk assignee or a bulk buyer fails to comply with the provisions of part VII of ch. 718, F.S., all protections and exemptions provided in that part are lost.

Sale or Lease of Parcels by a Bulk Assignee or a Bulk Buyer

The bill creates s. 718.706, F.S., relating to the sale or lease of parcels by a bulk assignee or a bulk buyer. It provides that, prior to the sale or lease of parcels for a term of more than five years, a bulk assignee or a bulk buyer must file the following documents with the Division of Florida Condominiums, Timeshares, and Mobile Homes in the Department of Business and Professional Regulation and provide the documents to a prospective purchaser or tenant:

¹⁴ Section 718.301(4), F.S., sets forth the documents that the developer must transfer to the association after the unit owners elect the majority of the board. These records include, but are not limited to, the recorded condominium declaration and all amendments, certified copy of the association's articles of incorporation, bylaws, minutes, financial records, association funds or control of such funds, association tangible personal property, plans and specifications used in the construction of the condominium, insurance contracts, and a common elements turnover inspection report under seal of a state licensed architect or engineer.

¹⁵ It may be difficult to establish in litigation that the assignee did not make a "good faith effort" to obtain and deliver the documents. In the insurance context, the Department of Business and Professional Regulation reports that it has been overruled in its attempt to enforce "best efforts." See *DBPR v. Waterfront*, Case No. 09-1232 (Fla. DOAH 2009).

- Updated prospectus of offering circular, or a supplement, which must include the form of contract for sale and for lease in s. 718.503(1)(a), F.S.;
- Updated Frequently Asked Questions and Answers sheet;
- Executed escrow agreement if required under s. 718.202, F.S., relating to sales or reservation deposits prior to closing; and
- Financial information required under s. 718.111(13), F.S. (association financial report for preceding fiscal year), unless the report does not exist for the previous fiscal year prior to acquisition by bulk assignee or accounting records cannot be obtained in good faith, in which case notice requirements must be met.¹⁶

Prior to the sale or lease of parcels for a term of more than five years, a bulk assignee must provide to the prospective purchaser or tenant and file with the Division of Florida Condominiums, Timeshares, and Mobile Homes in the Department of Business and Professional Regulation, a disclosure statement that includes, but is not limited to, the following:

- A description of any rights of the developer assigned to the bulk assignee;
- A statement relating to the seller's limited liability for warranties of the developer; and
- If the condominium is subject to conversion, a statement relating to the seller's limited obligation to fund converter reserves or to provide converter warranties under s. 718.618, F.S., relating to converter reserve accounts.

The bill prohibits the waiver of reserves or reduction of reserve funding and the use of reserve expenditures for other purposes unless approved by a majority of the voting interests not under the control of the developer, the bulk assignee, and the bulk buyer. A bulk assignee in control of the association board of administration must comply with the requirements imposed on developers to transfer control of the association as required under s. 718.301, F.S.

A bulk assignee or a bulk buyer must comply with the requirements of s. 718.301, F.S., regarding contracts entered into by the association during the period the assignee or buyer maintains control of the association board of administration. In addition, unit owners must be afforded all of the protections contained in s. 718.302, F.S., regarding certain agreements.

A bulk buyer must comply with the requirements of the declaration regarding the transfer of any unit by sale, lease, or sublease. No exemptions afforded to a developer regarding the sale, lease, sublease, or transfer of a unit are afforded to a bulk buyer.

Time Limitations

The bill creates s. 718.707, F.S., to provide a time limitation for classification as a bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or a bulk buyer unless the parcels were acquired prior to July 1, 2011. The date of acquisition is based on the date that the deed or other instrument of conveyance is recorded.

¹⁶ The bulk assignee or bulk buyer must include a specific, conspicuous statement advising that financial information for the preceding year is not available or cannot be created because of insufficient accounting records of the association. It may be difficult to establish in litigation that the buyer did not act in "good faith" in attempting to obtain the accounting records.

Liabilities of Developers and Others

The bill creates s. 718.708, F.S., to provide that an assignment of developer rights does not release the original developer from any liabilities under the condominium declaration or ch. 718, F.S. The creating developer's liability is not limited for claims brought by unit owners, bulk assignees, or bulk buyers for violations of ch. 718, F.S., unless specifically excluded.

The bill provides that nothing in the act waives, releases, compromises, or limits the liability, if any, of contractors, subcontractors, materialmen, manufacturers, architects, engineers, or any participant in the design or construction of a condominium for any claim brought by the association, unit owners, bulk assignees, or bulk buyers relating to the design, construction defects, misrepresentations, or violations of ch. 718, F.S., except as provided in the act.

Effective Date

The bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Department of Business and Professional Regulation (department) noted that the bill should result in more bulk investors getting into the business, and that it should improve the financial position of condominium associations in which a significant number of parcels are unsold and unoccupied. The department also stated that the purchase of unsold inventory would have a positive effect on the depressed condominium market.¹⁷

¹⁷ Florida Department of Business and Professional Regulation, Office of Legislative Affairs, *2010 Legislative Analysis Form: CS/HB 327* (Nov. 17, 2009).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Judiciary on April 7, 2010:

The committee substitute clarifies that nothing in the act waives, releases, compromises, or limits the liability, *if any*, of specified participants in the design or construction of a condominium.

CS/CS by Community Affairs on March 17, 2010

The committee substitute makes technical and clarifying changes.

CS by Regulated Industries on February 16, 2010:

The committee substitute (CS) replaces the references to condominium “parcels” with the term “units.”

The CS amends s. 718.501(1), F.S., to include bulk assignees and bulk buyers within the division enforcement authority.

The CS amends s. 718.706(1)(a), F.S., to replace the term “for purchase and sale” with the term “for sale and for lease.”

The CS does not include provisions that were contained in s. 718.706(3), F.S., which required the bulk assignee or bulk buyer to comply with the nondeveloper disclosure requirements of s. 718.503(2), F.S.

- B. Amendments:

None.