

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 Rules

BILL: CS/CS/SB 398

INTRODUCER: Judiciary Committee; Regulated Industries Committee; and Senator Passidomo

SUBJECT: Estoppel Certificates

DATE: March 28, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Oxamendi</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 398 revises requirements for estoppel certificates for condominium, cooperative, and homeowners' associations. Under current law, when an ownership interest in a condominium unit, cooperative unit, or homeowners' parcel is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a condominium, cooperative, or homeowners' association. Unpaid assessments may also become a lien on the property. Purchasers may request that the seller provide an estoppel certificate from the condominium, cooperative, or homeowners' association to protect against undisclosed financial obligations and to transfer title to the property free of any lien or encumbrance in favor of the association. An estoppel certificate certifies the amount of any total debt owed to the association for unpaid monetary obligations by a unit or parcel owner as of a specified date.

The bill:

- Revises the period in which an association must respond to a request for an estoppel certificate from 15 days to 10 business days.
- Provides that an estoppel certificate delivered by hand, mail, or e-mail has a 30-day effective period, and a certificate sent by regular mail has a 35-day effective period.
- Specifies the information that the association must provide in the estoppel certificate.
- Prohibits an association from charging a fee for an amended estoppel certificate, and provides a new effective period of 30 days or 35 days, depending on the method used to deliver the amended certificate.

- Provides that an association waives the right to collect any moneys owed in excess of the amounts set forth in the estoppel certificate from any person, and his or her successors and assigns, who in good faith relies upon the certificate.
- Prohibits an association from charging a fee for preparing and delivering an estoppel certificate that is requested, if it is not delivered within 10 business days.
- Authorizes the use of a summary proceeding pursuant to s. 51.011, F.S., to compel compliance with the estoppel certificate requirements for a cooperative association, as existing law provides for condominium and homeowners' associations.
- Permits an association to charge a maximum fee of \$200 for the preparation and delivery of an estoppel certificate, if there are no delinquent amounts owed to the association.
- Permits an association to charge an additional \$100 fee for an expedited estoppel certificate delivered within 3 business days after a request for an expedited certificate.
- Permits an association to charge an additional maximum fee of \$200, if there is a delinquent amount owed to the association.
- Specifies the maximum fee that an association may charge when it receives simultaneous requests for estoppel certificates for multiple units or parcels owned by the same person and there are no past due monetary obligations owed to the association.
- Provides that a lender or purchaser who pays for the preparation of an estoppel certificate may not waive the right to reimbursement if the closing does not occur and the prevailing party in a suit to enforce a right of reimbursement shall be awarded damages, attorney fees, and costs.
- Authorizes a cooperative to charge a fee for preparing and delivering an estoppel certificate but the authorization must be established by a written resolution adopted by either the board or a written management, booking, or maintenance contract.

The bill has no fiscal impact on state government.

The bill provides an effective date of July 1, 2017.

II. Present Situation:

Condominiums

A condominium is a form of ownership of real property comprised entirely of units that may be owned by one or more persons, which have an undivided share in common elements.¹ The common elements are the portions of the condominium property not included in the units.² A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.³ A declaration governs the relationship between the condominium unit owners and the condominium association.⁴ A condominium association is administered by an elected board of administration that can assess costs for common expenses.⁵

¹ Section 718.103(11), F.S.

² Section 718.103(8), F.S.

³ Section 718.104(2), F.S.

⁴ *Woodside Vill. Condo. Ass'n v. McClernan*, 806 So. 2d 452, 456 (Fla. 2002).

⁵ Section 718.103(1) and (4), F.S.

Cooperative Associations

A cooperative is a form of ownership of real property in which legal title vests in a corporation or other entity.⁶ A cooperative differs from a condominium because the cooperative holds the legal title to the unit and all common elements. The units are not individually owned. Instead, a cooperative unit's occupants receive an exclusive right to occupy the unit. The cooperative association may assess costs for the maintenance of common expenses.⁷

Homeowners' Associations

A homeowners' association is a Florida corporation responsible for the operation of a community in which the voting membership is composed of parcel owners or their agents, or a combination thereof. Membership in the association is a mandatory condition of parcel ownership.⁸ A homeowners' association is administered by an elected board of directors that is authorized to impose assessments.⁹

Assessments

An assessment is a unit or parcel owner's share of the funds required for the payment of the association's common expenses.¹⁰ A special assessment is any assessment levied against a unit or parcel owner other than the assessment adopted the annual budget.¹¹

Assessments that are unpaid may become a lien on the unit or parcel.¹² An owner is jointly and severally liable with the previous owner for all unpaid assessments that come due up to the time of transfer of title.¹³ This liability is without prejudice to an owner's right to recover from the previous owner the amounts paid that were assessed during the time that the previous owner owned the property.¹⁴

Estoppel Certificates

Delivery Requirements

To protect against undisclosed financial obligations and to obtain title to the property free of any lien or encumbrance in favor of the association, purchasers may request that the seller provide an estoppel certificate from the condominium, cooperative, or homeowners' association. An estoppel certificate certifies the amount of any total debt owed to the association for unpaid monetary obligations by a unit or parcel owner as of a specified date.¹⁵

⁶ Section 719.103(12), F.S.

⁷ See ss. 719.106(1)(g) and 719.107, F.S.

⁸ Section 720.301(9), F.S.

⁹ Section 720.303(2)(c)2., F.S.

¹⁰ Sections 718.103(1), 719.103(1), and 720.301(1), F.S.

¹¹ Sections 718.103(24) and 719.103(23), F.S.

¹² Sections 718.116(5), 719.108(4), and 720.3085(1), F.S.

¹³ Sections 718.116(1)(a), 719.108(1), and 720.3085(2)(b), F.S.

¹⁴ *Id.* The term "without prejudice" means "without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." BLACK'S LAW DICTIONARY 770 (10th ed. 2014).

¹⁵ Sections 718.116(8), 719.108(6), and 720.30851, F.S.

Within 15 days after receiving a written request for an estoppel certificate, the association must provide an estoppel certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the owner with respect to the unit or parcel.¹⁶

Fees

Condominium and homeowners' associations must establish the authority to charge a fee for an estoppel certificate by a written resolution adopted by the board or by a written management, bookkeeping, or maintenance contract.¹⁷ The fee is payable upon the preparation of the certificate.¹⁸ A cooperative association may charge a fee for the preparation of the certificate, but is not required to establish the fee amount in a written resolution or by a written management, bookkeeping, or maintenance contract.¹⁹

Condominium and cooperative associations may charge a "reasonable" fee for preparation of an estoppel certificate.²⁰ Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the fee charged by associations for the preparation of an estoppel certificate.

Payment and Refund of the Fee

The fee for preparation of an estoppel certificate by a condominium or homeowners' association is payable upon the preparation of the certificate.²¹ Chapter 719, F.S., does not have a comparable provision for cooperative associations.

For a condominium or homeowners' association, if the certificate is requested in conjunction with the sale or mortgage of a unit and the closing does not occur, the preparer of the certificate must refund the fee to a third party payor within 30 days after receipt of the request for refund. A written request for a refund must be made no later than 30 days after the closing date for which the certificate was sought and include reasonable documentation that the sale did not occur. Payment of the refund is a legal obligation of the owner, and the association may collect the refunded amount from that owner in the same manner as an assessment.²² There is no corresponding requirement in chapter 719, F.S., for a refund of the fee for an estoppel certificate paid to a cooperative association.

Summary Proceedings

A condominium association and a homeowners' association may be compelled to comply with the requirements of providing an estoppel certificate as required in ss. 718.116(8) and

¹⁶ *Id.*

¹⁷ Sections 718.116(8)(d) and 720.30851(3), F.S.

¹⁸ *Id.*

¹⁹ Section 719.108(6), F.S.

²⁰ Sections 718.116(8)(c) and 719.108(6), F.S. There is no corresponding requirement in chapter 720, F.S., that the fee charged by a homeowners' association be reasonable.

²¹ Sections 718.116(8)(d) and 720.30851(3), F.S.

²² Sections 718.116(8)(d) and 720.30851(3), F.S. There is no corresponding requirement in chapter 719, F.S., for a refund of the fee for an estoppel certificate paid to a cooperative association.

720.30851, F.S., respectively, by a summary proceeding pursuant to s. 51.011, F.S.²³ The prevailing party in the summary proceeding is entitled to recover reasonable attorney fees.²⁴ Current law does not provide a comparable provision to compel compliance with the estoppel certificate requirements for cooperative associations.

Community Association Living Study Council

After a series of public meetings in 2014, the Community Association Living Study Council,²⁵ by unanimous vote, made the following recommendations to the Legislature:

- That a reasonable cap be established for estoppel certificate fees and that such fees be tiered;
- The amount of the fee should depend on whether or not the owner is current in fees, delinquent in fees, or if the sale is a bulk purchase.²⁶

III. Effect of Proposed Changes:

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to revise the requirements for estoppel certificates issued by condominium, cooperative, and homeowners' associations, respectively.

Delivery of Estoppel Certificates

The bill revises the period in which an association must respond to a request for an estoppel certificate from 15 days to 10 *business* days. An association is required to designate on its website a person or entity with a street or e-mail address for receipt of a request for an estoppel certificate.

The bill requires that an association deliver an estoppel certificate by hand, mail, or e-mail to the requestor on the date of issuance. A certificate that is hand delivered or sent by electronic means has a 30-day effective period, and a certificate sent by regular mail has a 35-day effective period.

²³ Section 51.011, F.S., specifies a summary procedure for actions that specifically authorize this procedure by statute or rule. Under the summary procedure, the defendant's answer must contain all defenses of law or fact and be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, be filed within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. No discovery postpones the time for trial except for good cause shown or by stipulation of the parties. Summary procedure provides for an immediate trial, if requested.

²⁴ See 718.116(8)(b) and 720.30851(2), F.S.

²⁵ The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of 7 members appointed by the President of the Senate, the Speaker of the House of Representatives, and the Governor. The Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes appointed an ex officio nonvoting member. The Legislature abolished the Council in 2014. See ch. 2014-133, Laws of Fla.

²⁶ Final Report Community Association Living Study Council, *Final Report*, March 31, 2014, p. 6, available at <http://www.myfloridalicense.com/dbpr/lsc/documents/2014CALSCReport.pdf> (last visited March 12, 2017).

Required Form

The bill revises requirements for the issuance of an estoppel certificate to provide that an association must include all of the following information in substantially the following form in each certificate:²⁷

- Date of issuance;
- Name of the unit or parcel owner(s) reflected in the books and records of the association;
- Unit designation and address;
- Parking or garage space number, if any;
- Storage locker number, if any;
- Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection but no fee may be charged for this information;
- Fee for the preparation and delivery of the estoppel certificate;
- Name of the requestor; and
- Assessment information and other information.

The bill requires that the "Assessment Information" provided by an association contains the following information in substantially the form provided in the bill:

- The amount of regular periodic assessment levied against the unit or parcel;
- The amount of regular periodic assessment paid to date;
- The date the next installment of the regular periodic assessment is due;
- An itemized list of all assessments, special assessments, and other moneys owed on the date the certificate is issued to the association by the unit or parcel owner; and
- An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due during the effective period of the estoppel certificate.

The bill provides that the association, at its option, may include additional information in the estoppel certificate. The bill also provides the form for the following "Other Information," which requires that the association answer specific questions. In the "Other Information" section, the association must:

- Provide the amount, if any, of a capital contribution fee, resale fee, transfer fee, or other fee due;
- Provide the amount, if any, of an association application fee;
- Provide the amount, if any, of a credit balance on the current account, and state whether the amount will be transferred to the new owner account or to the association;
- State whether the association's records include any notice to the unit or parcel owner of violation of rule or regulation;
- Indicate whether the rules or regulations of the association require the approval of the board of directors of the association required for the transfer of the unit or parcel, and if applicable, whether the board approved the transfer;
- Indicate whether the rules or regulations of the association provide a right of first refusal in favor of the members or association, and if applicable, include the applicable rules or regulations;

²⁷ See ss. 718.116(8), 719.108(6), and 720.30851, F.S.

- Provide a list of utilities provided to the unit which are included in the assessments paid to the association;
- Provide a list of all recreational or land leases to the association affecting the unit;
- Provide a list of, and contact information for, all other associations of which the unit is a member;
- Provide a description of any litigation or administrative proceedings in which the association is a party;
- Provide contact information for all insurance maintained by the association; and
- Provide the signature of an officer or authorized agent of the association.

Amending Estoppel Certificates

The bill permits the association to amend an estoppel certificate within the applicable effective period if additional information or a mistake becomes known. An association may not charge a fee for an amended estoppel certificate. An amended estoppel certificate:

- Becomes effective on the date it is issued and delivered if a sale or refinancing of the unit or parcel has not been completed during the effective period;
- Must be delivered on the date of issuance; and
- Has a new applicable effective period of 30 or 35 days, depending on the method used to deliver the amended certificate, beginning on the date the amended estoppel certificate is issued.

Effect of Estoppel Certificates

The bill provides that an association waives the right to collect any moneys owed in excess of the amounts set forth in the estoppel certificate from any person, and his or her successors and assigns, who in good faith relies upon the certificate.

Requests from Designees or Mortgagees

If an association receives a request for an estoppel certificate from a unit owner or the unit or parcel owner's designee, or a unit or parcel mortgagee or the unit or parcel mortgagee's designee and fails to deliver the estoppel certificate within 10 business days, it may not charge a fee for preparation and delivery of what estoppel certificate.

Summary Proceedings

The bill provides for the use of a summary proceeding pursuant to s. 51.011, F.S., to compel compliance with the estoppel certificate requirements for a cooperative association. This provision is identical to the existing provisions in ss. 718.116(8)(b) and 720.30851(2), F.S., for condominium and homeowners' associations, respectively.

Fees – Single Units or Parcels

The bill provides that an association may charge a reasonable fee for preparation and delivery of an estoppel certificate for a single unit or parcel. Current law does not authorize a delivery fee. The bill establishes a maximum fee of \$200 for the preparation and delivery of an estoppel

certificate, if there are no delinquent amounts owed to the association on the date the certificate is issued. The association may charge an additional \$100 fee for an expedited estoppel certificate delivered within 3 business days after the request for issuance of an expedited estoppel certificate. The association may charge an additional maximum fee of \$200, if there is a delinquent amount owed to the association.

Fees – Multiple Units or Parcels

The bill provides the maximum fees that an association may charge when it receives simultaneous requests for estoppel certificates for multiple units or parcels owned by the same person and there are no past due monetary obligations owed to the association. The association may deliver the statement of moneys due in one or more estoppel certificates. However, the association may not charge a total fee that exceeds:

- \$750 for 25 or fewer units or parcels;
- \$1,000 for 26 to 50 units or parcels;
- \$1,500 for 51 to 100 units or parcels; or
- \$2,500 for more than 100 units or parcels.

Right to Reimbursement

The bill provides that, a lender or purchaser who pays for the preparation of an estoppel certificate may not waive, by contract or agreement, the right to be reimbursed for the cost of the certificate if the closing on the property does not occur. The party that prevails in an action to enforce a right of reimbursement shall be awarded damages, applicable attorney fees, and costs.

Effective Date

The bill provides an effective date of July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill establishes maximum fees for estoppel certificates, specifies timeframes for providing the certificate, and provides the form of the certificate. These provisions may affect existing management, bookkeeping, or maintenance contracts that provide for the

issuance of estoppel certificates and the fees for that service. Therefore, these provisions may implicate constitutional impairment of contract concerns.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/CS/SB 398 may cause condominium, cooperative, and homeowners' associations to incur costs to prepare and deliver an estoppel certificate. The bill will also make the costs that purchasers pay for estoppel certificates more predictable.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

CS/CS/SB 398 (lines 46-49) requires that an association designate on its website a person or entity with a street or e-mail address for receipt of requests for estoppel certificates. No alternative method is provided if an association does not maintain a website, and the term "website" is not used in connection with the duties of associations in chapter 718 (Condominiums), chapter 719 (Cooperatives), or chapter 720 (Homeowners' Associations), F.S.²⁸

VII. Related Issues:

The bill requires that an estoppel certificate include information on the form provided by the bill. Some of the information, if provided by a person who is not a lawyer, may constitute the unlicensed practice of law.

The Florida Bar has a standing committee that focuses on the unlicensed practice of law.²⁹ The committee issues advisory opinions to individuals or organizations seeking guidance as to whether certain activities constitute the unlicensed practice of law. In 1995, a community association manager (CAM) requested an advisory opinion to determine if certain practices constituted the unlicensed practice of law. The committee held hearings and issued a proposed advisory opinion that was reviewed by the Florida Supreme Court in 1996 when it determined that certain activities by a CAM were ministerial in nature and did not constitute the unlicensed practice of law because the activities that did not require significant legal expertise and interpretation to complete. Those activities include drafting certificates of assessments and

²⁸ The term "website" is used in another context in s. 720.303(13(d), F.S., a provision that expired July 1, 2016 and has not been re-enacted.

²⁹ See Florida Supreme Court, Standing Committees, Unlicensed Practice of Law, at: <https://www.floridabar.org/DIVEXE/BD/CMStanding.nsf/2021e58ed0c7505585256e45004b060d/494974ec1e28b2a785256c5b0055481e?OpenDocument> (Last visited February 14, 2017).

written notices of annual meetings.³⁰ The court found that other activities performed by a nonlawyer do constitute the unlicensed practice of law. Those activities include completing certain forms, determining the ownership of property in preparation of a statutory pre-lien letter, and determining facts and interpreting statutes for giving notices of meetings.

In 2015, the Florida Supreme Court determined that its previous advisory opinion should not be disturbed.³¹ The Court concluded that certain activities were ministerial and do not constitute the unlicensed practice of law when performed by a CAM, including preparing a certificate of assessments due once the delinquent account is turned over to the association's lawyer, a foreclosure against the unit has commenced, or a member disputes in writing the amount due to the association.³² The court found that a CAM engages in the unlicensed practice of law if he or she reviews title instruments to determine ownership of property for preparation of a pre-lien letter.³³ The court relied on a prior decision to determine if an activity constitutes the practice of law:

[I]n determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.³⁴

The following information or questions that must be provided or answered in the form of the estoppel certificate provided in the bill may require the retention of legal counsel for preparation of a suitable response:

- Whether the rules or regulations of the association provide a right of first refusal in favor of the members or association, and if applicable, providing copies of the applicable rules or regulations; and
- Providing a list of utilities that are provided to the unit or parcel which are included in the assessments paid to the association.

VIII. Statutes Affected:

This bill substantially amends sections 718.116, 719.108, and 720.30851 of the Florida Statutes.

³⁰ *The Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 681 So. 2d 1119, 1123 (Fla. 1996).

³¹ *The Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 164 So. 3d 650 (Fla. 2015).

³² *Id.* at 657.

³³ *Id.* at 661, 662.

³⁴ *The Florida Bar re Advisory Opinion* 164 So. 3d at 655, quoting *State ex rel. Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (1963).

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 14, 2017:

The committee substitute removes virtually identical provisions from the underlying bill that pertained to condominiums, cooperatives, and homeowner associations. These provisions would have provided that:

- When the association fails to deliver a certificate within 15 business days, it waives any claim against a purchaser, mortgagee, and successors who would have relied on the certificate for an amount owed to the association through the date of closing that should have been reflected on the certificate; and
- The fee for preparing and delivering an estoppel certificate in conjunction with a sale or refinancing will be paid from the closing or settlement proceeds; but if the closing does not occur, the fee remains the obligation of the unit owner which may be collected as other assessments.

The committee substitute adds provisions pertaining to condominiums, cooperatives and homeowner associations which prohibit a lender or purchaser from waiving the right to reimbursement of the cost of an estoppel certificate and requiring a court to award the prevailing party in an action to enforce a right of reimbursement damages and applicable attorney fees and costs.

CS by Regulated Industries on February 22, 2017:

The committee substitute revises the form for the estoppel certificate in ss. 718.116(8)(a), 719.108(6)(a), and 720.30851(1), F.S., to:

- Require that it include the name of the unit or parcel owner(s) “reflected in the books and records of the association;”
- Delete the provision that requires the association to state whether the amount of any credit balance will be transferred to the new owner’s account or to the association;
- Require that it indicate whether the rules or regulations of the association require the approval of the board for the transfer of the unit or parcel, and if applicable, whether the board has approved the transfer; and
- Revise the requirement related to a description of litigation to require that the certificate provide a description of litigation or administrative proceedings in which the association is a party.

B. Amendments:

None.