

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7025 (PCB BPRS 13-02) Timeshares  
**SPONSOR(S):** Business & Professional Regulation Subcommittee; Eagle  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 696

| REFERENCE  | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| Orig. Comm.: Business & Professional Regulation Subcommittee | 11 Y, 0 N | Collins | Luczynski                                |
| 1) Civil Justice Subcommittee                                | 12 Y, 0 N | Cary    | Bond                                     |
| 2) Regulatory Affairs Committee                              |           |         |  |

### SUMMARY ANALYSIS

The bill amends the Florida Vacation Plan and Timesharing Act to:

- Exempt timeshare condominiums from the requirements related to condominium board member elections;
- Provide that a “timeshare estate” includes both a direct and an indirect interest in a trust; and
- Allow timeshare plan reserves to be calculated using the pooling accounting method.

The bill amends the process for timeshare foreclosures to:

- Allow the foreclosure trustee to use another country’s equivalent of certified, registered mail;
- Eliminate the requirement that a title search be conducted in order to initiate a foreclosure proceeding and makes a title search a condition to the trustee’s exercise of a power of sale;
- Provide that no lis pendens is recorded or pending against a timeshare interest unless properly recorded and noticed;
- Provide a good faith standard in determining whether the obligor is the person who signed the receipt of notice;
- Delineate what information is to be included in the publication notice;
- Provide that attestation in a notice affidavit that a diligent search and inquiry was made is only required if a diligent search and inquiry was specifically required to be conducted by the provisions in the timeshare law;
- Allow for notice to be perfected as to all obligors at the same address, so long as notice is perfected as to at least one obligor at that address;
- Provide a procedure for filing a lis pendens in relation to the initiation of a foreclosure proceeding;
- Allow the trustee to use a third party to conduct the foreclosure sale on behalf of the trustee; and
- Provide that it is not a violation of the law if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the receipt of notice.

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

The bill provides an effective date of July 1, 2013.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Condominium Board Election Provisions**

###### *Current Situation*

Current law provides procedures and rules related to condominium unit owner meetings, specifically the procedure for the election of members to the Board of Administration (the board).<sup>1</sup> Timeshare condominiums were previously exempt from these requirements under prior versions of the Condominium Act because they are not applicable to the procedures in common use by timeshare owners' associations. However, prior amendments to the Condominium Act inadvertently removed the exemption.<sup>2</sup>

###### *Effect of Proposed Changes*

The bill amends s. 718.112(2)(d)4., F.S., to specifically exempt timeshare condominiums from the requirements related to condominium board member elections. The section now conforms to prior versions of the Condominium Act.<sup>3</sup>

##### **Definition of "Timeshare Estate"**

###### *Current Situation*

Current law defines a "timeshare estate" as "an interest in a cooperative unit pursuant to s. 719.103, or an interest in a trust that complies in all respects with the provisions of s. 721.08(2)(c)4., provided that the trust does not contain any personal property timeshare interests."<sup>4</sup>

The statute does not specify whether this definition includes both direct and indirect interests in trusts. An example of an indirect interest in a trust is a trust beneficiary's spouse or other dependent.

###### *Effect of Proposed Changes*

The bill amends s. 721.05(34), F.S., to clarify that a "timeshare estate" includes an interest in a trust that complies in all respects with s. 721.08(2)(c)4., F.S., regardless of whether that interest is direct or indirect.

##### **Reserves**

###### *Current Situation*

Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the

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<sup>1</sup> Section 718.112(2)(d)4., F.S.

<sup>2</sup> Prior to 2011, the board election provisions located in s. 718.112(2)(d)4., F.S., were located in s. 718.112(2)(d)3., F.S. In 2010, the provisions of SB 1196 split subparagraph 3. of s. 718.112(2)(d), F.S., into an introduction and two separate sub-subparagraphs. The language that stipulates that subparagraph 3. does not apply to timeshare condominium associations was relocated to sub-subparagraph 3.a., which references proxy procedures. No similar exemption language was included in the introductory subparagraph that references board election procedures. In 2011, in response to concerns as to whether the proxy provisions apply to timeshare condominiums, the provisions of HB 1195 added subsection 10. to s. 718.112(2)(d), F.S., to clarify that the procedures regarding proxies do not apply to timeshare condominium associations. In order to reduce redundancy, this legislation also dropped the sub-subparagraph 3.a. exemption for timeshare condominiums. As such, there is currently no 'exemption' language remaining in s. 718.112(2)(d)4., F.S., as it relates to timeshare condominiums. This change has created uncertainty in the industry.

<sup>3</sup> For procedures and rules related to timeshare condominium unit owner meetings, see generally, s. 721.13, F.S.

<sup>4</sup> Section 721.05(34), F.S.

Division of Condominiums, Timeshares and Mobile Homes for approval, which must include certain information and disclosures.<sup>5</sup> Specifically, the filed public offering statement must include an estimated operating budget for the timeshare plan and a schedule of the purchaser's expenses to be paid to the timeshare plan and the managing entity.<sup>6</sup> A common expense to be paid to the managing entity is a reserve for deferred maintenance and capital expenditures.

Current law provides that reserves for timeshare plans must be calculated by a formula based upon the estimated life and replacement cost of each reserve item.<sup>7</sup> This is also known as the 'straight-line accounting method.' Conversely, a second type of calculation formula, the 'pooling method,' is based upon the pooling of two or more assets. The pooling method is authorized to be used when calculating reserves for condominiums.<sup>8</sup>

#### *Effect of Proposed Changes*

The bill amends s. 721.07(5)(t)3.a.(XI)(A), F.S., to allow timeshare plan reserves to be calculated using the pooled accounting method. Reserves may still be calculated based on the straight line accounting method, if desired.

### **Definition of "Notice Address"**

#### *Current Situation*

In order to institute trustee foreclosure proceedings, adequate notice must be provided to the mortgagor, the owner of the timeshare interest if different than the mortgagor, and any junior interestholder.<sup>9</sup>

Current law defines "notice address" as the address that is used in the books and records of the timeshare plan.<sup>10</sup> However, a mortgagor, owner, or junior interestholder's current address may be different than the address used in the timeshare plan's books and records.

#### *Effect of Proposed Changes*

The bill creates s. 721.82(9)(d), F.S., to include as a "notice address," any address that is known to be the current address of a timeshare mortgagor, owner, or junior interestholder.

### **Definition of "Permitted Delivery Service"**

#### *Current Situation*

A "permitted delivery service" is "any nationally recognized common carrier delivery service or international airmail service that allows for return receipt service."<sup>11</sup> The current statutory language does not permit the trustee to use a foreign country's equivalent of certified, registered mail.

#### *Effect of Proposed Changes*

The bill amends s. 721.82(11), F.S., to also allow the trustee to use a foreign country's equivalent of certified, registered mail.

### **Title Searches**

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<sup>5</sup> See, generally: ss. 721.07 and 721.07(5), F.S.

<sup>6</sup> Section 721.07(5)(t)3., F.S.

<sup>7</sup> Section 721.07(5)(t)3.a.(XI)(A), F.S.

<sup>8</sup> See: Fla. Admin. Code 61B-22.005(3).

<sup>9</sup> See, generally: ss. 721.855(5)(a) and 721.856(5)(a), F.S.

<sup>10</sup> Section 721.82(9), F.S.

<sup>11</sup> Section 721.82(11), F.S.

### *Current Situation*

Currently, in order to initiate a trustee foreclosure proceeding against a timeshare interest, the lienholder must deliver an affidavit and a title search of the timeshare interest identifying junior lienholders.<sup>12</sup> The title search must have been conducted within 60 days of the date of the affidavit.<sup>13</sup>

### *Effect of Proposed Changes*

The bill amends ss. 721.855(2)(c)1. and 721.856(2)(b)1., F.S., to eliminate the requirement that the title search be conducted within 60 days of the date of the affidavit.

The bill creates ss. 721.855(4)(f) and 721.856(4)(g), F.S., to instead require that a title search be conducted and delivered to the trustee prior to the sale of the timeshare interest. The trustee may not exercise his or her power of sale of the timeshare interest until a title search has been conducted and delivered. Moreover, the title search must have been conducted within 60 days of the date that it is delivered to the trustee.

If incorrect obligors or junior interestholders were served or additional obligors or junior interestholders have not been served, the foreclosure action may not continue until the correct or additional notices have been served.

### **Recording of a Lis Pendens**

#### *Current Situation*

A lis pendens has the effect of notifying potential claimants and interested parties of the action, and establishes a priority right against future claims. Current statutory language is unclear as to whether the initiation of a trustee foreclosure action operates as a lis pendens on the timeshare interest. This has caused confusion in the industry, as a trustee may not proceed with a sale if a lis pendens has been filed.<sup>14</sup>

#### *Effect of Proposed Changes*

The bill amends ss. 721.855(4)(c) and 721.856(4)(c), F.S., to clarify that the initiation of a foreclosure proceeding against a timeshare interest does not automatically act as a lis pendens.

The bill also creates ss. 721.855(5)(h) and 721.856(5)(h), F.S., to provide that the initiation of a trustee foreclosure action operates as a lis pendens on the timeshare interest if a notice of lis pendens is recorded in the county in which the deed conveying the timeshare interest to the obligor was recorded.

The notice of lis pendens must include:

- The name of the obligor;
- The date of the initiation of the trustee foreclosure action;
- The name and contact information of the trustee;
- The legal description of the timeshare interest; and
- A statement that a trustee foreclosure action has been initiated against the timeshare interest.

### **Permitted Delivery Service Typographical Error**

#### *Current Situation*

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<sup>12</sup> Sections 721.855(2)(c)1. and 721.856(2)(b)1., F.S.

<sup>13</sup> *Id.*

<sup>14</sup> Sections 721.855(4)(c) and 721.856(4)(c), F.S.

Current law provides that giving notice by use of any “permitted delivery service” is an alternative to providing notice by the use of any “permitted delivery service.”<sup>15</sup> The second use of “permitted delivery service” is redundant.

#### *Effect of Proposed Changes*

The bill amends ss. 721.855(5)(a), 721.855(5)(a)4., 721.855(5)(b)1., 721.856(5)(a), 721.856(5)(a)4., and 721.856(5)(b)1., F.S., to correct the redundancy.

### **Standard for Trustee Ascertaining Signature**

#### *Current Situation*

In foreclosure proceedings, the trustee is required to notify the obligor of the proceeding by sending a written notice of default and intent to foreclose to the obligor’s notice address.<sup>16</sup> Notice is not perfected if the trustee cannot ascertain whether the obligor is the person who signed the receipt of notice.<sup>17</sup>

A trustee who determines that the obligor signed the receipt, when he or she knows or should know that this determination is not correct, commits a third-degree felony.<sup>18</sup>

#### *Effect of Proposed Changes*

The bill amends ss. 721.855(5)(a)5., 721.855(5)(b)1., 721.856(5)(a)5., and 721.856(5)(b)1., F.S., to provide a good faith standard in determining whether the obligor is the person who signed the receipt of notice. The bill also provides reasons for why the trustee may be unable to ascertain whether the obligor signed the receipt, including if all or a portion of the obligor’s name is not on the signed receipt, or if the trustee cannot otherwise determine that the obligor signed the receipt.

Moreover, the bill amends ss. 721.855(14)(b) and 721.856(13)(b), F.S., to provide that if the trustee, in good faith, makes an incorrect determination as to the identity of the signature on the notice receipt, it will not be a violation of law.

### **Published Notice of Default**

#### *Current Situation*

As previously discussed, the trustee is required to notify the obligor of the foreclosure proceeding by sending a written notice of default and intent to foreclose to the obligor’s notice address.<sup>19</sup>

Current law sets forth the information that is required to be included in the notice of default and intent to foreclose, including:

- The identity of the obligor;
- The notice address of the obligor;
- The legal description of the timeshare interest;
- The nature of the default;
- The amounts secured by the lien;
- A per diem amount to account for further accrual of the amounts secured by the lien; and
- The method by which the obligor may cure the default, including the period of time within which the obligor may cure the default.<sup>20</sup>

<sup>15</sup> See: ss. 721.855(5)(a), 721.855(5)(a)4., 721.855(5)(b)1., 721.856(5)(a), 721.856(5)(a)4., and 721.856(5)(b)1., F.S.

<sup>16</sup> Sections 721.855(5)(a) and 721.856(5)(a), F.S.

<sup>17</sup> Sections 721.855(5)(a)5. and 721.856(5)(a)5., F.S.

<sup>18</sup> Sections 721.855(14)(b) and 721.856(13)(b), F.S.

<sup>19</sup> Sections 721.855(5)(a) and 721.856(5)(a), F.S..

<sup>20</sup> Sections 721.855(5)(a)1. and 721.856(5)(a)1., F.S.,

Notice is perfected when the trustee receives the return receipt of notice bearing the signature of the obligor or junior interestholder within thirty calendar days after the notice was sent.<sup>21</sup> In some instances, notice by permitted delivery service is not perfected and notice by publication is appropriate.<sup>22</sup> Unlike with the “standard” notice of default procedure, the current statutory language does not delineate what information must be included in the publication notice. As a result, there is confusion in the industry as to how much and what information is to be included in the publication notice.

### *Effect of Proposed Changes*

The bill amends ss. 721.855(5)(c) and 721.856(5)(c), F.S., to delineate what information is to be included in the publication notice. Specifically, the notice of default and intent to foreclose by publication must identify:

- The obligor;
- The notice address of the obligor;
- The legal description of the timeshare interest;
- The nature of the action in short and simple terms;
- The name and contact information of the trustee; and
- The period of time within which the obligor may cure the default.

### **Affidavit of Publication Notice Typographical Error**

#### *Current Situation*

Sections 721.855(5)(e) and 721.856(5)(e), F.S., list which information is to be included in the affidavit certifying perfected notice.

Specifically, the information to be included is:

- The nature of the notice;
- The dates on which the notice was mailed;
- The name and address on the envelopes containing the notice;
- The manner in which the notices were mailed;
- The fact that a signed receipt from the certified mail, registered mail, or permitted delivery service was timely received; and
- The name and address on the envelopes containing the notice.

The second use of “the name and address on the envelopes containing the notice” is redundant.

### *Effect of Proposed Changes*

The bill amends ss. 721.855(5)(e) and 721.856(5)(e), F.S., to eliminate the redundancy.

### **Affidavit of Publication Notice**

#### *Current Situation*

As previously discussed, in a timeshare interest foreclosure proceeding, the trustee is required to notify the obligor of the proceeding by sending a written notice of default and intent to foreclose to the obligor’s notice address.<sup>23</sup> Notice is perfected when the trustee receives the return receipt of notice

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<sup>21</sup> Sections 721.855(5)(a)5. and 721.856(5)(a)5., F.S.

<sup>22</sup> See, generally: ss. 721.855(5)(c) and 721.856(5)(c), F.S.

<sup>23</sup> Sections 721.855(5)(a) and 721.856(5)(a), F.S.

bearing the signature of the obligor or junior interestholder within 30 calendar days after the notice was sent.<sup>24</sup>

Notice is not perfected, and notice by publication is appropriate, when:

- Notice is returned as undeliverable within 30 calendar days after the trustee sent the notice;
- The trustee cannot ascertain who signed the receipt of notice; or
- The receipt of notice is returned or refused within 30 calendar days after the trustee sent the notice.<sup>25</sup>

If the notice is returned as undeliverable within 30 calendar days after the trustee sent the notice, the trustee is obligated to conduct a diligent search and inquiry to determine a different address for the obligor or junior interestholder.<sup>26</sup> If the trustee's diligent search and inquiry produces an address different from the notice address, the trustee must attempt to perfect notice at the new address before attempting to perfect notice by publication.<sup>27</sup> However, the diligent search and inquiry is only required to be conducted the first time that the notice is returned as undeliverable; any subsequent time that the notice is returned as undeliverable, the trustee may proceed with notice by publication.

As with other forms of notice perfection, a trustee who perfects notice by publication is required to prepare an affidavit setting forth the manner in which notice was perfected.<sup>28</sup> Among other things, the affidavit must include a statement that a diligent search and inquiry was made for the current address for the person. This is potentially confusing, as a diligent search and inquiry may not always be required for notices perfected by publication.

#### *Effect of Proposed Changes*

The bill amends ss. 721.855(5)(f) and 721.856(5)(f), F.S., to provide that attestation that a diligent search and inquiry was done is only required if a diligent search and inquiry was specifically required to be conducted by the provisions in ch. 721, F.S.

The bill does not affect any requirements set forth by ss. 49.041 or 49.051, F.S., as applicable.

### **Perfection of Service at Same Address**

#### *Current Situation*

Current statutory language does not provide trustees with the ability to perfect notice as to multiple obligors residing at the same address, with the same service of notice.<sup>29</sup> Instead, notice must be perfected as to each obligor separately, regardless of whether multiple obligors reside at the same address.

#### *Effect of Proposed Changes*

The bill creates ss. 721.855(5)(g) and 721.856(5)(g), F.S., to allow for notice to be perfected as to all obligors at the same address, so long as notice is perfected as to at least one obligor at that address.

### **Manner of Sale**

#### *Current Situation*

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<sup>24</sup> Sections 721.855(5)(a)5. and 721.856(5)(a)5., F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Sections 721.855(5)(b) and 721.856(5)(b), F.S.

<sup>27</sup> Sections 721.855(5)(b)1. and 721.856(5)(b)1., F.S.

<sup>28</sup> See, generally: ss. 721.855(5)(f) and 721.856(5)(f), F.S.

<sup>29</sup> See, generally: ss. 721.855(5) and 721.856(5), F.S.

Currently, the trustee must conduct the foreclosure sale of the timeshare interest, and must act as the auctioneer.<sup>30</sup> The current statutory language does not allow anyone other than the trustee to conduct the sale or act as the auctioneer.

#### *Effect of Proposed Changes*

The bill amends ss. 721.855(7)(b) and 721.856(7)(b), F.S., to allow the trustee to use a third party to conduct the sale on behalf of the trustee. However, the trustee remains liable for the conduct of the sale, including the actions of any third-party auctioneer.

#### B. SECTION DIRECTORY:

Section 1 amends s. 718.112(2)(d)4., F.S., relating to bylaws.

Section 2 amends s. 721.05(34), F.S., relating to definitions.

Section 3 amends s. 721.07(5)(t)3.a.(XI)(A), F.S., relating to public offering statement.

Section 4 amends s. 721.82(9)(d), F.S., relating to definitions.

Section 5 amends s. 721.84(6), F.S., relating to appointment of a registered agent and duties.

Section 6 amends s. 721.855(2)(c)1., F.S., relating to procedure for the trustee foreclosure of assessment liens.

Section 7 amends s. 721.856(2)(b)1., F.S., relating to procedure for the trustee foreclosure of mortgage liens.

Section 8 provides an effective date of July 1, 2013.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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<sup>30</sup> Sections 721.855(7)(b) and 721.856(7)(b), F.S.  
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The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenues in the aggregate, nor reduce the percentage of sales tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

It appears that rule 61B-40.006, F.A.C., may need to be amended in order to address the changes to s. 721.07, F.S., relating to reserve calculations using the pooling accounting method.

Current law appears to provide sufficient rulemaking authority to the Department of Business and Professional Regulation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.