

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 Committee on Regulated Industries

BILL: SB 696

INTRODUCER: Senator Stargel

SUBJECT: Vacation and Timeshare Plans

DATE: February 25, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Pre-meeting
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

SB 696 relates to the Florida Vacation Plan and Timesharing Act. The bill revises provisions related to the nonjudicial, trustee foreclosure process for the foreclosure of liens on timeshare interests, including liens based on unpaid assessments and unpaid mortgage obligations. In current law, the lienholders appoint a trustee to serve the required notices and forms on the timeshare interestholder. The bill:

- Exempts timeshare condominiums from the requirements related to the conduct of condominium board member elections;
- Permits timeshare plan reserves to be calculated using the pooling accounting method as an alternative to the straight line accounting method, as is also currently permitted for condominium associations;
- Revises the definition of the term “notice address” to include any address that is known to be the current address of a timeshare mortgagor, owner, or junior interest holder;
- Revises the definition of the term “obligor” to include persons who would need to be a party to the trustee foreclosure process if the obligor is deceased;
- The bill amends the definition of the term “permitted delivery service” in s. 721.82(11), F.S., to allow the trustee to use a foreign jurisdiction’s recognized equivalent of certified or registered mail;
- Requires that the required title search must be conducted and delivered to the trustee prior to the sale of the timeshare interest with an effective date of within sixty days of the date it is delivered to the trustee;
- Provides that the initiation of a foreclosure proceeding against a timeshare interest does not automatically act as a lis pendens, which is a notice, recorded in the chain of title to

- real property that gives notice that the property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome;
- Provides the information that must be included in a notice of lis pendens;
 - Provides a good faith standard for determining whether the obligor is the person who signed the receipt of the notice of default and intent to foreclose;
 - Provides that it will not be a third degree felony, as provided in current law, if the trustee makes an incorrect determination as to the identity of the signature on the notice receipt and he or she made a good faith effort to properly ascertain if the obligor signed the return receipt in accordance with the good faith standards provided in this bill;
 - Delineates the information that must be included in the publication notice that is required if the obligor cannot be served with a notice of default and intent to foreclose;
 - Provides that the attestation that a diligent search and inquiry has been done is not required if service was refused, returned as undeliverable, or the trustee has ascertained that the obligor or junior interestholder is the person who signed the receipt;
 - Permits the notice of default and intent to foreclose 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;
 - Permits the trustee to use a third party to conduct the sale on behalf of the trustee; and
 - Corrects scrivener's error by deleting duplicative terms.

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

This bill substantially amends the following sections of the Florida Statutes: 718.112, 721.07, 721.82, 721.84, 721.855, and 721.856.

II. Present Situation:

Timeshares

A timeshare interest is a form of ownership of real and personal property.¹ According to a report prepared by the American Resort Development Association (ARDA), Florida had 23 percent of the estimated 1,548 timeshare resorts in the United States as of December 31, 2011.²

In a timeshare, the real property is typically a condominium unit or a cooperative unit. A timeshare property is typically a resort in which multiple parties hold the right to use the property. Each owner of a timeshare interest is allotted a period of time (typically one week) in which they may use the property.

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.³ Chapter 721, F.S., applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within

¹ See s. 721.05(36), F.S.

² ARDA International Foundation, State of the Vacation Timeshare Industry, 2012 Edition, a copy of the report is available at:

http://www.arda.org/uploadedFiles/ARDA/News_and_Information/Industry_Information/2012%20state%20of%20industry%20fact%20sheet.pdf (Last visited February 27, 2013).

³ Section 721.02(2) and (3), F.S.

this state.⁴ A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods or a condominium unit in which timeshare estates have been created.⁵ A timeshare plan is any arrangement, plan, scheme, or similar device whereby a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years.⁶

Section 721.05(34), F.S., defines a “timeshare estate” as “a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof.” The term also includes an interest in a condominium unit, a cooperative unit, or a trust. This definition does not specify whether the term 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.

A timeshare plan developer must file a public offering statement and the required exhibits with the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation, prior to offering the timeshare plan to the public.⁷

For each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners’ association.⁸ The 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.⁹ A common expense to be paid to the managing entity is a reserve for deferred maintenance and capital expenditures.

Calculation of Reserves

Section 721.07(5)(t)3.a.(XI)(A), F.S., provides that reserves for timeshare plans must be calculated by a formula based upon the estimated life and replacement cost of each reserve item. This is also known as the “straight-line accounting method.” An alternative method is known as the ‘pooling method’ in which the reserves for two or more assets are accounted together. Condominium associations may account for reserves with the pooling method.¹⁰

Nonjudicial Process for Foreclosure of Liens on Timeshare Interests

Section 721.855 and 856, F.S., provide a nonjudicial, trustee foreclosure process for the foreclosure of liens on timeshare interests. 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.¹¹ In this process the lienholders

⁴ Section 721.03, F.S.

⁵ See ss. 721.05(41) and 718.103(26), F.S.

⁶ Section 721.05(39), F.S.

⁷ Section 721.07, F.S.

⁸ Section 721.13(1)(a), F.S. The duties of a managing entity are detailed in s. 721.13(3), F.S.,

⁹ Section 721.07(5)(t)3., F.S.

¹⁰ See ss. 718.111(13) and 718.112(2)(f), F.S., and rule 61B-22.005(3), F.A.C. A “junior interestholder” is defined as “any person who has a lien or interest of record against a timeshare interest in the county or counties in which the timeshare interest is located, which is inferior to the mortgage lien or assessment lien being foreclosed under this part [pt. III, ch. 721, F.S.]”.

¹¹ See ss. 721.855(5)(a) and 721.856(5)(a), F.S.

appoint a trustee to serve the required notices and forms on the timeshare interest holder.¹² Section 721.855, F.S., provides for the foreclosure of assessment liens. Section 721.856, F.S., provides for the foreclosure of mortgage liens.

Section 721.82(9), F.S., defines the term “notice address” as the address that is used in the books and records of the timeshare plan. 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.

Section 721.82(10), F.S., defines the term “obligor” to mean the mortgagor, the person subject to an assessment lien, or the owner of the timeshare interest.

Section 721.82(11), F.S., defines the term “permitted delivery service” as “any nationally recognized common carrier delivery service or international airmail service that allows for return receipt service.” This definition does not permit the trustee to use a foreign country’s equivalent of certified or registered mail.

In any foreclosure proceeding, the trustee is required to notify the obligor of the proceeding by sending him or her a written notice of default and intent to foreclose. The notice must be sent to the notice address of the obligor by certified mail, registered mail, or permitted delivery service, return receipt requested, and by first-class mail or permitted delivery service, postage prepaid.¹³

In order to initiate a trustee foreclosure proceeding against a timeshare interest, the trustee must deliver an affidavit and a title search of the timeshare interest identifying junior lienholders.¹⁴ The title search must have been conducted within sixty days of the date of the affidavit.¹⁵

Recording of a Lis Pendens

A lis pendens is a notice, recorded in the chain of title to real property that gives notice that the property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.¹⁶ One of the conditions for a trustee sale of a timeshare interest after a nonjudicial foreclosure is that no lis pendens is recorded and pending against the same timeshare interest and the trustee has not been served notice of the filing of any action to enjoin the trustee foreclosure sale.¹⁷ Timeshare industry representatives have expressed concern regarding whether the initiation of a trustee foreclosure action operates as a lis pendens on the timeshare interest.

Standard for Trustee Ascertaining Signature

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.¹⁸ Notice is not perfected if the trustee cannot ascertain whether the obligor is the person who signed the receipt of notice.¹⁹ A

¹² *Id.*

¹³ *Id.*

¹⁴ Sections 721.855(2)(c)1. and 721.856(2)(b)1., F.S.

¹⁵ *Id.*

¹⁶ Black’s Law Dictionary (9th ed. 2009).

¹⁷ Sections 721.855(4)(c) and 721.856(4)(c), F.S.

¹⁸ Sections 721.855(5)(a) and 721.856(5)(a), F.S.

¹⁹ Sections 721.855(5)(a)5. and 721.856(5)(a)5., F.S.

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.²⁰

Notice of Default and Intent to Foreclose

Sections 721.855(5)(a)1. and 721.856(5)(a)1., F.S., set 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.

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.²¹ In some instances, notice by permitted delivery service is not perfected and notice by publication is appropriate.²² 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.

Certification of Perfected Notice

Sections 721.855(5)(e) and 721.856(5)(e), F.S., list information that must 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 duplicative, and is a scrivener’s error.

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

²⁰ Sections 721.855(14)(b) and 721.856(13)(b), F.S. Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not exceeding five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not exceeding \$5,000.

²¹ Sections 721.855(5)(a)5. and 721.856(5)(a)5., F.S.

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

- Notice is returned as undeliverable within thirty 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 thirty calendar days after the trustee sent the notice.²³

If the notice is returned as undeliverable within thirty 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.²⁴ 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.²⁵ 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.

A trustee who perfects notice by publication is required to prepare an affidavit setting forth the manner in which notice was perfected.²⁶ Among other things, the affidavit must include a statement that a diligent search and inquiry was made for the person's current address.

Manner of Sale

Sections 721.855(7)(b) and 721.856(7)(b), F.S., require the trustee to conduct the foreclosure sale of the timeshare interest, and to act as the auctioneer. This provision would not permit anyone other than the trustee to conduct the sale or act as the auctioneer.

III. Effect of Proposed Changes:

Timeshare Condominiums – Elections

The bill amends s. 718.112(2)(d)4., F.S., to exempt timeshare condominiums from the requirements related to the conduct of condominium board member elections.²⁷

Calculation of Reserves

The bill amends s. 721.07(5)(t)3.a.(XI)(A), F.S., to permit timeshare plan reserves to be calculated using the pooling accounting method as an alternative to the straight line accounting method. The bill would permit timeshare associations to calculate reserves in the same manner as condominium associations.²⁸

Trustee Foreclosure Definitions

The bill amends the definition of the term "notice address" in s. 721.82(9)(d), F.S., to include

²³ *Id.*

²⁴ Sections 721.855(5)(b) and 721.856(5)(b), F.S.

²⁵ Sections 721.855(5)(b)1. and 721.856(5)(b)1., F.S.

²⁶ *See*, generally: ss. 721.855(5)(f) and 721.856(5)(f), F.S.

²⁷ Section 718.112(2)(d)4., F.S., provides procedures related to the conduct of elections for members to the condominium's Board of Administration (the board), including the use of proxies and the issuance of election notices. Prior to 2011, the provisions in s. 718.112(2)(d)4., F.S., were located in s. 718.112(2)(d)3., F.S., and included an exemption for timeshare condominiums. *See* s. 718.112(2)(d)3., F.S. (2010). In 2011, the provisions of s. 718.112(2)(d), F.S., were restructured and the exemption for timeshare condominiums was deleted. *See* s. 3, ch. 2011-196, L.O.F. This reinstates that provision.

²⁸ *See* 61B-22.005(3), F.A.C.

any address that is known to be the current address of a timeshare mortgagor, owner, or junior interestholder if the person's address is not the address recorded in the books and records of the timeshare plan or the mortgagee.

The bill amends the definition of the term "obligor" in s. 721.82(10), F.S. to include the personal representative, court appointed counsel, or guardian ad litem on behalf of the mortgagor, person subject to an assessment lien, and the record owner of the timeshare interest. According to a timeshare industry representative, this would eliminate uncertainty with whether the trustee foreclosure process could be used if the obligor is deceased.

The bill amends the definition of the term "permitted delivery service" in s. 721.82(11), F.S., to allow the trustee to use a foreign jurisdiction's recognized equivalent of certified or registered mail.

Trustee Foreclosure Title Searches

The bill amends ss. 721.855(2)(c)1. and 721.856(2)(b)1., F.S., to delete the requirement that the title search must be conducted within sixty days of the date of the affidavit. To initiate a trustee foreclosure procedure, a lienholder is required to deliver an affidavit to the trustee that identifies the obligor, the obligor's notice address, the timeshare interest, the date of the notice, the official record book and page, and the name and address on any junior interestholder.

The bill creates ss. 721.855(4)(f) and 721.856(4)(g), F.S., to require that a title search be conducted and delivered to the trustee prior to the sale of the timeshare interest. The effective date of the title search must be within sixty 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 and all applicable time periods have expired.

Recording of a Lis Pendens

The bill amends ss. 721.855(4)(c) and 721.856(4)(c), F.S., to provide 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

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 delete the scrivener's error that duplicates the reference to the term "permitted delivery service."

Standard for Trustee Ascertaining Signature

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 of default and intent to foreclose on the timeshare interest. Notice is completed or perfected when the receipt is returned with the signature of the obligor or junior interest holder. The bill would allow the notice to be perfected if the trustee cannot in good faith 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.

The bill also amends ss. 721.855(14)(b) and 721.856(13)(b), F.S., to provide that if the trustee makes an incorrect determination as to the identity of the signature on the notice receipt, it will not be a third degree felony as provided in these sections. However, the trustee must have made a good faith effort to properly ascertain if the obligor signed the return receipt in accordance with s. 721.855(5), F.S.

Section 721.856(13)(b), F.S., incorrectly references s. 721.855(6), F.S. This provision should reference the signature verification provisions for the mortgage foreclosure process in s. 721.856(5), F.S.

Published Notice of Default

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

Publication Notice

The bill amends ss. 721.855(5)(e) and 721.856(5)(e), F.S., to delete the duplication of the term "the name and address on the envelope containing the notice."

The bill amends ss. 721.855(5)(f) and 721.856(5)(f), F.S., to provide that the attestation that a diligent search and inquiry has been done is not required if service was refused, returned as undeliverable, or the trustee has ascertained that the obligor or junior interestholder is the person who signed the receipt.

Perfection of Service at Same Address

The bill creates ss. 721.855(5)(g) and 721.856(5)(g), F.S., to permit the notice of default and intent to foreclose 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

The bill amends ss. 721.855(7)(b) and 721.856(7)(b), F.S., to permit 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.

Effective Date

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

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:

C. Government Sector Impact:

VI. Technical Deficiencies:

Section 721.856(13)(b), F.S., incorrectly references s. 721.855(5), F.S. This provision should reference the signature verification provisions for the mortgage foreclosure process in s. 721.856(5), F.S.

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.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
