HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 411 Community Associations
SPONSOR(S): Sullivan
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1184

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2) Insurance			
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

This bill provides that a condominium association and its authorized agent are not liable for providing information in good faith, other than that required by law, in response to a written request if the person providing the information includes a written statement in substantially the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

This bill provides that the required written notice to members that a homeowners' association board will consider assessments at a meeting must be provided to all members at least 14 days prior to such meeting. Similarly, this bill requires the board to provide written notice to all members at least 14 days prior to a meeting if the board intends to adopt, amend, or revoke any rules regarding the use of parcels in the community and the notice must state that changes to such rules will be considered at the meeting.

In addition, this bill amends the "Cardiac Arrest Survival Act," to provide that a community association (condominium association, cooperative, homeowners' association, vacation/timeshare plan or mobile home park association) which provides an automated external defibrillator ("AED") primarily for use by its members, guests, or invitees, is immune from civil liability for any damages resulting from the use of the device if the association properly maintains such device and offers periodic training on the use of such device. Further, this bill prohibits an insurer from requiring an association to purchase medical malpractice liability coverage as a condition of issuing any other coverage carried by the association. Finally, this bill also prohibits insurers from excluding damages that result from the use of an AED from coverage under a general liability policy issued to a community association.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[x]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

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

This bill could be described as increasing government because it imposes requirements that do not exist in current law on homeowners' associations before those associations' boards may take certain actions.

This bill could be said to decrease individual freedom because it prohibits certain types of insurance policies, thus eliminating the current freedom of both insurers and insureds from entering into such contracts if they choose.

This bill could be described as diminishing personal responsibility because it extends immunity to certain causes of action for which tortfeasors can currently be held accountable through civil liability.

B. EFFECT OF PROPOSED CHANGES:

Present Situation: Condominium Associations and Requests for Records or Information

Chapter 718, F.S., governs condominium associations. Specifically, s. 718.111, F.S., provides the powers and duties of an association, including the maintenance, management, and operation of the condominium property. The association is responsible for maintaining its official records under s. 718.111(12), F.S. Those official records must include:

- a copy of plans, permits, warranties, and other items provided by the developer pursuant to s. 718.301(4);
- a copy of the recorded declaration of condominium, and each amendment thereto, for each condominium operated by the association;
- a photocopy of the recorded bylaws, and each amendment thereto, for the association;
- a certified copy of the articles of incorporation of the association or other documents creating the association and amendments thereto;
- a copy of the association's current rules;
- a book or books that contain the minutes of all meetings of the association, of the board of directors, and of unit owners for the past 7 years;
- a current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The roster shall also include email addresses if the unit owner consents to receiving an electronic transmission;
- all current insurance policies of the association and condominiums which it operates;
- a current copy of any management agreement, lease, or other contract to which the association is a party or under which the association or the unit owners have an obligation or responsibility;
- bills of sale or transfer for all property owned by the association; and

- accounting records for the association, including separate accounting records for each condominium it operates, for the past 7 years.[1]

The official records of an association must be maintained within the state. An association is required to make the official records available to a unit owner within 5 working days after the association's board or its designee receives a written request.[2] Alternatively, the association may keep a copy of the official records available for inspection or copying on the condominium property or association property. The right to inspect includes the ability of a unit owner to make or obtain copies at a reasonable expense to that owner.[3] If the records are not available for inspection or copying and the association fails to provide the records within 10 working days after receiving a written request, such failure creates a rebuttable presumption that the association willfully violated this provision of law. The unit owner may bring an enforcement action that could result in damages. Also, the unit owner may recover reasonable attorney's fees and costs from the person in control of the records who denied the unit owner access to those records.

Certain records shall not be made available to unit owners. Those records are:

- any record protected by attorney-client or work-product privilege;
- information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit; and
- the medical records of unit owners.[4]

Section 718.111(12)(e), F.S., provides that an association or its authorized agent may not be required to provide a prospective purchaser or lienholder with information about the condominium or the association other than information or documents statutorily required to be made available. The association or its authorized agent may charge a reasonable fee to the prospective purchaser, lienholder, or the current unit owner for providing a good faith response to a request for information. However, such fee may not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the association's response. Currently, if an association provides information in good faith that is not statutorily required to a prospective purchaser or lienholder, the person providing the information may be liable for any inaccuracies in the information.

Present Situation: Homeowners' Associations and Notice Requirements for Board Meetings

Chapter 720, F.S., provides operating procedures for homeowners' associations while protecting the rights of association members without unduly impairing the ability of such associations to perform their functions. Section 720.303(2), F.S., specifies procedures for association board meetings. A meeting of the board occurs whenever a quorum of the board gathers to conduct association business. Board meetings are open to all members, except for those meetings between the board and its attorney relating to propose or pending litigation.

Notice of a board meeting must be posted in a conspicuous place in the community at least 48 hours prior to a meeting, except in an emergency. If notice of the board meeting is not posted in a conspicuous place, then notice of the board meeting must be mailed or delivered to each association member at least 7 days prior to the meeting, except in an emergency. For associations that have more than 100 members, the bylaws may provide for a reasonable alternative to this posting or mailing requirement. These alternatives include publication of notice, provision of a schedule of board meetings, conspicuous posting and repeated broadcasting of a notice in a certain format on a closed-circuit cable television system serving the association, or electronic transmission if the member consents in writing to such transmission.

[1] *See* s. 718.111(12)(a), F.S.
[2] *See* s. 718.111(12)(b), F.S.
[3] *See* s. 718.111(12)(c), F.S.
[4] *See id.*

A board may not levy assessments at a meeting unless the notice of the meeting includes a statement that the assessments will be considered at the meeting and the nature of those assessments. Currently, there are no additional notice requirements for board meetings at which the board will consider taking action on rules that regulate the use of parcels in the community (i.e., prohibited structures, pets, etc.).

Automated External Defibrillators

Each year in the U.S., sudden cardiac arrest strikes more than 350,000 people, making it the single leading cause of death. Sudden cardiac arrest is usually caused by a condition called ventricular fibrillation. This is a condition where the normal flow of electrical impulses in the heart is disturbed and the heart muscle goes into an uncoordinated electrical activity or fibrillation. Due to the unexpectedness with which sudden cardiac arrest strikes, most of its victims die before reaching a hospital. Experts warn that a victim's chances of survival decrease by 7 to 10 percent for each minute that passes without defibrillation. The victim's best chance of survival is when defibrillation occurs within 4 minutes after the cardiac arrest.[5] Few attempts at resuscitation succeed after 10 minutes have elapsed.[6]

An automated external defibrillator ("AED") administers an electric current to the heart muscle which momentarily stuns the heart and gives it an opportunity to resume a normal rhythm, a process known as defibrillation. The device's built-in computer is able to assess the patient's heart rhythm and determine whether defibrillation is needed, and will administer the appropriate level of shock. In 1996, an AED device came on the market, the manufacturer of which refers to the product as "completely automated," with a single-button design, with non-polarized electrodes, and with step-by-step voice instructions. This device, theoretically, does not administer a shock unless it detects a lethal heart rhythm. According to the American Heart Association, a victim's chance of survival is greater than 50 percent with early defibrillation.

The number of AEDs obtained for on-premises use by community associations has increased, in part, as the result of the American Heart Association's campaign to encourage associations or other population centers to have the device available. The results of a recent study funded by the National Heart Lung and Blood Institute, in cooperation with the American Heart Association, shows an increased survival rate for locations with AEDs.[7] The study was designed to determine the effectiveness of deploying AEDs in public access areas with trained laypersons to improve the survival rates for victims of sudden cardiac arrest. The results of the study showed not only an increase in survival rates for public access sites with AEDs, but also that there were few adverse events and no cases of the devices delivering a shock inappropriately.[8]

Present Situation: Liability/Insurance Costs Associated with Automated External Defibrillators

Community associations that have obtained an AED for on-premises use have expressed concerns relating to liability and the high cost of insurance for such devices. Part I of chapter 768, F.S., provides the state's general negligence law. Section 768.13, F.S., the Good Samaritan Act, provides that any person who, gratuitously and in good faith, renders emergency care or treatment at the scene of an emergency outside of a hospital, doctor's office, or other place having proper medical equipment without the objection of the injured victim is not liable for any civil damages as a result of such care or

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[5] *See* American College of Emergency Physicians, "Fact Sheets: Automatic External Defibrillators," available online at http://www.acep.org/1,2891,0.html.
[6] *See* American Heart Association, "Cardiac Arrest: AHA Recommendation," available online at http://www.americanheart.org/presenter.jhtml?identifier=4481.
[7] *See* National Center for Early Defibrillation, "Use of Public Access Defibrillators Doubles Survival From Sudden Cardiac Arrest" (Nov. 11, 2003), available online at http://www.early-defib.org/news.asp?news_id=105.
[8] *See id.*

treatment where the person acts as an ordinary reasonably prudent person would have acted under the same or similar circumstances.

Based on the development of AED technology and in an effort to reduce the death rate associated with sudden cardiac arrest, the Legislature enacted s. 401.291, F.S., in 1990. This law broadened the list of persons authorized to use an AED to include first responders. First responders include police officers, firefighters, and citizens who are trained as part of locally coordinated emergency medical services ("EMS") response teams. In order to qualify to use an AED, a first responder had to meet specific training requirements including certification in cardiopulmonary resuscitation or successful completion of an 8 hour basic first aid course that included cardiopulmonary resuscitation training, demonstrated proficiency in the use of an automatic or semiautomatic defibrillator, and successful completion of at least 6 hours of training in at least two sessions, in the use of an AED. The local EMS medical director or another physician authorized by the medical director must authorize the use of an AED by a first responder.

Chapter 97-34, L.O.F., expanded the deregulation of the use of an AED by repealing s. 401.291, F.S., and enacting s. 401.2915, F.S., to specify legislative intent that an AED may be used by any person for the purpose of saving the life of another person in cardiac arrest. Under this section, the user of an AED is required to successfully complete an appropriate training course in cardiopulmonary resuscitation ("CPR") or a basic first aid course that includes CPR and demonstrate proficiency in the use of an AED. In addition, any person or entity in possession of an AED is encouraged to register the device with the local EMS medical director, and any person who uses an AED is required to activate the EMS system as soon as possible.

In 2001, the Legislature enacted s. 768.1325, F.S., the Cardiac Arrest Survival Act ("Act"). For purposes of the Act, Florida Statutes defines an AED as a defibrillator device that:

- is commercially distributed in accordance with the federal Food, Drug, and Cosmetic Act;
- is capable of recognizing the presence or absence of ventricular fibrillation and is capable of determining whether defibrillation should be performed; and
- after determining that defibrillation should be performed, is able to deliver an electrical shock to an individual.[9]

The Act provides that any person who uses or attempt to use an AED on a victim of a perceived medical emergency,[10] without objection of the victim, is immune from civil liability for any harm resulting from the use or attempted use of the device. Further, any person who acquired the device is immune from liability if the harm did not result from the failure to:

- notify the local emergency medical services medical director of the most recent placement of the device within a reasonable period of time;
- properly maintain and test the device; or
- provide appropriate training to the employee or agent who used the device on the victim.[11]

However, pursuant to s. 768.1325(4), F.S., this immunity does not apply to a person if:

- the harm involved was caused by that person's willful or criminal misconduct, gross negligence, reckless disregard or misconduct, or a conscious, flagrant indifference to the victim's safety or rights;
- the person is a licensed or certified health professional who used the AED while acting within the scope of his or her license or certification;

[9] *See* s. 768.1325(2)(b), F.S.
[10] Under s. 768.1325(2)(a), F.S., a perceived medical emergency, for purposes of the Act, means circumstances where an individual's behavior "leads a reasonable person to believe that the individual is experiencing a life-threatening medical condition that requires an immediate medical response relating to the heart or other cardiopulmonary function[.]"
[11] *See* s. 768.1325(3), F.S.

- the person is a hospital, clinic, or other entity whose primary purpose is providing health care and the harm was caused by an employee or agent of the entity;
- the person is an acquirer of the device who leased the device for compensation to a health care entity without selling the device to the entity; or
- the person is the manufacturer of the device.

Notwithstanding the immunity provisions of the Good Samaritan Act and the Cardiac Arrest Survival Act, it has been reported that some insurance companies are requiring community associations to purchase medical malpractice liability coverage in addition to a general liability policy if the association has acquired an AED. In general, medical malpractice liability coverage is expensive and may discourage some associations from acquiring this life-saving device.

Proposed Changes

This bill amends s. 718.111(12), F.S., to provide that a condominium association and its authorized agent are not liable for providing information in good faith, other than that required by law, in response to a written request if the person providing the information includes a written statement in substantially the following form: "The responses herein are made in good faith and to the best of my ability as to their accuracy."

This bill amends s. 720.303(2), F.S., to provide that the required notice to members that a homeowners' association board will consider assessments at a meeting shall be provided to all members at least 14 days prior to such meeting, and must be in writing. Similarly, this bill requires the board to provide written notice to all members at least 14 days prior to a meeting if the board intends to adopt, amend, or revoke any rules regarding the use of parcels in the community and the notice must state that changes to such rules will be considered at the meeting.

In addition, this creates new s. 768.1325(5)(a), F.S., as a part of the "Cardiac Arrest Survival Act," to provide that a community association organized under chapters 617, 718, 719, 720, 721, or 723, F.S.,[12] and which provides an automated defibrillator device primarily for use by its members, guests, or invitees, is immune from civil liability for any damages resulting from the use of the device if the association properly maintains such device and offers periodic training on the use of such device. Further, this new section prohibits an insurer from requiring an association to purchase medical malpractice liability coverage as a condition of issuing any other coverage carried by the association. Finally, it also prohibits insurers from excluding damages that result from the use of such device from coverage under a general liability policy issued to a community association.

C. SECTION DIRECTORY:

Section 1. amends s. 718.111, F.S., with respect to a condominium association's liability for providing information in response to a request.

Section 2. amends s. 720.303, F.S., requiring additional written notices to members of a homeowners' association if the board of that association intends to consider assessments or take action with respect to rules regulating members' use of their parcels.

Section 3. amends s. 768.1325, F.S., to extend immunity from civil liability resulting from the use of automated external defibrillators to community associations that maintain such devices and properly train on their use, and imposing certain restrictions on insurers with respect to such devices.

Section 4. provides an effective date of July 1, 2004.

[12] These chapters govern non-profit corporations, condominiums, cooperatives, homeowners' associations, vacation clubs and timeshares, and mobile home parks, respectively.

II. 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.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is possible that insurance companies may experience higher costs associated with liability exposure because of this bill's prohibition against the exclusion of damages that result from the use of an AED from coverage under a general liability policy. Also, there may be higher costs that result from an association not having to purchase medical malpractice liability coverage.

The community associations affected by this bill may experience a reduction in the cost of insurance because this bill prohibits insurers from requiring the associations to purchase medical malpractice liability coverage in addition to a general liability policy. They may also experience a reduction in the cost or frequency of litigation due to this bill's immunity provisions.

D. FISCAL COMMENTS:

In addition to the potential direct reduction in their cost of insurance, community associations may also experience a reduction in liability exposure because of this bill's prohibition against excluding certain damages from coverage under a general liability policy.

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, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   Access to Courts

   Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Because this

bill immunizes potential defendants from civil liability, it is possible that it may violate this access to courts provision.

In *Kluger v. White*,[13] the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded $550.[14] The court determined that the statute violated the access to courts provision of the state constitution, holding that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[15] Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision of the state constitution.

The Florida Supreme Court applied the *Kluger* test in *Smith v. Department of Insurance*.[16] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages.[17] The cap on damages was challenged on the basis that it violated the access to courts provision of the state constitution. The court found that a right to sue for unlimited noneconomic damages existed at the time the constitution was adopted.[18] The *Smith* court held that the Legislature had not provided an alternative remedy or commensurate benefit in exchange for limited the right to recover damages and noted that the parties did not assert that an overwhelming public necessity existed.[19] Accordingly, the court held that the $450,000 cap on noneconomic damages violated the access to courts provision of the Florida Constitution.

Because this bill eliminates causes of action, a litigant could argue that it likewise denies him or her access to the courts. Since both statutory and common-law causes of action for negligence predate the 1968 constitution, it is possible that such a suit would require a court to apply the *Kluger* test to this bill; especially given its lack of any legislative findings, it is also possible that it would not survive such scrutiny.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

[13] 281 So. 2d 1 (Fla. 1973).
[14] *See* ch. 71-252, s. 9, L.O.F.
[15] *See Kluger* at 4.
[16] 507 So. 2d 1080 (Fla. 1987).
[17] *See* ch. 86-160, s. 59, L.O.F.
[18] *See Smith* at 1087.
[19] *See id.* at 1089.