Civil Justice Subcommittee

Wednesday, February 5, 2014

1:00 PM

404 HOB

Will Weatherford
Speaker

Larry Metz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

(AMENDED 1/31/2014 3:30:00PM)

Amended(1)

Civil Justice Subcommittee

Start Date and Time:	Wednesday, February 05, 2014 01:00 pm
End Date and Time:	Wednesday, February 05, 2014 04:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

HB 277 Joint Use of Public School Facilities by Spano
HB 291 Warranty Associations by Santiago
HB 405 Trusts by Peters
HB 425 Condominiums by Rodríguez, J.
HB 627 Service of Process by Pilon

Consideration of the following proposed committee bill(s):

PCB CJS 14-02 -- Residential Communities
PCB CJS 14-03 -- Unlicensed Practice of Law

NOTICE FINALIZED on 01/31/2014 15:30 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 277 Joint Use of Public School Facilities
SPONSOR(S): Spano
TIED BILLS: None **IDEN./SIM. BILLS:** SB 396

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Choice & Innovation Subcommittee	13 Y, 0 N	Beagle	Fudge
2) Civil Justice Subcommittee		Bond MB	Bond MB
3) Education Committee			

SUMMARY ANALYSIS

Florida law requires each county and municipality located within the geographic area of a school district to enter into an interlocal agreement with the district school board to coordinate their respective growth and development plans and processes. These agreements must include a process for determining where and how school board or local government facilities can be shared for mutual benefit and efficiency. Some school boards currently authorize, through their interlocal agreements, public access to sports and recreational facilities on school campuses.

The bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property and to increase the number of joint-use agreements a board enters into with local governments or private organizations. A public access policy should outline the outdoor recreation and sports facilities that are open to the public and the hours the facilities are open. A joint-use agreement should set forth the terms and conditions for the shared use of outdoor recreation and sports facilities on public school property. School boards must submit public access policies and joint-use agreements to the Department of Education (DOE) within 30 days of adopting such policy or agreement. School boards must create a process that enables parties seeking a joint-use agreement with the school district to appeal to the district school superintendent if negotiations fail.

DOE is required to develop a model joint-use agreement and criteria for the acceptance of grants for implementing joint-use agreements and post on its website the model agreement, links to or copies of all public access policies and joint-use agreements submitted by school boards, and the grant criteria.

The bill also grants a school board immunity from liability for civil damages for personal injury, property damage, or death occurring on public school property it opens for public use through a public access policy or joint-use agreement, during hours reserved for such use, unless gross negligence or intentional misconduct on the part of the school board is a proximate cause of the damage, injury, or death. The bill does not affect liability for incidents occurring during school hours or school-related or -sponsored activities.

The bill requires school boards to create a process that enables parties seeking a joint-use agreement with the school district to appeal to the superintendent if negotiations fail. This provision does not align with the respective roles and responsibilities assigned to boards and superintendents by Florida law. *See* Drafting Issues or Other Comments. The bill requires DOE to develop grant criteria for the acceptance of grants for implementing joint-use agreements, but does not specify whether state funding will be provided for the grants or whether DOE or another entity is responsible for administering such grants. *See* Drafting Issues or Other Comments.

This bill does not appear to have a fiscal impact on state governments. School boards may have a fiscal impact, but only if they elect to enter into joint use agreements.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Overweight Children and Adults

The Centers for Disease Control and Prevention (CDC) estimates that 35.9% of American adults are obese and another 33.3% are overweight, and approximately 17% (or 12.5 million) of children and adolescents aged 2-19 are obese. The prevalence of obesity among children and adolescents has almost tripled since 1980.[1] The Surgeon General estimates 300,000 deaths per year may be attributed to obesity and reports that individuals who are obese have a 50-100% increased risk of premature death from all causes, when compared to individuals with a healthy weight.[2]

According to the CDC, youth who have access to opportunities for physical activity during nonschool hours have higher overall levels of physical activity and are less likely to be overweight or obese. CDC cites increasing access to safe and appealing places to play and be active as one strategy communities can employ to combat youth obesity. CDC's research indicates that less than half of Florida's youth have access to parks and community centers in their neighborhood.[3]

Public Access to Public School Facilities

Florida law broadly authorizes district school boards and the boards of trustees of Florida College System institutions, state universities, and the Florida School for the Deaf and the Blind to allow the public access to educational facilities and grounds for any legal assembly or as community use centers or voting precincts.[4] Additionally, the law specifically requires each county and municipality located within the geographic area of a school district to enter into an interlocal agreement with the district school board to coordinate their respective growth and development plans and processes. Among other things, the interlocal agreement must include a process for determining where and how the school boards and local governments can share facilities for mutual benefit and efficiency.[5] Some district school boards currently authorize, through their interlocal agreements, public access to sports and recreational facilities on school campuses. The specific details related to such access, such as the hours the facility will be open and which party is liable for any damages or injuries sustained on the property, are contained in a separate "joint-use" agreement.[6]

According to DOE, school district facilities personnel have informally expressed support for providing public access to recreation and sports facilities. However, such personnel indicate that reaching a joint-use agreement to provide such access is highly dependent on variables related to individual facilities. Thus, agreements are typically considered on a facility-by-facility basis. Such personnel cite premises

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[1] Centers for Disease Control and Prevention, *Obesity and Overweight*, http://www.cdc.gov/nchs/fastats/overwt.htm (last visited Jan. 2, 2014); Centers for Disease Control and Prevention, Data and Statistics, *Obesity rates among all children in the United States*, http://www.cdc.gov/obesity/childhood/data.html (last visited Jan. 2, 2014).

[2] Office of the Surgeon General, *Overweight and Obesity: Health Consequences*, http://www.surgeongeneral.gov/library/calls/obesity/fact_consequences.html (last visited Jan. 2, 2014).

[3] Centers for Disease Control and Prevention, *Overweight and Obesity: A Growing Problem*, http://www.cdc.gov/obesity/childhood/problem.html (last visited Jan. 2, 2014); Centers for Disease Control and Prevention, *State Indicator Report on Physical Activity, 2010*, at 3 and 13, *available at* http://www.cdc.gov/physicalactivity/downloads/PA_State_Indicator_Report_2010.pdf.

[4] Section 1013.10, F.S.; *see also* s. 1013.01(3), F.S. (defines "Board").

[5] Sections 163.31777(1) and (2)(g) and 1013.33(2) F.S.

[6] *See, e.g., Interlocal Agreement between Pinellas County, Florida, et al. and the School Board of Pinellas County, Florida*, at 4 (2012), *available at* www.pinellascounty.org/Plan/pdf_files/1906_IA.pdf [hereinafter *Pinellas County Agreement*].

liability concerns; additional costs for supervision, custodial services, utilities, and wear and tear on fields and equipment; and potential reductions in revenues available for facilities operation and maintenance as barriers to expanding joint-use of, and public access to, facilities.[7]

District school boards are not limited to partnering with governmental entities in joint-use agreements. If authorized by the school board's interlocal agreements, boards may establish joint-use agreements with private entities. For example, in 2003, a Best Financial Management Practices Review of the Duval County School District stated that the school district had established 47 joint-use agreements with the City of Jacksonville, the YMCA, and various community groups for the use of school facilities.[8]

School District Liability

Landowner Liability

A plaintiff who is injured on another person's land may sue the landowner in tort if the landowner breached a duty of care owed to the plaintiff and the plaintiff suffered damages as a result of the landowner's breach.[9] A landowner's duty to persons on his or her land is governed by the status of the injured person. There are two primary categories of persons on land – invitees and trespassers. The status of the person is generally a question of fact to be determined by the jury.[10]

An invitee is a person who was invited to enter the land.[11] Florida law defines "invitation" to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs."[12] The duties owed to most invitees are the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.[13]

A trespasser is any person who is not an invitee. The only duty a landowner owes to a trespasser is to avoid willful and wanton injury; however, if the presence of the person is discovered, then there is also a duty to warn of known dangerous conditions not readily apparent to ordinary observation.[14] This bill does not affect tort law related to trespassers.

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[7] Florida Department of Education, *Legislative Bill Analysis for HB 431* (2012). For example, the Pinellas County interlocal agreement with the School Board of Pinellas County, among others, authorizes the parties to establish an agreement "for each instance of collocation and shared use to address legal liability, operating and maintenance costs, scheduling of use, and facility supervision or any other issues that may arise from collocation or shared use." *Pinellas County Agreement, supra* note 6, at 4.

[8] Office of Program Policy Analysis and Government Accountability, *Best Financial Management Practices Review of the Duval County School District*, Report No. 03-41, ch. 7 Facilities Construction, at 18-19 (Aug. 2003), *available at* http://www.oppaga.state.fl.us/Summary.aspx?reportNum=03-41.

[9] 74 Am. Jur. 2d Torts s. 7 (2013).

[10] *Post v. Lumney*, 261 so. 2d 146, 147 (Fla. 1972). A third category of persons is "licensee." A licensee is one who enters the property of another for his or her own convenience or benefit, whose tolerance on the property is tolerated or permitted, but not invited, either expressly or by reasonable implication. Such a person is often referred to as an "uninvited licensee," whose legal status is between trespasser and invitee. Mail carriers and persons crossing business premises at a time when the business is closed are examples of licensees. 41 Fla. Jur 2d Premises Liability s. 51 (2013). A landowner owes a licensee the duty to refrain from wanton negligence or willful misconduct that would injure such person, avoid intentionally exposing such person to danger, and to warn of any known dangerous or defective conditions that would not be open to ordinary observation by the licensee. 41 Fla. Jur 2d Premises Liability s. 53 (2013).

[11] *Post*, 261 So.2d at 147-148.

[12] Section 768.075(3)(a)1., F.S.

[13] *See, e.g., Dampier v. Morgan Tire & Auto, LLC*, 82 So.3d 204, 205 (Fla. 5th DCA 2012).

[14] 41 Fla. Jur 2d Premises Liability s. 59 (2013).

Sovereign Immunity

When a government may be liable in tort, such as for landowner liability, current law limits such liability. Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive the state's immunity in part or in full by general law. The Legislature did in fact establish a limited waiver of sovereign immunity for tort liability for state agencies or subdivisions.[15] School districts are a state agency or subdivision for purposes of sovereign immunity.[16] The statutory waiver of sovereign immunity limits the recovery in a tort action against the state or subdivision to $200,000 for any one person or one incident and limits all recovery related to one incident to a total of $300,000.[17] When the state's sovereign immunity applies, the officers, employees, and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.[18]

Effect of Proposed Changes

The bill specifies legislative findings indicating that greater public access to recreation and sports facilities is necessary to reduce the impact of obesity on personal health and health care expenditures and that tax-payer funded public school playgrounds, fields, tracks, courts, and other outdoor recreation and sports facilities should be used to provide the public with accessible opportunities for physical activity. Accordingly, the bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property during nonschool hours when a school-sponsored or school-related activity is not occurring and to increase joint-use agreements between district school boards and local governments or private organizations.

A public access policy should outline the outdoor recreation and sports facilities that are open to the public and the hours the facilities are open. A joint-use agreement should set forth the terms and conditions for the shared use of outdoor recreation and sports facilities on public school property. School boards must submit public access policies and joint-use agreements to DOE within 30 days of adopting such policy or agreement.

The bill requires district school boards to create a process that enables parties seeking a joint-use agreement with the school district to appeal to the superintendent if negotiations fail. This appeal provision is not consistent with the traditional respective roles and responsibilities of boards and superintendents set forth in Florida law. The law establishes school boards as the primary decision-making body for school district affairs, with the superintendent acting as chief executive.[19] A district school superintendent is responsible for recommending to the school board actions, policies, and rules he or she considers necessary for the efficient operation of the district school system. Such actions, policies, and rules may only be enacted with the school board's approval at a publicly noticed board meeting.[20] It is also questionable that failed negotiations by parties to a prospective joint-use agreement constitute an appealable action without the matter first being heard and voted on by the school board at a publicly noticed board meeting. *See* Drafting Issues and Other Comments.

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[15] Section 768.28(1) and (2), F.S.; *see* Op. Att'y Gen. Fla. 78-145 (1978); *see also Wallace v. Dean*, 3 So.3d 1035, 1045 (Fla. 2009), *citing Hutchins v. Mills,* 363 So.2d 818, 821 (Fla. 1st DCA 1978). "Prior to the effective date of s. 768.28(6), F.S., courts did not have subject matter jurisdiction of tort suits against the State and its agencies because they enjoyed sovereign immunity pursuant to Article X, section 13, Florida Constitution. However, by enacting s. 768.28[, F.S.,] the Legislature provided for waiver of sovereign immunity in tort actions. Therefore, pursuant to that statute, courts now have subject matter jurisdiction to consider suits that fall within the parameters of the statute."

[16] The term "state agencies or subdivisions" includes the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities. Section 768.28(2), F.S.

[17] Section 768.28(5), F.S.

[18] Section 768.28(9), F.S.

[19] Article IX, ss. 4 and 5, Florida Constitution.

[20] Sections 1001.372, 1001.41, 1001.49, and 286.011, F.S.

DOE must develop a model joint-use agreement and criteria for the acceptance of grants for implementing joint-use agreements and post on its website the model agreement, links to or copies of all public access policies and joint-use agreements submitted to DOE by district school boards, and the grant criteria. However, the bill does not specifically require submission and posting of joint-use agreements that predate the bill's effective date, if enacted. Thus, it is unclear whether such agreements will be submitted to DOE by school districts and posted on the DOE website. The bill also does not specify whether state funding will be provided for the grants or whether DOE or another entity will be responsible for administering such grants. *See* Drafting Issues and Other Comments.

The bill changes the standard of liability for district school boards from negligence to gross negligence or intentional misconduct under certain circumstances. More particularly, the bill provides a district school board immunity from liability for personal injury, property damage, or death that occurs on a public school property that the district school board has opened up to public use, through public access policies or joint-use agreements, during times reserved for such use, unless gross negligence or intentional misconduct on the part of the district school board is a proximate cause of the damage, injury, or death.[21] The new standard of liability does not apply to incidents occurring during school hours or during school-related or -sponsored activities or to the other party to a joint-use agreement.

Generally speaking, a gross negligence standard requires a plaintiff to show that the landowner acted or failed to act with conscious indifference to the potential harm that may befall others. It is a course of conduct that a reasonable, prudent person would know is very likely to result in injury to another.[22] In contrast, a plaintiff seeking damages for ordinary negligence need only show that the landowner failed to exercise reasonable care to protect persons on his or her land.[23]

District school boards already have the authority to adopt public use policies and enter into joint-use agreements that include provisions regarding public use of recreation and sports facilities. However, provisions changing the liability standard from negligence to gross negligence or intentional misconduct, may encourage more school boards to adopt public access policies or enter into more joint-use agreements, and thus, increase the number of outdoor recreation and sports facilities made available to the public.

The limitation on liability established in the bill will result in a plaintiff only receiving damages for personal injury, property damage, or death that was caused by gross negligence or intentional misconduct. Therefore, an injured party will not be able to recover damages for an injury sustained due to ordinary negligence. The existence of gross negligence or intentional misconduct is usually a determination made by the jury in a particular case. Nothing in the bill prevents a suit from being filed against the board; therefore, a school board may still incur litigation costs.

Additionally, even if a school district's actions are found to be a proximate cause of the damage, injury, or death, the school district is protected by sovereign immunity, and the damages would be capped pursuant to law.[24] The bill makes clear that this sovereign immunity still applies.

B. SECTION DIRECTORY:

Section 1. Creates s. 1013.105, F.S., relating to joint use of public school facilities.

Section 2. Creates s. 768.072, F.S., relating to limitation on public school premises liability.

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[21] While Art. 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay," and the Florida Supreme Court has in the past found that this provision limits the ability of the Legislature to amend tort law, the court in *Abdin v. Fischer*, held that limiting liability of owners and lessees who provide the public with a park area for outdoor recreational purposes, is a reasonable exercise of legislative power and does not violate Art. I, s. 21, Fla. Const., regarding access to courts. 374 So.2d 1379 (Fla. 1979).
[22] 38 Fla. Jur 2d Negligence s. 35 (2013).
[23] 38 Fla. Jur 2d Negligence s. 4 (2013).
[24] Section 768.28(5), F.S.

Section 3. Provides an effective date of July 1, 2014.

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 may have a minimal indeterminate fiscal impact on local government expenditures, but only where a school district elects to utilize the provisions created by this bill. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Damages received by an injured party may be limited due to a school district's immunity from liability created by this bill. A plaintiff will only receive damages if the injury, damage, or death was caused by gross negligence or intentional misconduct. Therefore, an injured party may not be able to recover damages for an injury sustained due to ordinary negligence.

D. FISCAL COMMENTS:

The bill encourages, but does not require, district school boards to adopt public access policies and enter into joint-use agreements to increase public access to outdoor recreation and sports facilities on public school property. Opening more school recreational facilities to the public may enable cities and counties to reduce spending on the development and maintenance of public parks and recreation areas; however, increased public use may increase "wear and tear" on school recreational facilities, thereby increasing a board's oversight, repair, and maintenance costs.[25] The bill does not prohibit district school boards from addressing any anticipated financial issues within a public access policy or joint-use agreement.

The bill limits a district school board's liability for civil damages for personal injury, property damage, or death occurring on public school property it opens to the public through a public access policy or joint-use agreement. A plaintiff will only receive damages if the injury, damage, or death was caused by gross negligence or intentional misconduct on the part of the school board. Therefore, an injured party will not be able to recover damages for an injury sustained due to ordinary negligence. The bill does not change the cap on damages for recovery in a tort action against the state or a subdivision, which is $200,000 for any one person or one incident and with all recovery related to one incident limited to a total of $300,000.

While the bill provides school boards immunity from liability except in the case of gross negligence or intentional misconduct, the existence of gross negligence or intentional misconduct is usually a

[25] Memorandum, Florida School Boards Association, Inc. (Jan. 18, 2012).

determination made by the jury in a particular case. Nothing in the bill prevents a suit from being filed against the board; therefore, a school board may still incur litigation costs.

The bill requires DOE to develop a model joint-use agreement and criteria for the acceptance of grants for implementing joint-use agreements submitted to DOE by district school boards and post on its website the model agreement, links to or copies of all public access policies and joint-use agreements, and the grant criteria. These requirements are anticipated to be accomplished within departmental resources. Accordingly, no impact on state expenditures is expected.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to require counties or municipalities to spend funds of take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenue in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 44-51: Provisions allowing a party seeking a joint-use agreement with the school board to appeal to the superintendent when negotiations fail are not consistent with the traditional respective roles and responsibilities of boards and superintendents set forth in Florida law. The law establishes district school boards as the primary decision-making body for school district affairs, with the superintendent acting as chief executive.[26] District school superintendents are responsible for recommending to the school board actions, policies, and rules he or she considers necessary for the efficient operation of the district school system. Such actions, policies, and rules may only be enacted with the school board's approval at a publicly noticed board meeting.[27] It is also questionable that failed negotiations by parties to a prospective joint-use agreement constitute an appealable action without the matter first being heard and voted on by the board at a publicly noticed board meeting.

Lines 63-65: The bill requires DOE to develop grant criteria for the acceptance of grants for implementing joint-use agreements, but does not specify whether state funding will be provided for the grants or whether DOE or another entity is responsible for administering such grants.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

[26] Article IX, ss. 4 and 5, Florida Constitution.
[27] Sections 1001.372, 1001.41, 1001.49, and 286.011, F.S.

A bill to be entitled

An act relating to the joint use of public school facilities; creating s. 1013.105, F.S.; providing legislative findings; encouraging each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on school property, to increase the number of joint-use agreements, and to develop and adopt policies and procedures for an appeal process if negotiations for a joint-use agreement fail; providing duties of district school boards and the Department of Education; creating s. 768.072, F.S.; providing immunity from liability for a district school board that adopts public access policies or enters into a joint-use agreement except in instances of gross negligence or intentional misconduct; providing application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1013.105, Florida Statutes is created to read:

1013.105 Joint use of public school facilities.—

(1) The Legislature finds that greater access to recreation and sports facilities is needed to reduce the impact of obesity on personal health and health care expenditures. The

Legislature further finds that public schools are equipped with taxpayer-funded playgrounds, fields, tracks, courts, and other outdoor recreation and sports facilities that offer easily accessible opportunities for physical activity for residents of the community.

(2) Each district school board is encouraged to:

(a) Adopt written policies to promote public access to the outdoor recreation and sports facilities on public school property during nonschool hours when a school-sponsored or school-related activity is not occurring. A public access policy should outline the outdoor recreation and sports facilities that are open to the public and the hours the facilities are open.

(b) Increase the number of joint-use agreements entered into with a local government or a private organization. A joint-use agreement should specify the terms and conditions for the shared use of outdoor recreation and sports facilities on public school property.

(c) Develop and adopt policies and procedures providing for an appeal process in which a party seeking to enter into a joint-use agreement with a school district pursuant to this section may file an appeal with the district school superintendent if the negotiations for such joint-use agreement fail. The decision of the district school superintendent with regard to the appeal process for joint-use agreements does not constitute final agency action for purposes of chapter 120.

Within 30 days after adopting a public access policy or entering into a joint-use agreement, a district school board shall submit a copy of the policy or agreement to the Department of Education.

(3) The Department of Education shall:

(a) Develop a model joint-use agreement and post the model agreement on its website.

(b) Post on its website links to or copies of all public access policies and joint-use agreements submitted to the department by a district school board.

(c) Develop criteria for the acceptance of grants for implementing joint-use agreements and post the criteria on its website.

Section 2. Section 768.072, Florida Statutes, is created to read:

768.072 Limitation on public school premises liability.—

(1) A district school board is not liable for civil damages for personal injury, property damage, or death that occurs on a public school property that the district school board has opened to the public through public access policies or joint-use agreements under s. 1013.105 unless gross negligence or intentional misconduct on the part of the district school board is a proximate cause of the injury, damage, or death.

(2) This section does not affect liability for injury, damage, or death that occurs during school hours or during a school-related or school-sponsored activity.

(3) This section does not waive sovereign immunity beyond the limited waiver in s. 768.28.

Section 3. This act shall take effect July 1, 2014.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 277 (2014)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Spano offered the following:

Amendment (with title amendment)

Remove lines 43-73 and insert:

school property and may include provisions regarding liability insurance coverage and indemnification of the school district.

Within 30 days after adopting a public access policy or entering into a joint-use agreement, a district school board shall submit a copy of the policy or agreement to the Department of Education.

(3) The Department of Education shall develop a model joint-use agreement and post on its website the model agreement and links to or copies of all public access policies and joint-use agreements submitted to the department by a district school board.

Amendment No. 1

Section 2. Section 768.072, Florida Statutes, is created to read:

768.072 Limitation on public school premises liability.—

(1) A district school board is not liable for civil damages for personal injury, property damage, or death that occurs on a public school property that the district school board has opened to the public through public access policies or joint-use agreements under s. 1013.105(2)(b) unless gross negligence

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T I T L E A M E N D M E N T

Remove lines 7-10 and insert:

school property and to increase the number of joint use agreements; providing duties of district

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 291 Warranty Associations
SPONSOR(S): Santiago
TIED BILLS: None **IDEN./SIM. BILLS:** SB 496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	9 Y, 0 N	Cooper	Cooper
2) Civil Justice Subcommittee		Aziz PA	Bond MB
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The state regulates warranty associations, which are motor vehicle service agreement companies, home warranty associations and service warranty associations. Motor vehicle service agreements provide vehicle owners with protection when the manufacturer's warranty expires. Home warranty associations indemnify warranty holders against the cost of repairs or replacement of any structural component or appliance in a home. Service warranty contracts for consumer electronics and appliances allow consumers to extend the product protection beyond the manufacturer's warranty terms.

While a warranty is not considered a traditional insurance product, it protects purchasers from future risks and associated costs. In Florida, warranty associations are regulated by the Office of Insurance Regulation (OIR). The OIR's regulatory authority of warranty associations includes approval of forms, investigation of complaints, and monitoring of reserve requirements, among other duties. However, the OIR is not required to approve rates for warranties.

Current law requires every motor vehicle service agreement and home warranty to be mailed or delivered to the purchaser within 45 days after the purchase of the agreement. The bill allows both these contracts to be transmitted electronically, subject to the warranty holder requesting mail delivery instead. The bill also adds the same delivery requirement for service warranties that is contained in current law for motor vehicle service agreements and home warranties and allows electronic delivery of service agreements to the warranty holder under the same parameters required for electronic delivery of motor vehicle service agreements and home warranties.

The bill also changes the financial requirements of service warranty associations. Current law allows a service warranty association to demonstrate financial responsibility by securing contractual liability insurance from an authorized insurer which covers the association's obligations under service warranties sold in Florida. In addition, service warranty associations are required to maintain a specified writing ratio of gross written premiums to net assets. Currently, an association can avoid this minimum writing ratio by securing an insurance policy providing first dollar coverage from an insurer. The bill expands the exception to the minimum writing ratio for service warranty associations and for insurers providing first dollar coverage to those associations and it repeals one of the three requirements for those insurers so associations purchasing insurance can be exempt from the required writing ratio.

The bill has no fiscal impact on state or local government. Regarding the electronic transmission provisions of the bill, the fiscal impact on the warranty associations and consumers is indeterminate because it is unknown how many associations will opt to email or how many policyholders will agree to participate.

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 634, F.S., governs the regulation of warranty associations, which are motor vehicle service agreement companies, home warranty associations and service warranty associations. Motor vehicle service agreements provide vehicle owners with protection when the manufacturer's warranty expires. Home warranty associations indemnify warranty holders against the cost of repairs or replacement of any structural component or appliance in a home. Service warranty contracts for consumer electronics and appliances allow consumers to extend the product protection beyond the manufacturer's warranty terms.

While a warranty is not considered a traditional insurance product, it protects purchasers from future risks and associated costs. In Florida, warranty associations are regulated by the OIR. The OIR's regulatory authority of warranty associations includes approval of forms, investigation of complaints, and monitoring of reserve requirements, among other duties. However, the OIR is not required to approve rates for warranties.

Electronic Delivery of Service Agreements and Warranties

Section 634.121(6), F.S., requires every motor vehicle service agreement to be mailed or delivered to the purchaser within 45 days after the purchase of the agreement. Section 634.312(2), F.S., requires every home warranty to be mailed or delivered to the purchaser within 45 days after the purchase of the warranty. The delivery required by current law is typically hand delivery and not electronic delivery.

The bill allows motor vehicle service agreement companies to deliver motor vehicle service agreements by electronic transmission. Similarly, the bill allows electronic transmission of home warranties by insurers or home warranty associations. The bill further specifies electronic transmission of a motor vehicle service agreement constitutes delivery of the agreement to the purchaser and specifies the same for electronic transmission of home warranties. If a motor vehicle service agreement is transmitted to the purchaser electronically, then the transmission must include a notice to the purchaser indicating the purchaser has a right to receive the agreement by mail instead of electronic transmission. If the purchaser notifies the company that he or she does not agree to electronic transmission of the motor vehicle service agreement, a paper copy of the agreement must be provided to the purchaser. The bill contains the same provisions relating to notice and provision of a paper copy of the warranty for home warranties.

The bill adds a delivery requirement for service warranties. Unlike motor vehicle service agreements and home warranties, current law does not require service warranties to be delivered to the purchaser. The bill adds the same delivery requirement for service warranties that is contained in current law for motor vehicle service agreements and home warranties and allows electronic delivery of service agreements to the warranty holder under the same parameters required for electronic delivery of motor vehicle service agreements and home warranties. Thus, under the bill, the parameters for electronic delivery of motor vehicle service agreements, home warranties, and service warranties are consistent and the same.

Applicability of Federal and State Law Relating to Electronic Transactions

The Federal Electronic Signatures in Global and National Commerce Act (E-SIGN) applies to electronic transactions involving interstate commerce.[1] E-SIGN provides contracts formed using electronic signatures on electronic records will not be denied legal effect only because they are electronic. However, E-SIGN requires consumer disclosure and consent to electronic records in certain instances before electronic records will be given legal effect. Under E-SIGN, if a statute requires information to be provided or made available to a consumer in writing, the use of an electronic record to provide or make the information available to the consumer will satisfy the statute's requirement of writing if the consumer affirmatively consents to use of an electronic record. The consumer must also be provided with a statement notifying the consumer of the right to have the electronic information made available in a paper format and of the right to withdraw consent to electronic records, among other notifications.

E-SIGN allows state law to preempt the E-SIGN law in certain circumstances. State law addressing electronic transmission can preempt E-SIGN if the state law is an enactment of the Uniform Electronic Transactions Act (UETA) as adopted by the National Conference of Commissioners on Uniform State Laws. Alternatively, a state law that is not an enactment of UETA but is not inconsistent with E-SIGN and does not give greater legal status or effect to a specific form of technology or signature can preempt E-SIGN.[2] Florida adopted the substantive provisions of UETA in 2000 and has not substantively changed the provisions since they were adopted.[3] Thus, the Florida adoption of UETA should preempt E-SIGN. Section 668.50, F.S., Florida's Uniform Electronic Transaction Act (FUETA), is Florida's adoption of UETA. FUETA applies to electronic records and electronic signatures relating to a transaction and has limited exceptions.[4]

Although UETA and E-SIGN overlap in some areas, they differ on some consumer protection issues. E-SIGN focuses on regulating the manner of consent to deal electronically, while UETA focuses on how the parties are to comply with state consumer protection laws.[5] By adopting the official version of UETA, states can modify, limit, or supersede some E-SIGN provisions, including its consumer protection issues, which includes E-SIGN's requirement of consumer disclosure and affirmative consent for electronic records.[6]

FUETA should apply to the electronic transmission of motor vehicle service agreements, home warranties, and service warranties allowed under the bill. One provision of FUETA provides if parties have agreed to conduct a transaction by electronic means and a provision of law requires a person to deliver information in writing to another person, that delivery requirement is satisfied if the information is delivered in an electronic record capable of retention by the recipient.[7] Furthermore, whether parties have agreed to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.[8]

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[1] Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, § 101,114 Stat. 464 (2000). Many of the provisions of E-SIGN took effect on October 1, 2000.

[2] 15 U.S.C. § 7002.

[3] http://www.uniformlaws.org/Act.aspx?title=Electronic Transactions Act (last viewed January 28, 2014); http://www.ncsl.org/issues-research/telecom/uniform-electronic-transactions-acts.aspx (last viewed January 28, 2014) and Fla. S. Comm. on Utils. & Comms., CS/CS/SB 1334 (2000) Staff Analysis (final July 27, 2000) *available at* http://archive.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2000&billnum=1334 (last viewed January 28, 2014) indicating on page 10 that "the bill is identical to the act recommended by the National Commissioners for Uniform State Laws except for provisions that were added to conform to Florida law and provisions added to subsection (11) requiring a first time notary to complete certain training requirements." Although Florida's adoption of the UETA has been amended five times since adoption in 2000, none of the amendments were substantive.

[4] Section 668.50(3), F.S.

[5] Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, available at http://uniformlaws.org/Narrative.aspx?title=UETA%20and%20Preemption%20Article (last viewed January 3, 2014).

[6] http://www.ncsl.org/issues-research/telecom/uniform-electronic-transactions-acts.aspx (last viewed January 3, 2014).

[7] Section 668.50(8)(a), F.S.

[8] Section 668.50(5)(b), F.S.

Emailing a service agreement or warranty to the agreement or warranty holder could fall under this provision of FUETA, in part, because in order to email the agreement or warranty, the agreement or warranty holder must provide an email address to the insurer or warranty association which could be construed to mean the parties have agreed to conduct a transaction by electronic means. If this is the case, then current law requiring delivery of a motor vehicle service agreement or home warranty by mail or other delivery may be satisfied by emailing the agreement or warranty. The consent of the agreement or warranty holder to receive the agreement or warranty by email would not be required in this case because under FUETA, consent is not required when the parties agree to conduct a transaction electronically. Additionally, the bill requires the insurer or warranty association to notify the agreement or warranty holder when the agreement or warranty is emailed that the holder can elect to receive the agreement or warranty by mail in lieu of email. Once this notice is given, an agreement or warranty holder's action to not elect to receive the agreement or warranty by mail may be construed to mean the parties have agreed to conduct a transaction by electronic means and thus, under FUETA, consent is not required for electronic delivery of the agreement or warranty to the holder.

Although service warranties do not have a delivery requirement in current law, one is provided in the bill. Thus, providing service warranties electronically without consent of the warranty holder could be possible under FUETA using the same analysis that applies to motor vehicle service agreements and home warranties.

In addition, another provision of FUETA provides if a Florida law other than FUETA requires a record to be sent or transmitted by a certain method, the record must be sent or transmitted by the method provided in the other law.[9] This provision may allow a motor vehicle service agreement or home warranty to be emailed to the agreement or warranty holder if the current law requiring delivery of the agreement or warranty to the holder is amended to allow electronic delivery, as the bill proposes, because the amended law allowing electronic delivery of the agreement or warranty may control over FUETA. This same analysis could apply to service warranties under the bill because the bill requires delivery of these warranties and allows for electronic delivery of them.

Financial Requirements for Service Warranty Associations

The bill changes one of the financial requirements service warranty associations must have in order to keep its license. Current Florida law allows a service warranty association to demonstrate financial responsibility by securing contractual liability insurance from an authorized insurer which covers the service warranty association's obligations under service warranties sold in Florida. There are two kinds of insurance policies that are permitted: (1) an insurance policy that pays only when the service warranty association fails to pay its obligations under the service warranties; and (2) a policy that pays claims under the association's service warranties from the first dollar. In addition, Florida law requires service warranty associations to maintain a writing ratio of gross written premiums to net assets of seven-to-one, meaning for every one dollar of net assets held by the association, the association can write seven dollars of premium. Under current Florida law a service warranty association can avoid this minimum writing ratio by securing an insurance policy providing first dollar coverage from an insurer that maintains a minimum capital surplus of $100 million, maintains an "A" or higher rating, and is not affiliated with the service warranty association it insures.[10]

The bill expands the exception to the minimum writing ratio for service warranty associations. Under the bill, associations utilizing an insurance policy that pays only when the service warranty association fails to pay its obligations can avoid the writing ratio as long as the insurer issuing the policy to the association maintains a minimum capital surplus of $200 million and an "A" or higher rating. The surplus requirement for insurers issuing both kinds of insurance policies for service warranty associations helps ensure there should be more than adequate capital in the insurance companies to honor all obligations of the insured association under service warranties sold in Florida.

[9] Section 668.50(8)(b)(2), F.S.
[10] The rating is from A.M. Best Company. However, an equivalent rating by another national rating service acceptable to the OIR is also allowed by statute.

For insurers providing first dollar coverage to service warranty associations, the bill repeals one of the three requirements for these insurers so the service warranty association purchasing insurance from the insurer can be exempt from the writing ratio required by law. The requirement that the insurer providing the first dollar coverage not be affiliated with the service warranty association it insures is repealed. These insurers must still maintain a minimum surplus of $100 million and maintain an "A" or higher rating.

B. SECTION DIRECTORY:

Section 1. Amends s. 634.121, F.S., relating to forms, required procedures, and provisions for motor vehicle service agreement companies.

Section 2. Amends s. 634.312, F.S., relating to forms, required provisions, and procedures for home warranty associations.

Section 3. Amends s.634.406, F.S., relating to financial requirements for service warranty associations.

Section 4. Amends s. 634.414, F.S., relating to forms and required provisions for service warranty associations.

Section 5. Provides an effective date of July 1, 2014.

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:

Warranty associations emailing service warranties will save costs associated with printing and mailing the warranties to warranty holders. The exact amount of savings cannot be calculated as it is unknown how many warranty associations will opt to deliver their warranties by email and how many warranty purchasers will choose to obtain their warranty by email rather than by mail. However, any savings realized by warranty associations should be passed through to the warranty purchasers.

If warranty associations incur computer reprogramming costs connected with emailing warranties or service agreements, any increased costs may be passed through to the warranty purchasers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to warranty associations; amending ss. 634.121 and 634.312, F.S.; authorizing electronic transmission of service agreements and home warranties; providing requirements for electronic transmission; providing notice requirements; amending s. 634.406, F.S.; revising criteria authorizing premiums of certain service warranty associations to exceed their specified net assets limitations; revising requirements relating to contractual liability policies that insure warranty associations; amending s. 634.414, F.S.; providing requirements for the delivery of service warranty contracts; providing notice requirements; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) of section 634.121, Florida Statutes, is amended to read:

634.121 Forms, required procedures, provisions.—

(6) Each service agreement, which includes a copy of the application form, must be mailed, ~~or~~ delivered, or electronically transmitted to the agreement holder within 45 days after the date of purchase. Electronic transmission of a service agreement constitutes delivery to the agreement holder. The electronic transmission must notify the agreement holder of

his or her right to receive the service agreement via United States mail rather than electronic transmission. If the agreement holder communicates to the service agreement company electronically or in writing that he or she does not agree to receipt by electronic transmission, a paper copy of the service agreement shall be provided to the agreement holder.

Section 2. Subsection (2) of section 634.312, Florida Statutes, is amended to read:

634.312 Forms; required provisions and procedures.—

(2) Subject to the insurer's or home warranty association's requirement as to payment of premium, every home warranty must ~~shall~~ be mailed, ~~or~~ delivered, or electronically transmitted to the warranty holder within ~~not later than~~ 45 days after the effectuation of coverage, and the application is part of the warranty contract document. Electronic transmission of a home warranty constitutes delivery to the warranty holder. The electronic transmission must notify the warranty holder of his or her right to receive the home warranty via United States mail rather than electronic transmission. If the warranty holder communicates to the home warranty association electronically or in writing that he or she does not agree to receipt by electronic transmission, a paper copy of the home warranty shall be provided to the warranty holder.

Section 3. Subsections (6) and (7) of section 634.406, Florida Statutes, are amended to read:

634.406 Financial requirements.—

(6) An association that ~~which~~ holds a license under this part ~~and which does not hold any other license under this chapter~~ may allow its premiums for service warranties written under this part to exceed the ratio to net assets limitations of this section if the association meets all of the following:

(a) Maintains net assets of at least $750,000.

(b) Uses ~~Utilizes~~ a contractual liability insurance policy approved by the office that:

1. ~~which~~ Reimburses the service warranty association for 100 percent of its claims liability and is issued by an insurer that maintains a policyholder surplus of at least $100 million; or

2. Complies with subsection (3) and is issued by an insurer that maintains a policyholder surplus of at least $200 million.

(c) The insurer issuing the contractual liability insurance policy:

~~1. Maintains a policyholder surplus of at least $100 million.~~

1.~~2.~~ Is rated "A" or higher by A.M. Best Company or an equivalent rating by another national rating service acceptable to the office.

~~3. Is in no way affiliated with the warranty association.~~

2.~~4.~~ In conjunction with the warranty association's filing of the quarterly and annual reports, provides, on a form prescribed by the commission, a statement certifying the gross

written premiums in force reported by the warranty association and a statement that all of the warranty association's gross written premium in force is covered under the contractual liability policy, regardless of whether ~~or not~~ it has been reported.

~~(7) A contractual liability policy must insure 100 percent of an association's claims exposure under all of the association's service warranty contracts, wherever written, unless all of the following are satisfied:~~

~~(a) The contractual liability policy contains a clause that specifically names the service warranty contract holders as sole beneficiaries of the contractual liability policy and claims are paid directly to the person making a claim under the contract;~~

~~(b) The contractual liability policy meets all other requirements of this part, including subsection (3) of this section, which are not inconsistent with this subsection;~~

~~(c) The association has been in existence for at least 5 years or the association is a wholly owned subsidiary of a corporation that has been in existence and has been licensed as a service warranty association in the state for at least 5 years, and:~~

~~1. Is listed and traded on a recognized stock exchange; is listed in NASDAQ (National Association of Security Dealers Automated Quotation system) and publicly traded in the over-the-counter securities market; is required to file either of Form~~

~~10-K, Form 100, or Form 20-C with the United States Securities and Exchange Commission; or has American Depository Receipts listed on a recognized stock exchange and publicly traded or is the wholly owned subsidiary of a corporation that is listed and traded on a recognized stock exchange; is listed in NASDAQ (National Association of Security Dealers Automated Quotation system) and publicly traded in the over-the-counter securities market; is required to file Form 10-K, Form 100, or Form 20-C with the United States Securities and Exchange Commission; or has American Depository Receipts listed on a recognized stock exchange and is publicly traded;~~

~~2. Maintains outstanding debt obligations, if any, rated in the top four rating categories by a recognized rating service;~~

~~3. Has and maintains at all times a minimum net worth of not less than $10 million as evidenced by audited financial statements prepared by an independent certified public accountant in accordance with generally accepted accounting principles and submitted to the office annually; and~~

~~4. Is authorized to do business in this state; and~~

~~(d) The insurer issuing the contractual liability policy:~~

~~1. Maintains and has maintained for the preceding 5 years, policyholder surplus of at least $100 million and is rated "A" or higher by A.M. Best Company or has an equivalent rating by another rating company acceptable to the office;~~

~~2. Holds a certificate of authority to do business in this~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

~~state and is approved to write this type of coverage; and~~

~~3. Acknowledges to the office quarterly that it insures all of the association's claims exposure under contracts delivered in this state.~~

~~If all the preceding conditions are satisfied, then the scope of coverage under a contractual liability policy shall not be required to exceed an association's claims exposure under service warranty contracts delivered in this state.~~

Section 4. Subsection (4) is added to section 634.414, Florida Statutes, to read:

634.414 Forms; required provisions.—

(4) Each service warranty contract must be mailed, delivered, or electronically transmitted to the warranty holder within 45 days after the date of purchase. Electronic transmission of a service warranty contract constitutes delivery to the warranty holder. The electronic transmission must notify the warranty holder of his or her right to receive the contract via United States mail rather than electronic transmission. If the warranty holder communicates to the service warranty company electronically or in writing that he or she does not agree to receipt by electronic transmission, a paper copy of the contract shall be provided to the warranty holder.

Section 5. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Trusts
SPONSOR(S): Peters
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

Florida law governs the creation and administration of trusts. Florida trust documents may contain broad parameters for trust administration while the Trust Code provides default provisions for where the trust document is silent. The Trust Code also makes certain trust terms unenforceable.

Current Florida law provides for one cotrustee (called the "included trustee") to direct the actions of another cotrustee (called the "excluded trustee"). However, both cotrustees remain liable for the willful misconduct of the included cotrustee where the excluded cotrustee has actual knowledge of wrongdoing.

The bill allows creation of a trust that allows one cotrustee to direct the actions of another cotrustee without creating liability in the excluded cotrustee. The included cotrustee remains liable to the beneficiaries with respect to the exercise of the power as if the excluded cotrustee were not in office. The included trustee has the exclusive obligation to account to a beneficiary and to defend any action brought by a beneficiary with respect to the exercise of the power.

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

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Trust Code

A trust is generally defined as, "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . ." [1]

A trust must have three interest holders - a settlor (also called a "grantor"), a trustee, and a beneficiary. The settlor is the party creating the trust. The trustee holds legal title to the property held in trust for the benefit of the beneficiary.[2] The beneficiary has an equitable interest in property subject to trust, enjoying the benefit of the administration of the trust by a trustee.[3]

The Trust Code[4] is the portion of the Florida Statutes that pertains to the drafting and administration of trusts. The Trust Code provides default rules for trust drafting and administration. The terms of a trust document prevail over any provision of the Trust Code, with exceptions and mandatory rules as set out in the statute.[5] One exception is a trust term relieving a trustee of liability for breach of trust.[6] Clauses in a trust exonerating a trustee from liability are called "exculpatory terms." [7]

Exculpatory Terms

A trustee has a fiduciary duty to the beneficiary for proper administration of trust assets and is liable for any breach of that duty.[8] Cotrustees are generally jointly and severally liable to the beneficiary for any breach of trust, without special trust terms changing their duties and liabilities.[9] As a result, exculpatory terms in a trust document providing for the release of a trustee who breaches his fiduciary duty are strictly construed.[10] They may also be unenforceable.[11] At the same time, settlors may require documents tailored to specific needs and the trustees require special latitude to accomplish the settlor's purposes.

The expertise of a single trustee may be limited in respect to managing unique assets such as a family business, certain real estate or large blocks of stock that cannot be easily diversified. Management of such peculiar assets may require a unique skill or personal knowledge. For example, if a settlor funds a trust with stock in a closely-held corporation, he or she might want to continue to make decisions regarding the purchase, sale, and voting of such stock. Similarly, a

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[1] 55A Fla. Jur.2d Trusts s.1; Sec. 731.201(38), F.S.
[2] 55A Fla. Jur.2d Trusts s.1.
[3] *Id.*
[4] Florida's Trust Code, ch. 736, F.S., is modeled on the Uniform Trust Code of 2000. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Trust Code (UTC) in 2000 and it has been enacted in some form in 24 states and the District of Colombia. In Florida, the Ad Hoc Trust Code Revision Committee of the Florida Bar reviewed and revised the UTC to account for distinctions found in Florida statutory and case law. The product of the committee's work was the basis or the new Florida Trust Code adopted in 2006. *See*, Ch. 2006-217, L.O.F.
[5] Section 736.0105(2), F.S.
[6] Section 736.0105(2)(u), F.S.
[7] Sections 736.1011, and 736.0105(u), F.S.
[8] Sections 736.1001, and 736.1002, F.S.
[9] 55A Fla. Jur.2d Trust s.155.
[10] 55A Fla. Jur.2d Trusts s.154.
[11] Section 736.1011, F.S.

family having a long-standing relationship with a successful money manager might want him or her to continue to make trust investment decisions without appointing him or her as a sole trustee. A settlor might want someone other than the trustee to decide when to make income or principal distributions to beneficiaries. In these situations, the settlor wants to minimize a single trustee's involvement in decisions, and yet, without exculpatory trust terms, the trustee remains responsible to the beneficiaries for proper management of the trust assets. As a result, settlors seek to appoint a cotrustee for general administration while certain trust decisions are reserved to another cotrustee with particular expertise.

Cotrustees

Cotrustees are governed by the trust document and s. 736.0703(9), F.S. The statute provides that when the settlor appoints a cotrustee for particular purposes:

- An excluded trustee[12] must act in accordance with the exercise of the power given to the included trustee;[13]

- An excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power given to the included trustee, regardless of the information available to the excluded trustee, except in cases of willful misconduct on the part of the directed trustee of which the excluded trustee has actual knowledge;

- An excluded trustee is relieved from any obligation to review, inquire, investigate or make recommendations or evaluations with respect to the exercise of the power by the included trustee; and

- A trustee having the power to direct or prevent actions of the trustees is liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office, and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

However, an exoneration provision remains subject to another statute which makes the exculpation of a trustee unenforceable in certain circumstances.[14] The current statutory scheme, therefore, poses problems for Florida drafters and clients who wish to fully exonerate an excluded cotrustee without concerns about whether the exoneration provision is unenforceable under s.736.1011, F.S.

Florida settlors sometimes have the option to establish trusts in other jurisdictions where the law clearly permits the bifurcation of functions among cotrustees and is more flexible on the issue of exoneration of the excluded trustee.[15] Likewise, excluded cotrustees express concern as to whether they have oversight or some other responsibility to ensure that the included cotrustee's direction is not an act of willful misconduct. Corporate trustees who have multiple employees deal with concerns about imputed knowledge. Excluded cotrustees with some residual responsibility are hesitant to make inquiry into family matters where such inquiries are viewed as unwelcome and unwarranted intrusions.

Effect of Proposed Changes

The bill amends s. 736.0703(9), F.S., to allow drafting of a trust document which fully exonerates an excluded trustee. The bill enhances the previously existing exoneration of an excluded cotrustee by fully removing any duty of inquiry. The excluded cotrustee is exonerated under the new provision even if he or she has actual knowledge of willful misconduct by the included cotrustee. The bill provides that

[12] The "excluded trustee" is the trustee not assigned the specific power or purpose at issue.
[13] The "included trustee" is the trustee assigned the specific power or purpose at issue.
[14] Section 736.1011, F.S.
[15] *See*, s. 736.0107, F.S.

the excluded cotrustee is exonerated from liability for following the direction of the included cotrustee, except in cases of its own willful misconduct.

The bill also amends s. 736.1011, F.S., to make the exculpation of a cotrustee parallel to the revised statute. The bill provides that the exoneration of excluded cotrustees is not restricted by the mandatory trust drafting provision.[16] Therefore, a provision in a trust that fully exonerates the excluded cotrustee prevails over the actual knowledge exception contained in the statute and is an enforceable provision under the Trust Code.

B. SECTION DIRECTORY:

Section 1 amends s. 736.0703, F.S., regarding cotrustees.

Section 2 amends s. 736.1011, F.S., regarding exculpation of trustee.

Section 3 provides an effective date of July 1, 2014.

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:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

[16] *Id.*

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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 revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Even if a trust document relieves the trustee from liability in following the direction of an advisor the trustee of a revocable trust retains the responsibility to oversee, monitor and intervene to avoid a serious breach of trust by the advisor. Florida law provides that when a grantor of a trust confers "on a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute* a *serious breach of* a *fiduciary duty that the person holding the power owes to the beneficiaries of the trust* (emphasis added)."[17]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[17] Section 736.0808(2), F.S.

A bill to be entitled

An act relating to trusts; amending ss. 736.0703 and 736.1011, F.S.; limiting the liability of excluded trustees; providing an exception; authorizing trusts to provide for exculpation of excluded trustees under certain circumstances; providing an effective date.

Be It Enacted by Legislature of State of Florida:

Section 1. Subsection (9) of section 736.0703, Florida Statutes, is amended to read:

736.0703 Cotrustees.—

(9) If the terms of a trust ~~instrument~~ provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. ~~Except in cases of willful misconduct on the part of the trustee with the authority to direct or prevent actions of the trustees of which the excluded trustee has actual knowledge,~~ An excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power, regardless of the information available to the excluded trustee, unless with respect to the exercise of such power the excluded trustee has actual knowledge of willful misconduct by the trustee entrusted with the power to

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

direct or prevent actions of the excluded trustees. To the extent provided by terms of the trust, an excluded trustee may be exculpated from that liability even if the excluded trustee has actual knowledge of willful misconduct by the trustee entrusted with the power to direct or prevent actions of the excluded trustees. An excluded trustee has no duty or ~~trustees. The excluded trustees are relieved of any~~ obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee entrusted with ~~or trustees having~~ the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. This subsection does not exculpate an excluded trustee from liability arising from his or her willful misconduct.

Section 2. Subsection (3) is added to section 736.1011, Florida Statutes, to read:

736.1011 Exculpation of trustee.—

(3) This section does not apply to terms of a trust which exculpate an excluded trustee from liability for any consequence that results from compliance with the exercise of a power described in s. 736.0703(9).

Section 3. This act shall take effect July 1, 2014.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 405 (2014)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Passidomo offered the following:

Amendment

Remove line 43 and insert:

arising from his or her willful misconduct. Notwithstanding the provisions of s. 736.0808(2), only this subsection shall govern the liability of the excluded trustee when the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 425 Condominiums
SPONSOR(S): Rodríguez
TIED BILLS: None **IDEN./SIM. BILLS:** SB 440

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary JMC	Bond
2) Business & Professional Regulation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A condominium is a form of ownership of real property created pursuant Florida law that is comprised of units which are individually owned, but have an undivided share of access to common facilities. All unit owners are members of the condominium association, an entity responsible for the operation of the common elements owned by the unit owners which operates or maintains real property in which unit owners have use rights. The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration." Further, the association delineates condominium association bylaws, which governs the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.

The bill partially deregulates commercial condominium associations by removing certain regulatory requirements. Areas of deregulation include board inquiries, proxy voting, board member qualifications, training and certification of board members, fire safety, and mandatory nonbinding arbitration.

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

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A condominium is a form of ownership of real property created pursuant to ch. 718, F.S., which is comprised of units which are individually owned, but have an undivided share of access to common facilities.[1] A condominium is created by recording a declaration of condominium in the public records of the county in which the condominium will be located.[2] A declaration is similar to a constitution in that it governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.[3]

All unit owners are members of the condominium association, an entity responsible for the operation of the common elements owned by the unit owners which operates or maintains real property in which unit owners have use rights.[4] The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration."[5]

Further, the association enacts condominium association bylaws, which govern the administration of the association, including, but not limited to, quorum, voting rights, and election and removal of board members.[6]

A condominium association may be classified as residential, nonresidential (commercial), mixed-use, or timeshare.

- A residential condominium is defined as a condominium consisting of two or more units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium. With respect to a condominium that is not a timeshare condominium, a residential unit includes a unit intended as a private temporary or permanent residence as well as a unit not intended for commercial or industrial use.

- A condominium which contains both commercial and residential units is a mixed-use condominium.

- A timeshare condominium association is one in which the majority of condominium units are used for timeshares.

- A nonresidential condominium is a condominium that is not included in any of the other categories of condominiums. Examples of nonresidential condominium associations include small office condominiums and small retail centers.

[1] Section 718.103(11), F.S.
[2] Section 718.104(2), F.S.
[3] Section 718.104(5), F.S.
[4] Section 718.103(2), F.S.
[5] Section 718.103(4), F.S.
[6] Section 718.112, F.S.

Effects of the Bill

Board Inquiries

Current law requires a condo board to respond in writing within 30 days to a written inquiry that is sent by certified mail by a unit owner. The board's response must either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (hereinafter "Division"). If the board requests advice from the Division, the board must provide a substantive response to the inquirer within 10 days of receiving the response from the Division.[7]

The bill amends s. 718.112(2)(a)2., F.S., to exempt a nonresidential condominium board from the requirement to either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the Division. A nonresidential board is still required to respond in writing to the unit owner in 30 days, but the type of response would be left to the discretion of the board. The bill also exempts nonresidential condominium boards from the requirement to respond with a substantive response within 10 days of receiving a response from the Division.

Proxy Voting

Current law generally does not allow condominium unit owners to vote by general proxy. However, general and limited proxies may be used to establish a quorum. Limited proxies may be used for a few specific purposes:

- To waive or reduce reserves;
- For votes taken to waive financial reporting requirements;
- For votes taken to amend the declaration;
- For votes taken to amend the articles of incorporation or bylaws; and
- For any other matter for which ch. 718 requires or allows.[8]

A proxy is only effective for the specific meeting for which it was given and is valid for only 90 days after the first meeting for which it was given. Proxies are revocable at any time by the unit owner.[9]

There is a general exemption for a timeshare condominium with respect to the proxy-voting limitations.[10]

Furthermore, an association of 10 or fewer units may provide for different voting and election procedures in its bylaws, which may be by a proxy specifically delineating the different voting and election procedures, which in turn may provide for elections to be conducted by limited or general proxy.[11]

The bill amends s. 718.112(2)(b)2., F.S., to allow proxy voting is a nonresidential condominium association. The bill also amends s. 718.112(2)(b)10., F.S., to provide that a nonresidential condominium has the same exemption to proxy-voting limitations as a timeshare condominium.

The bill also amends s. 718.112(2)(d), F.S., to only allow for different voting and election procedures for an association of 10 or fewer units if the association has 10 or fewer residential units. Nonresidential

[7] Section 718.112(2)(a)2., F.S.
[8] Section 718.112(2)(b)2., F.S.
[9] Section 718.112(2)(b)3., F.S.
[10] Section 718.112(2)(d)10., F.S.
[11] Section 718.112(2)(d), F.S.

condominium units would not benefit from this exemption, however the amendments to ss. 718.112(2)(b)2. and 718.112(2)(b)10., F.S., appear to eliminate any impact that would otherwise be caused by this change.

Board of Directors

Current law generally requires a board member's term in office to expire at the annual meeting, however a condominium may allow for 2-year terms if allowed by the bylaws or articles of incorporation.[12] Coowners of a unit may not both serve as members of the board at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. A candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election and must be eligible to serve on the board at the time of the deadline for submitting a notice of intent to run in order to be listed as a candidate.[13]

The bill amends s. 718.112(2)(d)2., F.S., to exempt nonresidential condominiums from the board membership term requirements. A board member in a nonresidential condominium may serve a term of longer than one or two years, and the term is not required to expire at the annual meeting. The bill also allows coowners of a unit in a nonresidential condominium to serve simultaneously without restriction. Finally, a candidate for board membership in a nonresidential condominium would not need to be eligible to serve as a board member at the time of the deadline for submitting a notice of intent to run.

Training and Certification

Current law requires that with 90 days of being elected or appointed, a newly elected or appointed director of a condominium association must certify in writing that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. Alternatively, he or she may submit a certificate of having satisfactorily completed Division-approved educational curriculum. A director who fails to timely file such certification is suspended from service on the board until he or she does so.[14]

The bill amends s. 718.112(2)(d)4.b., F.S., to exempt a newly-elected or newly-appointed director of a nonresidential condominium from the requirement to certify that he or she has completed the educational curriculum or that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members.

Arbitration

Current law requires that a condominium's bylaws must provide for mandatory nonbinding arbitration conducted by the Division as provided for in s. 718.1255, F.S.[15] Arbitration requires a $50 filing fee and must precede litigation.[16]

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[12] There are exceptions to the general rule when: (1) the condominium is a timeshare; (2) the board member is on a staggered term that does not expire until a later meeting; (3) if all the members' terms would expire but there are not candidates.
[13] Section 718.112(2)(d)2., F.S.
[14] Section 718.112(2)(d)4.b., F.S.
[15] Section 718.112(2)(k), F.S.
[16] Section 718.1255(4)(a)., F.S.

The bill amends s. 718.112(2)(k), F.S., to exempt a nonresidential condominium's bylaws from containing a provision for mandatory nonbinding arbitration. However, the bill does not remove the requirement for a party to submit to arbitration prior to litigation in s. 718.1255, F.S.

Fire Safety

Current law requires bylaws to contain a provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the board as evidence of compliance of the condominium units with the applicable fire and life safety code. An association, condominium, or unit owner is not required to retrofit common elements, association property, or individual units to meet current codes in a building that has been certified for occupancy by the applicable government entity if the unit owners vote to forego retrofitting by majority vote. Local governments may not require retrofitting with a fire sprinkler system before the end of 2019. If the association has not voted to forego retrofitting, the association must apply for a building permit by December 31, 2016 and become compliant by December 31, 2019.[17] A vote to forego retrofitting may be obtained by limited proxy, personally cast ballot, or by execution of a written consent by the member.[18]

The bill amends s. 718.112(2)(l), F.S., to exempt nonresidential condominiums from the requirement to apply for a building permit by December 31, 2016 and become code compliant by December 31, 2019.

The bill also amends s. 718.112(2)(l)1., F.S., to remove the allowance for a vote to forego retrofitting by limited proxy for a nonresidential condominium. However, as the bill generally allows for proxy voting for all votes in a nonresidential condominium association, this does not appear to have any substantive effect.

B. SECTION DIRECTORY:

Section 1 amends s. 718.112, F.S., relating to bylaws of a condominium.

Section 2 provides an effective date of July 1, 2014.

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.

[17] Section 718.112(2)(l), F.S.
[18] Section 718.112(2)(l)1., F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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:

The 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 revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 347-349 of the bill amend s. 718.112(2)(k), F.S., to exempt a nonresidential condominium's bylaws from containing a provision for mandatory nonbinding arbitration. However, the bill does not remove the requirement for a party to submit to arbitration prior to litigation in s. 718.1255, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to condominiums; amending s. 718.112, F.S.; limiting the application of certain requirements relating to bylaws to residential condominiums and their associations and boards; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (a), (b), (d), (k), and (l) of subsection (2) of section 718.112, Florida Statutes, are amended to read:

718.112 Bylaws.—

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(a) Administration.—

1. The form of administration of the association shall be described indicating the title of the officers and board of administration and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and boards. In the absence of such a provision, the board of administration shall be composed of five members, except in the case of a condominium which has five or fewer units, in which case in a not-for-profit corporation the board shall consist of not fewer than three members. In the absence of provisions to

the contrary in the bylaws, the board of administration shall have a president, a secretary, and a treasurer, who shall perform the duties of such officers customarily performed by officers of corporations. Unless prohibited in the bylaws, the board of administration may appoint other officers and grant them the duties it deems appropriate. Unless otherwise provided in the bylaws, the officers shall serve without compensation and at the pleasure of the board of administration. Unless otherwise provided in the bylaws, the members of the board shall serve without compensation.

2. When a unit owner files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days after ~~of~~ receipt of the inquiry. If the condominium is a residential condominium, the board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division. If the board in a residential condominium requests advice from the division, the board shall, within 10 days after ~~of~~ its receipt of the advice, provide in writing a substantive response to the inquirer. If a legal opinion is requested, the board shall, within 60 days after the receipt of the inquiry, provide in writing a substantive response to the inquiry. The failure to provide a substantive response to the inquiry as provided herein precludes the board from recovering attorney ~~attorney's~~ fees and costs in any subsequent litigation,

administrative proceeding, or arbitration arising out of the inquiry. The association may through its board of administration adopt reasonable rules and regulations regarding the frequency and manner of responding to unit owner inquiries, one of which may be that the association is only obligated to respond to one written inquiry per unit in any given 30-day period. In such a case, any additional inquiry or inquiries must be responded to in the subsequent 30-day period, or periods, as applicable.

(b) Quorum; voting requirements; proxies.—

1. Unless a lower number is provided in the bylaws, the percentage of voting interests required to constitute a quorum at a meeting of the members is a majority of the voting interests. Unless otherwise provided in this chapter or in the declaration, articles of incorporation, or bylaws, and except as provided in subparagraph (d)4., decisions shall be made by a majority of the voting interests represented at a meeting at which a quorum is present.

2. Except as specifically otherwise provided herein, unit owners <u>in a residential condominium</u> may not vote by general proxy, but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. A voting interest or consent right allocated to a unit owned by the association may not be exercised or considered for any purpose, whether for a quorum, an election, or otherwise. Limited proxies and general proxies may be used to establish a quorum. Limited proxies shall be used for votes taken to waive or reduce

reserves in accordance with subparagraph (f)2.; for votes taken to waive the financial reporting requirements of s. 718.111(13); for votes taken to amend the declaration pursuant to s. 718.110; for votes taken to amend the articles of incorporation or bylaws pursuant to this section; and for any other matter for which this chapter requires or permits a vote of the unit owners. Except as provided in paragraph (d), a proxy, limited or general, may not be used in the election of board members in a residential condominium. General proxies may be used for other matters for which limited proxies are not required, and may be used in voting for nonsubstantive changes to items for which a limited proxy is required and given. Notwithstanding this subparagraph, unit owners may vote in person at unit owner meetings. This subparagraph does not limit the use of general proxies or require the use of limited proxies for any agenda item or election at any meeting of a timeshare condominium association or a nonresidential condominium association.

3. A ~~Any~~ proxy given is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. A proxy is not valid longer than 90 days after the date of the first meeting for which it was given. Each ~~Every~~ proxy is revocable at any time at the pleasure of the unit owner executing it.

4. A member of the board of administration or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend.

This agreement or disagreement may not be used as a vote for or against the action taken or to create a quorum.

5. If any of the board or committee members meet by telephone conference, those board or committee members may be counted toward obtaining a quorum and may vote by telephone. A telephone speaker must be used so that the conversation of those members may be heard by the board or committee members attending in person as well as by any unit owners present at a meeting.

(d) Unit owner meetings.—

1. An annual meeting of the unit owners shall be held at the location provided in the association bylaws and, if the bylaws are silent as to the location, the meeting shall be held within 45 miles of the condominium property. However, such distance requirement does not apply to an association governing a timeshare condominium.

2. Unless the bylaws provide otherwise, a vacancy on the board caused by the expiration of a director's term shall be filled by electing a new board member, and the election must be by secret ballot. An election is not required if the number of vacancies equals or exceeds the number of candidates. For purposes of this paragraph, the term "candidate" means an eligible person who has timely submitted the written notice, as described in sub-subparagraph 4.a., of his or her intention to become a candidate. Except in a timeshare or nonresidential condominium, or if the staggered term of a board member does not expire until a later annual meeting, or if all members' terms

would otherwise expire but there are no candidates, the terms of all board members expire at the annual meeting, and such members may stand for reelection unless prohibited by the bylaws. If the bylaws or articles of incorporation permit terms of no more than 2 years, the association board members may serve 2-year terms. If the number of board members whose terms expire at the annual meeting equals or exceeds the number of candidates, the candidates become members of the board effective upon the adjournment of the annual meeting. Unless the bylaws provide otherwise, any remaining vacancies shall be filled by the affirmative vote of the majority of the directors making up the newly constituted board even if the directors constitute less than a quorum or there is only one director. In a residential condominium association of more than 10 units or in a residential condominium association that does not include timeshare units or timeshare interests, coowners of a unit may not serve as members of the board of directors at the same time unless they own more than one unit or unless there are not enough eligible candidates to fill the vacancies on the board at the time of the vacancy. A ~~Any~~ unit owner in a residential condominium desiring to be a candidate for board membership must comply with sub-subparagraph 4.a. and must be eligible to be a candidate to serve on the board of directors at the time of the deadline for submitting a notice of intent to run in order to have his or her name listed as a proper candidate on the ballot or to serve on the board. A person who has been suspended or

removed by the division under this chapter, or who is delinquent in the payment of any monetary obligation due to the association, is not eligible to be a candidate for board membership and may not be listed on the ballot. A person who has been convicted of any felony in this state or in a United States District or Territorial Court, or who has been convicted of any offense in another jurisdiction which would be considered a felony if committed in this state, is not eligible for board membership unless such felon's civil rights have been restored for at least 5 years as of the date such person seeks election to the board. The validity of an action by the board is not affected if it is later determined that a board member is ineligible for board membership due to having been convicted of a felony. This subparagraph does not limit the term of a member of the board of a nonresidential condominium.

3. The bylaws must provide the method of calling meetings of unit owners, including annual meetings. Written notice must include an agenda, must be mailed, hand delivered, or electronically transmitted to each unit owner at least 14 days before the annual meeting, and must be posted in a conspicuous place on the condominium property at least 14 continuous days before the annual meeting. Upon notice to the unit owners, the board shall, by duly adopted rule, designate a specific location on the condominium property or association property where all notices of unit owner meetings shall be posted. This requirement does not apply if there is no condominium property or

association property for posting notices. In lieu of, or in addition to, the physical posting of meeting notices, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. However, if broadcast notice is used in lieu of a notice posted physically on the condominium property, the notice and agenda must be broadcast at least four times every broadcast hour of each day that a posted notice is otherwise required under this section. If broadcast notice is provided, the notice and agenda must be broadcast in a manner and for a sufficient continuous length of time so as to allow an average reader to observe the notice and read and comprehend the entire content of the notice and the agenda. Unless a unit owner waives in writing the right to receive notice of the annual meeting, such notice must be hand delivered, mailed, or electronically transmitted to each unit owner. Notice for meetings and notice for all other purposes must be mailed to each unit owner at the address last furnished to the association by the unit owner, or hand delivered to each unit owner. However, if a unit is owned by more than one person, the association must provide notice to the address that the developer identifies for that purpose and thereafter as one or more of the owners of the unit advise the association in writing, or if no address is given or the owners of the unit do not agree, to the address provided on the deed of record. An

officer of the association, or the manager or other person providing notice of the association meeting, must provide an affidavit or United States Postal Service certificate of mailing, to be included in the official records of the association affirming that the notice was mailed or hand delivered in accordance with this provision.

4. The members of the board of a residential condominium shall be elected by written ballot or voting machine. Proxies may not be used in electing the board in general elections or elections to fill vacancies caused by recall, resignation, or otherwise, unless otherwise provided in this chapter. This subparagraph does not apply to an association governing a timeshare condominium.

a. At least 60 days before a scheduled election, the association shall mail, deliver, or electronically transmit, by separate association mailing or included in another association mailing, delivery, or transmission, including regularly published newsletters, to each unit owner entitled to a vote, a first notice of the date of the election. A ~~Any~~ unit owner or other eligible person desiring to be a candidate for the board must give written notice of his or her intent to be a candidate to the association at least 40 days before a scheduled election. Together with the written notice and agenda as set forth in subparagraph 3., the association shall mail, deliver, or electronically transmit a second notice of the election to all unit owners entitled to vote, together with a ballot that lists

all candidates. Upon request of a candidate, an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates. In order to reduce costs, the association may print or duplicate the information sheets on both sides of the paper. The division shall by rule establish voting procedures consistent with this sub-subparagraph, including rules establishing procedures for giving notice by electronic transmission and rules providing for the secrecy of ballots. Elections shall be decided by a plurality of ballots cast. There is no quorum requirement; however, at least 20 percent of the eligible voters must cast a ballot in order to have a valid election. A unit owner may not permit any other person to vote his or her ballot, and any ballots improperly cast are invalid. A unit owner who violates this provision may be fined by the association in accordance with s. 718.303. A unit owner who needs assistance in casting the ballot for the reasons stated in s. 101.051 may obtain such assistance. The regular election must occur on the date of the annual meeting. Notwithstanding this sub-subparagraph, an election is not required unless more candidates file notices of intent to run or are nominated than board vacancies exist.

b. Within 90 days after being elected or appointed to the board of an association of a residential condominium, each newly elected or appointed director shall certify in writing to the secretary of the association that he or she has read the association's declaration of condominium, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, within 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum administered by a division-approved condominium education provider within 1 year before or 90 days after the date of election or appointment. The written certification or educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption. A director of an association of a residential condominium who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with this sub-subparagraph. The board may temporarily fill the vacancy during the period of suspension. The secretary shall cause the association to retain a director's written certification or educational certificate for inspection by the members for 5 years after a director's

election or the duration of the director's uninterrupted tenure, whichever is longer. Failure to have such written certification or educational certificate on file does not affect the validity of any board action.

c. Any challenge to the election process must be commenced within 60 days after the election results are announced.

5. Any approval by unit owners called for by this chapter or the applicable declaration or bylaws, including, but not limited to, the approval requirement in s. 718.111(8), must be made at a duly noticed meeting of unit owners and is subject to all requirements of this chapter or the applicable condominium documents relating to unit owner decisionmaking, except that unit owners may take action by written agreement, without meetings, on matters for which action by written agreement without meetings is expressly allowed by the applicable bylaws or declaration or any law that provides for such action.

6. Unit owners may waive notice of specific meetings if allowed by the applicable bylaws or declaration or any law. If authorized by the bylaws, notice of meetings of the board of administration, unit owner meetings, except unit owner meetings called to recall board members under paragraph (j), and committee meetings may be given by electronic transmission to unit owners who consent to receive notice by electronic transmission.

7. Unit owners have the right to participate in meetings of unit owners with reference to all designated agenda items.

However, the association may adopt reasonable rules governing the frequency, duration, and manner of unit owner participation.

8. A unit owner may tape record or videotape a meeting of the unit owners subject to reasonable rules adopted by the division.

9. Unless otherwise provided in the bylaws, any vacancy occurring on the board before the expiration of a term may be filled by the affirmative vote of the majority of the remaining directors, even if the remaining directors constitute less than a quorum, or by the sole remaining director. In the alternative, a board may hold an election to fill the vacancy, in which case the election procedures must conform to sub-subparagraph 4.a. unless the association governs 10 units or fewer and has opted out of the statutory election process, in which case the bylaws of the association control. Unless otherwise provided in the bylaws, a board member appointed or elected under this section shall fill the vacancy for the unexpired term of the seat being filled. Filling vacancies created by recall is governed by paragraph (j) and rules adopted by the division.

10. This chapter does not limit the use of general or limited proxies, require the use of general or limited proxies, or require the use of a written ballot or voting machine for any agenda item or election at any meeting of a timeshare condominium association or nonresidential condominium association.

Notwithstanding subparagraph (b)2. and sub-subparagraph 4.a., an association of 10 or fewer residential units may, by affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

(k) Arbitration.—There shall be a provision for mandatory nonbinding arbitration as provided for in s. 718.1255 for any residential condominium.

(l) Certificate of compliance.— A provision that a certificate of compliance from a licensed electrical contractor or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code must be included. Notwithstanding chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, condominium, or unit owner is not obligated to retrofit the common elements, association property, or units of a residential condominium with a fire sprinkler system in a building that has been certified for occupancy by the applicable governmental entity if the unit owners have voted to forego such retrofitting by the affirmative vote of a majority of all voting interests in the affected condominium. The local authority having jurisdiction may not

require completion of retrofitting with a fire sprinkler system before January 1, 2020 ~~the end of 2019~~. By December 31, 2016, a residential condominium ~~an~~ association that is not in compliance with the requirements for a fire sprinkler system and has not voted to forego retrofitting of such a system must initiate an application for a building permit for the required installation with the local government having jurisdiction demonstrating that the association will become compliant by December 31, 2019.

1. A vote to forego retrofitting in a residential condominium may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and is effective upon recording a certificate attesting to such vote in the public records of the county where the condominium is located. The association shall mail or hand deliver to each unit owner written notice at least 14 days before the membership meeting in which the vote to forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote must be mailed or hand delivered to all unit owners. Evidence of compliance with this notice requirement must be made by affidavit executed by the person providing the notice and filed among the official records of the association. After notice is provided to each owner, a copy must be provided by the current owner to a new owner before closing and by a unit owner to a renter before signing a lease.

2. If there has been a previous vote to forego retrofitting, a vote to require retrofitting may be obtained at a special meeting of the unit owners called by a petition of at least 10 percent of the voting interests. Such a vote may only be called once every 3 years. Notice shall be provided as required for any regularly called meeting of the unit owners, and must state the purpose of the meeting. Electronic transmission may not be used to provide notice of a meeting called in whole or in part for this purpose.

3. As part of the information collected annually from condominiums, the division shall require condominium associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of condominiums that have elected to forego retrofitting.

4. Notwithstanding s. 553.509, an association may not be obligated to, and may forego the retrofitting of, any improvements required by s. 553.509(2) upon an affirmative vote of a majority of the voting interests in the affected condominium.

Section 2. This act shall take effect July 1, 2014.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 425 (2014)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	____	(Y/N)
ADOPTED AS AMENDED	____	(Y/N)
ADOPTED W/O OBJECTION	____	(Y/N)
FAILED TO ADOPT	____	(Y/N)
WITHDRAWN	____	(Y/N)
OTHER		

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Rodríguez, J. offered the following:

Amendment

Remove lines 37-44 and insert:

2. When a unit owner of a residential condominium files a written inquiry by certified mail with the board of administration, the board shall respond in writing to the unit owner within 30 days after ~~of~~ receipt of the inquiry. The board's response shall either give a substantive response to the inquirer, notify the inquirer that a legal opinion has been requested, or notify the inquirer that advice has been requested from the division. If the board

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Rodríguez, J. offered the following:

Amendment (with title amendment)

Remove lines 340-412 and insert:

association of 10 or fewer units may, by affirmative vote of a majority of the total voting interests, provide for different voting and election procedures in its bylaws, which may be by a proxy specifically delineating the different voting and election procedures. The different voting and election procedures may provide for elections to be conducted by limited or general proxy.

(k) Arbitration.—There shall be a provision for mandatory nonbinding arbitration as provided for in s. 718.1255 for any residential condominium.

(l) Certificate of compliance.— A provision that a certificate of compliance from a licensed electrical contractor

or electrician may be accepted by the association's board as evidence of compliance of the condominium units with the applicable fire and life safety code must be included. Notwithstanding chapter 633 or of any other code, statute, ordinance, administrative rule, or regulation, or any interpretation of the foregoing, an association, residential condominium, or unit owner is not obligated to retrofit the common elements, association property, or units of a residential condominium with a fire sprinkler system in a building that has been certified for occupancy by the applicable governmental entity if the unit owners have voted to forego such retrofitting by the affirmative vote of a majority of all voting interests in the affected condominium. The local authority having jurisdiction may not require completion of retrofitting with a fire sprinkler system before January 1, 2020 ~~the end of 2019~~. By December 31, 2016, a residential condominium ~~an~~ association that is not in compliance with the requirements for a fire sprinkler system and has not voted to forego retrofitting of such a system must initiate an application for a building permit for the required installation with the local government having jurisdiction demonstrating that the association will become compliant by December 31, 2019.

1. A vote to forego retrofitting may be obtained by limited proxy or by a ballot personally cast at a duly called membership meeting, or by execution of a written consent by the member, and is effective upon recording a certificate attesting

to such vote in the public records of the county where the condominium is located. The association shall mail or hand deliver to each unit owner written notice at least 14 days before the membership meeting in which the vote to forego retrofitting of the required fire sprinkler system is to take place. Within 30 days after the association's opt-out vote, notice of the results of the opt-out vote must be mailed or hand delivered to all unit owners. Evidence of compliance with this notice requirement must be made by affidavit executed by the person providing the notice and filed among the official records of the association. After notice is provided to each owner, a copy must be provided by the current owner to a new owner before closing and by a unit owner to a renter before signing a lease.

2. If there has been a previous vote to forego retrofitting, a vote to require retrofitting may be obtained at a special meeting of the unit owners called by a petition of at least 10 percent of the voting interests. Such a vote may only be called once every 3 years. Notice shall be provided as required for any regularly called meeting of the unit owners, and must state the purpose of the meeting. Electronic transmission may not be used to provide notice of a meeting called in whole or in part for this purpose.

3. As part of the information collected annually from condominiums, the division shall require condominium associations to report the membership vote and recording of a certificate under this subsection and, if retrofitting has been

undertaken, the per-unit cost of such work. The division shall annually report to the Division of State Fire Marshal of the Department of Financial Services the number of condominiums that have elected to forego retrofitting.

4. Notwithstanding s. 553.509, a residential ~~an~~ association may not be obligated to, and may forego the retrofitting of, any improvements required by s. 553.509(2) upon an affirmative vote of a majority of the voting interests in the affected condominium.

Section 2. Subsection (5) of section 718.113, Florida Statutes, is amended to read:

718.113 Maintenance; limitation upon improvement; display of flag; hurricane shutters and protection; display of religious decorations.—

(5) Each board of administration of a residential condominium shall adopt hurricane shutter specifications for each building within each condominium operated by the association which shall include color, style, and other factors deemed relevant by the board. All specifications adopted by the board must comply with the applicable building code.

(a) The board may, subject to s. 718.3026 and the approval of a majority of voting interests of the residential condominium, install hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection that comply with or exceed the applicable building code. However, a vote of the owners is not required if

the maintenance, repair, and replacement of hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection are the responsibility of the association pursuant to the declaration of condominium. If hurricane protection or laminated glass or window film architecturally designed to function as hurricane protection that complies with or exceeds the current applicable building code has been previously installed, the board may not install hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection except upon approval by a majority vote of the voting interests.

(b) The association is responsible for the maintenance, repair, and replacement of the hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection authorized by this subsection if such property is the responsibility of the association pursuant to the declaration of condominium. If the hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection are the responsibility of the unit owners pursuant to the declaration of condominium, the maintenance, repair, and replacement of such items are the responsibility of the unit owner.

(c) The board may operate shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection installed pursuant to this subsection without permission of the unit owners only if such operation is

necessary to preserve and protect the condominium property and association property. The installation, replacement, operation, repair, and maintenance of such shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection in accordance with the procedures set forth in this paragraph are not a material alteration to the common elements or association property within the meaning of this section.

(d) Notwithstanding any other provision in the residential condominium documents, if approval is required by the documents, a board may not refuse to approve the installation or replacement of hurricane shutters, impact glass, code-compliant windows or doors, or other types of code-compliant hurricane protection by a unit owner conforming to the specifications adopted by the board.

Section 3. Subsection (6) is added to section 718.1255, Florida Statutes, to read:

718.1255 Alternative dispute resolution; voluntary mediation; mandatory nonbinding arbitration; legislative findings.—

(6) APPLICABILITY.—This section does not apply to any nonresidential condominium unless otherwise specifically provided for in the declaration of a nonresidential condominium.

Section 4. Section 718.1256, Florida Statutes, is amended to read:

718.1256 Condominiums as residential property.—For the purpose of property and casualty insurance risk classification, residential condominiums shall be classed as residential property.

Section 5. Subsection (1) and paragraph (a) of subsection (2) of section 718.403, Florida Statutes, are amended and subsection (9) is added to section 718.403, to read:

718.403 Phase condominiums.—

(1) Notwithstanding the provisions of s. 718.110, a developer may develop a condominium in phases, if the original declaration of condominium submitting the initial phase to condominium ownership or an amendment to the declaration which has been approved by all of the unit owners and unit mortgagees provides for and describes in detail all anticipated phases; the impact, if any, which the completion of subsequent phases would have upon the initial phase; and the time period within which all phases must be added to the condominium and comply with the requirements of this section and at the end of which the right to add additional phases expires.

(a) All phases must be added to the condominium within 7 years after the date of the recording of the certificate of a surveyor and mapper pursuant to s. 718.104(4)(e) or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever

occurs first, unless the unit owners vote to approve an amendment extending the 7-year period pursuant to paragraph (b).

(b) An amendment to extend the 7-year period shall require the approval of the owners necessary to amend the declaration of condominium pursuant to s. 718.110(1)(a). An extension of the 7-year period may be submitted for approval only during the last 3 years of the 7-year period.

(c) An amendment must describe the time period within which all phases must be added to the condominium, and such time period may not exceed 10 years from the date of the recording of the certificate of a surveyor and mapper pursuant to s. 718.104(4)(e) or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first.

(d) An amendment that extends the 7-year period pursuant to this section is not subject to the requirements of s. 718.110(4).

(2) The original declaration of condominium, or an amendment to the declaration, which amendment has been approved by all unit owners and unit mortgagees and the developer, shall describe:

(a) The land which may become part of the condominium and the land on which each phase is to be built. The descriptions shall include metes and bounds or other legal descriptions of the land for each phase, plot plans, and surveys. Plot plans,

attached as an exhibit, must show the approximate location of all existing and proposed buildings and improvements that may ultimately be contained within the condominium. The plot plan may be modified by the developer as to unit or building types but, in a residential condominium, to the extent that such changes must be are described in the declaration. If provided in the declaration, the developer may make nonmaterial changes in the legal description of a phase.

(9) The provisions of subsections (2)(b)-(f) and (8) of this section shall not apply to nonresidential condominiums.

Section 6. Section 718.707, Florida Statutes, is amended to read:

718.707 Time limitation for classification as bulk assignee or bulk buyer.—A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2016 ~~2015~~. The date of such acquisition shall be determined by the date of recording a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuing a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

T I T L E A M E N D M E N T

Remove line 5 and insert:

their associations and boards; amending s. 718.1255, F.S.; limiting the application of mandatory arbitration to residential condominiums; amending s. 718.1256, F.S.; limiting the application of property and casualty insurance risk classification to residential condominiums; amending s. 718.113, F.S.; limiting the application of certain requirements relating to maintenance to residential condominiums and their associations and boards; amending s. 718.403, F.S.; limiting the application of certain requirements relating to phase condominiums to residential condominiums; amending s. 718.707, F.S.; extending the bulk assignee or bulk buyer provisions for an additional year; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 627 Service of Process
SPONSOR(S): Pilon
TIED BILLS: None **IDEN./SIM. BILLS:** SB 620

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Ward	Bond
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The duties of a sheriff include service of process and execution of money judgments. Service of process is the means by which official notice of an action is delivered to a defendant or respondent. Service of process may also be made by authorized individuals. A "return of service" proving by affidavit that the process was delivered to the proper party is then filed with the court. The bill:

- Provides that a fee of $40 will be charged by the sheriff for each summons served;
- Provides immunity to a sheriff for wrongful levy or distribution of the proceeds of sale;
- Requires that the party requesting service of process or the process server file the return of service; and
- Adds a noncriminal penalty of up to $1,000 for an employer who refuses to accommodate service of process on an employee.

The bill appears to have an unknown minimal positive fiscal impact on state and local government revenues. The bill may increase revenues of private process servers, and may increase costs to users of the court system.

The bill has an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Service of Process

Under Florida Rule of Civil Procedure 1.070(b), any person who is authorized by law to complete service of process may do so in accordance with applicable Florida law for the execution of legal process. Chapter 48, F.S., provides that service of process may be served by the sheriff in the county where the party to be served is located.[1] The sheriff may appoint special process servers who meet specified statutory minimum requirements.[2] The chief judge of the circuit court may establish an approved list of certified process servers.[3]

Authorized process servers serve the complaint or petition on a defendant or a respondent in a civil case so that the court may acquire personal jurisdiction over the person who receives service. Strict compliance with the statutory provisions of service of process is required in order for the court to obtain jurisdiction over a party and to assure that a defendant or respondent receives notice of the proceedings filed.[4] Because strict compliance with all of the statutory requirements for service is required, the failure to comply with the statutory terms renders that service defective, resulting in a failure to acquire jurisdiction over the defendant or respondent.[5]

Service of original process and most witness subpoenas is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of the contents.[6] Each process server must document the service of process by placing the date and time of service and the process server's identification number and initials on the copy served.[7] The person serving process is obligated to file the return of service form with the court to show that service was made. [8]

The sheriffs of all counties of the state must charge fixed, nonrefundable fees for docketing and service of process.[9] The sheriffs must charge $40 for docketing and serving each summons or writ of execution, except if duplicate process is to be served in the same action on the same person.[10] This may occur, for example, when a defendant is sued both individually and in some representative capacity in the same action. In that event, two summons' are issued and served. Current law precludes the sheriff from charging for service of each in such an event, when both are served at the same time.[11]

Currently, sheriffs may levy upon assets in satisfaction of a judgment, and sell those assets for payment of the judgment when they are provided a writ of execution by the court.[12] There is a

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[1] Section 48.021(1), F.S.
[2] Section 48.021(2), F.S.
[3] Section 48.27, F.S.
[4] *Vidal v. SunTrust Bank*, 41 So.3d 401, 402-03 (Fla. 4th DCA 2010).
[5] *See* s. 48.031, F.S.; *Vidal,* 41 So.3d at 402-04 (holding that the process server's failure to note the time of service of the bank's complaint on the copy of the complaint that was served on the debtor rendered the service of the complaint defective).
[6] Sections 48.031(1) and 48.031(3), F.S.
[7] Sections 48.29(6) and 48.031(5), F.S.
[8] Section 48.031(5), F.S.
[9] Section 30.231(1), F.S.
[10] Section 30.231(1)(a), F.S.
[11] Section 30.231(1)(a), F.S.
[12] *See* s. 30.30, F.S.

requirement that the judgment creditor provide an affidavit assuring the sheriff of clear title in the debtor to the asset,[13] but there is no statutory requirement that the parties in interest direct how proceeds of sale are to be paid.

Effect of Proposed Changes

Service on an Employee of a Business

Section 48.031, F.S., provides that an employer "shall permit" service of process on an employee in a private area designated by the employer. The bill creates a noncriminal[14] penalty of up to $1,000[15] for an employer or an agent who fails to comply with this provision.

Sheriff's Fees for Service

The bill amends s. 30.231, F.S., which currently provides that when serving more than one process regarding the same action at one location, the sheriff is only entitled to one fee. The bill removes this limiting provision, allowing the sheriff to charge $40 per process served at the same time in the same cause of action. The effect is that the sheriff may be paid multiple times to serve one person who has multiple capacities in one lawsuit.[16]

Filing of the Return of Service

The bill adds that either the person requesting service or the person authorized to serve process may file the return of service with the court.

Sheriff Sales in Execution of Judgments

The bill provides that the sheriff may rely upon the affidavit of clear title provided by the judgment creditor, and that the sheriff is not liable for wrongful distribution of funds which are proceeds of the sale.

The bill adds that a sheriff may apply to the court for instructions for distribution of sale proceeds. Instructions may be requested of the court that entered the judgment or the court in the jurisdiction where the levied property lies. The bill provides that service of the application for instructions and notice of hearing must be given by the sheriff to the parties. Service related to this hearing may be made by certified mail.

The bill takes effect July 1, 2014.

B. SECTION DIRECTORY:

Section 1 amends s. 30.231, F.S., regarding sheriff's fees for service of summons, subpoenas, etc.

Section 2 amends s. 48.031, F.S., regarding service of process generally.

Section 3 amends s. 48.081, F.S., regarding service on corporation.

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[13] *See* s. 56.27(4), F.S.

[14] A noncriminal violation is any offense punishable by nothing more than a fine, forfeiture, or other civil penalty, and does not constitute a crime. *State v. Knowles*, 625 So.2d 88 (Fla. 5th DCA 1993).

[15] Noncriminal fines are deposited by the clerk of the court in the "fine and forfeiture fund established pursuant to s. 142.01." See s. 775.083(1)(g), F.S.

[16] For example, a corporate debt might be personally guaranteed by an officer of the corporation. Suit may then be brought against the same person in two capacities. Therefore, one person would be served twice with the same complaint - once individually, and once as an officer of the corporation.

Section 4 amends 56.27, F.S., regarding executions and payment of money collected.

Section 5 provides that the bill takes effect July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The portion of the bill creating a civil penalty may have a minimal positive 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 portion of the bill providing that the sheriff may charge a fee for each process served rather than each address served may have an unknown positive fiscal impact on revenues received by sheriffs. See Fiscal Comments.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may positively revenues of private process servers and appears to increase costs to users of the civil court system. See Fiscal Comments.

D. FISCAL COMMENTS:

The fiscal impact of the portion of the bill providing that the sheriff may charge a fee for each process served rather than each address served may have unknown fiscal impacts on governments and the private sector.

While fees charged by the sheriff are fixed in statute, private process servers are free to charge any fee that the competitive market will bear. Some process servers match the sheriff's fees, some advertise lower fees to attract business, and others charge more and compete on service rather than price. In general, however, economic theory suggests that an increase in the statutory price for service of process generally leads to an increase in the private cost of such service. Should this occur, revenues to sheriffs and to private process servers will increase as a result of this bill, and the cost to the private sector litigants for prosecuting civil lawsuits will correspondingly increase.

There is no statistical reporting of how often sheriffs and private process servers currently serve a single individual in multiple capacities, and thus no means to accurately estimate the fiscal impact of the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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 revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to service of process; amending s. 30.231, F.S.; requiring sheriffs to charge a uniform fee for service of process; providing that such uniform fee does not include the cost of docketing; amending s. 48.031, F.S.; requiring an employer to allow an authorized individual to make service on an employee in a private area designated by the employer; providing a civil fine for employers who fail to comply with the process; revising provisions relating to substitute service if a specified number of attempts of service have been made at a business that is a sole proprietorship under certain circumstances; requiring the person requesting service or the person authorized to serve the process to file the return-of-service form; amending s. 48.081, F.S.; revising a provision related to service on a corporation; amending s. 56.27, F.S.; providing that a sheriff may rely on the affidavit submitted by the levying creditor; authorizing a sheriff to apply for instructions from the court regarding the distribution of proceeds from the sale of a levied property; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 30.231, Florida Statutes, is amended to read:

30.231 Sheriffs' fees for service of summons, subpoenas, and executions.—

(1) The sheriffs of all counties of the state in civil cases shall charge fixed, nonrefundable fees for ~~docketing and~~ service of process, according to the following schedule:

(a) All summons or writs except executions: $40 for each summons or writ to be served~~, except when more than one summons or writ is issued at the same time out of the same cause of action to be served upon one person or defendant at the same time, in which case the sheriff shall be entitled to one fee~~.

(b) All writs except executions requiring a levy or seizure of property: $50 in addition to the $40 fee as stated in paragraph (a).

(c) Witness subpoenas: $40 for each witness to be served.

(d) Executions:

1. Forty dollars for processing each writ of execution, regardless of the number of persons involved.

2. Fifty dollars for each levy.

a. A levy is considered made when any property or any portion of the property listed or unlisted in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure. Seizure requires that the sheriff take actual possession, if practicable, or, alternatively, constructive possession of the property by order

of the court.

b. When the instructions are for levy upon real property, a levy fee is required for each parcel described in the instructions.

c. When the instructions are for levy based upon personal property, one fee is allowed, unless the property is seized at different locations, conditional upon all of the items being advertised collectively and the sale being held at a single location. However, if the property seized cannot be sold at one location during the same sale as advertised, but requires separate sales at different locations, the sheriff may ~~is~~ then ~~authorized to~~ impose a levy fee for the property and sale at each location.

3. Forty dollars for advertisement of sale under process.

4. Forty dollars for each sale under process.

5. Forty dollars for each deed, bill of sale, or satisfaction of judgment.

Section 2. Paragraph (b) of subsection (1), paragraph (b) of subsection (2), and subsection (5) of section 48.031, Florida Statutes, are amended to read:

48.031 Service of process generally; service of witness subpoenas.—

(1)

(b) An employer ~~Employers~~, when contacted by an individual authorized to serve ~~make service of~~ process, shall allow ~~permit~~ the authorized individual to serve an employee ~~make service on~~

~~employees~~ in a private area designated by the employer. An employer who fails to comply with this paragraph commits a noncriminal violation, punishable by a fine of up to $1,000.

(2)

(b) Substitute service may be made on an individual doing business as a sole proprietorship at his or her place of business, during regular business hours, by serving the person in charge of the business at the time of service if two ~~or more~~ attempts to serve the owner have been made at the place of business.

(5) A person serving process shall place, on the first page of at least one of the processes served, the date and time of service and his or her identification number and initials for all service of process. The person serving process shall list on the return-of-service form all initial pleadings delivered and served along with the process. The person requesting service or the person authorized to serve ~~issuing~~ the process shall file the return-of-service form with the court.

Section 3. Paragraph (b) of subsection (3) of section 48.081, Florida Statutes, is amended to read:

48.081 Service on corporation.—

(3)

(b) If the address ~~provided~~ for the registered agent, officer, director, or principal place of business is a residence or private mailbox, service on the corporation may be made by serving the registered agent, officer, or director in accordance

with s. 48.031.

Section 4. Subsection (5) of section 56.27, Florida Statutes, is amended, and subsection (6) is added to that section, to read:

56.27 Executions; payment of money collected.—

(5) A sheriff may rely on the affidavit submitted as required under this section, and a sheriff paying money received under an execution in accordance with the information contained in the affidavit required under subsection (4) is not liable to anyone for damages arising from a wrongful levy or wrongful distribution of funds.

(6) A sheriff who is uncertain as to whom to disburse the proceeds from the sale of the levied property may apply for instructions from:

(a) The court that entered the judgment that is the basis of the judgment lien; or

(b) The appropriate court where the levied property was located at the time of the levy,

if the sheriff serves, by process pursuant to chapter 48, by certified mail, or by return receipt requested, a copy of his or her application and the notice of hearing on the levying creditor, the judgment debtor, and any other parties identified in the affidavit.

Section 5. This act shall take effect July 1, 2014.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 14-02 Residential Communities
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Cary JAC	Bond MB

SUMMARY ANALYSIS

Community Association Managers (CAMs) are licensed by the Department of Business and Professional Regulation (DBPR) to perform community association management functions on behalf of condominium, cooperative, and homeowners associations. Duties include controlling or disbursing funds, preparing budgets and other financial documents, assisting in noticing or conducting meetings, and coordinating maintenance and other services.

The bill amends the CAM statute to list additional duties that CAMs may perform.

The bill also provides lien and release of lien forms for condominiums, cooperatives, and homeowners' associations for unpaid assessments.

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

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Community Association Managers (CAMs) are licensed by the Department of Business and Professional Regulation (DBPR) to perform community association management functions.[1] The statutes define community association management as "practices requiring substantial specialized knowledge, judgment, and managerial skill."[2] Duties include controlling or disbursing funds, preparing budgets and other financial documents, assisting in noticing or conducting meetings, and coordinating maintenance and other services.[3]

CAMs are regulated by the seven-member Regulatory Council of Community Association Managers. Five of the members must be licensed CAMs, one of whom must be a CAM for a timeshare. The other two must not be CAMs. Members are appointed to 4-year terms by the Governor and confirmed by the Senate.[4]

Prospective CAMs must apply to DBPR to take the licensure examination and submit to a background check. Upon determination that the applicant is of good moral character, the applicant must attend Department-approved in-person training prior to taking the exam.[5] CAMs are then required to complete continuing education hours as approved by the Council.[6]

The Florida Bar has a Standing Committee that focuses on the unlicensed practice of law. The UPL Standing Committee (Standing Committee) held hearings in 1995 to determine if CAMs were crossing the line into the unlicensed practice of law in performing their statutory duties. On certain matters, the Standing Committee determined that the CAMs were not performing legal work. Those activities included drafting meeting notices, writing board- and annual-meeting agendas, and filling out certain forms. However, the standing committee determined that several other duties commonly performed by CAMs did constitute the unlicensed practice of law, such as drafting lien forms and other certain forms, determining the timing and method of meeting notices, determining the votes necessary for certain actions, and advising a community association about laws or rules. The Standing Committee determined some other actions may or may not involve the unlicensed practice of law, depending on the circumstances.[7] The Standing Committee provided an advisory opinion to the Supreme Court for consideration. The Supreme Court adopted the Standing Committee's recommendations the following year.[8]

On May 13, 2013, the Standing Committee proposed a subsequent advisory opinion to clarify the Court's earlier opinion regarding CAMs. The proposed advisory opinion requested that the 1996 Court opinion remain in effect, but also requested that the Court consider other common practices by CAMs that were not fully addressed in the 1996 opinion. Specifically, the Standing Committee proposed advisory opinion suggests that the following should constitute the unlicensed practice of law:

- Drafting amendments to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members;

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[1] Section 468.431(4), F.S.
[2] Section 468.431(2), F.S.
[3] *Id.*
[4] Section 468.4315(1), F.S.
[5] Section 468.433, F.S.
[6] Sections 468.4336 and 468.4337, F.S.
[7] *The Florida Bar re Advisory Opinion – Activities of Community Association Managers*, 681 So.2d 1119, 1122 (Fla. 1996).
[8] *Id.* at 1124.

- Determining of the number of days to be provided for statutory notice;
- Modifying limited proxy forms promulgated by the state if there is any discretion involved;
- Preparing documents concerning the right of the association to approve new prospective owners;
- Determining the votes needed to pass a proposition or amendment to recorded documents;
- Determining the number of owners' votes needed to establish a quorum;
- Preparing construction lien documents;
- Preparing, reviewing, drafting, and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.;
- Determining who is the owner of a property that is to receive a statutory pre-lien letter; and
- Any activity that requires statutory or case law analysis to reach a legal conclusion.[9]

The Florida Supreme Court has not issued an opinion regarding the Standing Committee's proposed advisory opinion.

Since 1950, through case law and advisory opinions, the Court has continued to define the boundaries of the unlicensed practice of law. There is no rule or test to determine whether an activity is considered to be the practice of law. However, if an activity is within a profession's "sphere of activity," it is more likely that the Court will allow a non-lawyer to perform the activity, even if the activity involves drafting a legal instrument.[10] Furthermore, the less discretion that is involved, the more likely that a non-lawyer will be allowed to perform the activity, such as if there is a form so that the professional is merely filling in factual information such as names, addresses, figures, etc.[11]

Effects of the Bill

The bill amends s. 468.431(2), F.S., to add several duties to the definition of a CAM:

- Determining the number of days required for statutory notices;
- Determining the amounts due the association;
- Calculating the votes required for a quorum or to approve a proposition or amendment;
- Completing forms related to the management of a community association that have been created by statute or by a state agency;
- Drafting demand letters;
- Drafting meeting notices and agendas;
- Calculating certificates of assessments;
- Responding to requests for an estoppel letter; and
- Negotiating monetary or performance terms of a contract subject to approval by an association.

The bill also amends ss. 718.116(5)(b), 719.108(4)(b), and 720.3085(1)(a), F.S., to provide a claim of lien form for a condominium, cooperative, and homeowners' association, respectively. The bill also amends ss. 718.116(5)(d), and 720.3085(1)(d), F.S., and adds s. 719.108(4)(d), F.S., to provide a release of lien form for a condominium, homeowners' association, and cooperative, respectively. The bill also amends language within ss. 719.108(4) and (4)(b), F.S., to match the law of cooperatives with existing condominium and homeowners' association law with respect to a claim and execution of a lien.

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[9] The Florida Bar Standing Committee on the Unlicensed Practice of Law, FAO #2012-2, *Activities of Community Association Managers*, proposed advisory opinion, May 15, 2013.
[10] See *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950).
[11] See, e.g., *The Florida Bar re: Advisory Opinion – Nonlwayer Preparation of Residential Leases up to One Year in Duration*, 602 So.2d 914 (Fla. 1992) and *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So.2d 485 (Fla. 1993).

B. SECTION DIRECTORY:

Section 1 amends s. 468.431, F.S., relating to definitions.

Section 2 amends s. 718.116, F.S., relating to assessments, liability, lien and priority; interest, and collection.

Section 3 amends s. 719.108, F.S., relating to rents and assessments, liability, lien and priority; interest, collection, and cooperative ownership.

Section 4 amends s. 720.3085, F.S., relating to payment for assessments and lien claims.

Section 5 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact of 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:

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:

   The 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 revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to residential communities; amending s. 468.431, F.S.; adding duties to the definition of community association management; amending s. 718.116, F.S.; creating a form for a condominium lien; creating a form for a release of lien; amending s. 719.108, F.S.; creating a form for a cooperative lien; creating a form for a release of lien; amending s. 720.3085, F.S.; creating a form for a homeowners' association lien; creating a form for a release of lien; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 468.431, Florida Statutes, is amended to read:

468.431 Definitions.—As used in this part:

(2) "Community association management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for remuneration and when the association or associations served contain more than 10 units or have an annual budget or budgets in excess of $100,000: controlling or disbursing funds of a community association, preparing budgets or other financial documents for a community association, assisting in the noticing or conduct of community association meetings, determining the number of days required

for statutory notices, determining amounts due the association, calculating the votes required for a quorum or to approve a proposition or amendment, completing forms related to the management of a community association that have been created by statute or by a state agency, drafting demand letters, drafting meeting notices and agendas, calculating certificates of assessments, responding to requests for an estoppel letter, negotiating monetary or performance terms of a contract subject to approval by an association, and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association. A person who performs clerical or ministerial functions under the direct supervision and control of a licensed manager or who is charged only with performing the maintenance of a community association and who does not assist in any of the management services described in this subsection is not required to be licensed under this part.

Section 2. Subsection (5) of section 718.116, Florida Statutes, is amended to read:

718.116 Assessments; liability; lien and priority; interest; collection.—

(5)(a) The association has a lien on each condominium parcel to secure the payment of assessments. Except as otherwise provided in subsection (1) and as set forth below, the lien is effective from and shall relate back to the recording of the original declaration of condominium, or, in the case of lien on

a parcel located in a phase condominium, the last to occur of the recording of the original declaration or amendment thereto creating the parcel. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the condominium parcel is located. Nothing in this subsection shall be construed to bestow upon any lien, mortgage, or certified judgment of record on April 1, 1992, including the lien for unpaid assessments created herein, a priority which, by law, the lien, mortgage, or judgment did not have before that date.

(b) ~~To be valid,~~ A claim of lien may be in substantially the following form: ~~must~~

CLAIM OF LIEN

BEFORE ME, the undersigned notary public, personally appeared (insert name) who was duly sworn and says that he is the authorized agent of the lienor, (insert name of association), whose address is (insert address), and that in accordance with the Condominium Act and the Declaration of (insert name of association), a Condominium, and the Articles of Incorporation and Bylaws of the Association, the Association makes this claim of lien for (insert basis for claim of lien), for the following described real property:

UNIT NO. OF (NAME OF CONDOMINIUM), A

CONDOMINIUM AS SET FORTH IN THE DECLARATION OF CONDOMINIUM AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK _____, PAGE _____, OF THE PUBLIC RECORDS OF _____ COUNTY, FLORIDA. THE ABOVE DESCRIPTION INCLUDES, BUT IS NOT LIMITED TO, ALL APPURTENANCES TO THE CONDOMINIUM UNIT ABOVE DESCRIBED, INCLUDING THE UNDIVIDED INTEREST IN THE COMMON ELEMENTS OF SAID CONDOMINIUM.

upon which the Association asserts this lien. The property is owned by (insert name of debtor), Debtor. There remains unpaid to the association, the sum of $_____. This lien secures these amounts, as well as any amounts and assessments and interest that may accrue in the future.

(signature of witness) (signature of authorized agent)
(signature of witness)

(insert notary clause as appropriate)

~~state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates.~~ It must be executed and acknowledged by an officer or authorized agent of the association. The lien is not effective 1 year after the claim of

lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien secures all unpaid assessments that are due and that may accrue after the claim of lien is recorded and through the entry of a final judgment, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien.

(c) By recording a notice in substantially the following form, a unit owner or the unit owner's agent or attorney may require the association to enforce a recorded claim of lien against his or her condominium parcel:

NOTICE OF CONTEST OF LIEN

TO: ...(Name and address of association)... You are notified that the undersigned contests the claim of lien filed by you on ...., ...(year)..., and recorded in Official Records Book .... at Page ...., of the public records of .... County, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days from the date of service of this notice. Executed this .... day of ...., ...(year)....

Signed: ...(Owner or Attorney)...

After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time during which the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(d) A release of lien may be in substantially the following form:

RELEASE OF LIEN

The undersigned lienor, in consideration of the final payment in the amount of $, hereby waives and releases its lien and right to claim a lien for unpaid assessments through (insert date) , for the following described real property:

UNIT NO. OF (NAME OF CONDOMINIUM) , A CONDOMINIUM AS SET FORTH IN THE DECLARATION OF

CONDOMINIUM AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK _____, PAGE _____, OF THE PUBLIC RECORDS OF _____ COUNTY, FLORIDA. THE ABOVE DESCRIPTION INCLUDES, BUT IS NOT LIMITED TO, ALL APPURTENANCES TO THE CONDOMINIUM UNIT ABOVE DESCRIBED, INCLUDING THE UNDIVIDED INTEREST IN THE COMMON ELEMENTS OF SAID CONDOMINIUM.

(signature of witness) (signature of authorized agent)
(signature of witness)

(insert notary clause as appropriate)

Section 3. Subsection (4) of section 719.108, Florida Statutes, is amended to read:

719.108 Rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.—

(4) The association has a lien on each cooperative parcel for any unpaid rents and assessments, plus interest, and any authorized administrative late fees. If authorized by the cooperative documents, the lien also secures reasonable attorney's fees incurred by the association incident to the collection of the rents and assessments or enforcement of such lien. The lien is effective from and after recording a claim of lien in the public records in the county in which the

cooperative parcel is located which states the description of the cooperative parcel, the name of the unit owner, the amount due, and the due dates. ~~The lien expires if a claim of lien is not filed within 1 year after the date the assessment was due, and the lien does not continue for longer than 1 year after the claim of lien has been recorded unless, within that time, an action to enforce the lien is commenced.~~ Except as otherwise provided in this chapter, a lien may not be filed by the association against a cooperative parcel until 30 days after the date on which a notice of intent to file a lien has been delivered to the owner.

(a) The notice must be sent to the unit owner at the address of the unit by first-class United States mail and:

1. If the most recent address of the unit owner on the records of the association is the address of the unit, the notice must be sent by ~~registered or~~ certified mail, return receipt requested, to the unit owner at the address of the unit.

2. If the most recent address of the unit owner on the records of the association is in the United States, but is not the address of the unit, the notice must be sent by ~~registered or~~ certified mail, return receipt requested, to the unit owner at his or her most recent address.

3. If the most recent address of the unit owner on the records of the association is not in the United States, the notice must be sent by first-class United States mail to the unit owner at his or her most recent address.

~~(b)~~ A notice that is sent pursuant to this paragraph ~~subsection~~ is deemed delivered upon mailing.

(b) A claim of lien may be in substantially the following form:

CLAIM OF LIEN

BEFORE ME, the undersigned notary public, personally appeared (insert name) who was duly sworn and says that he is the authorized agent of the lienor, (insert name of association), whose address is (insert address), and that in accordance with the Cooperative Act and the cooperative documents of (insert name of association), a Cooperative, and the Articles of Incorporation and Bylaws of the Association, the Association makes this claim of lien for (insert basis for claim of lien), for the following described real property:

UNIT NO. OF (NAME OF COOPERATIVE), A COOPERATIVE AS SET FORTH IN THE COOPERATIVE DOCUMENTS AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK , PAGE , OF THE PUBLIC RECORDS OF COUNTY, FLORIDA. THE ABOVE DESCRIPTION INCLUDES, BUT IS NOT LIMITED TO, ALL APPURTENANCES TO THE COOPERATIVE UNIT ABOVE DESCRIBED, INCLUDING THE UNDIVIDED INTEREST IN THE COMMON ELEMENTS OF SAID COOPERATIVE.

Upon which the Association asserts this lien. The property is owned by (insert name of debtor) , Debtor. There remains unpaid to the association, the sum of $. This lien secures these amounts, as well as any amounts and assessments and interest that may accrue in the future.

(signature of witness) (signature of authorized agent)
(signature of witness)

(insert notary clause as appropriate)

It must be executed and acknowledged by an officer or authorized agent of the association. The lien is not effective 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel. The claim of lien secures all unpaid rents and assessments that are due and that may accrue after the claim of lien is recorded and through the entry of a final judgment, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Upon payment in full, the person making the payment is entitled

to a satisfaction of the lien.

(c) By recording a notice in substantially the following form, a unit owner or the unit owner's agent or attorney may require the association to enforce a recorded claim of lien against his or her cooperative parcel:

NOTICE OF CONTEST OF LIEN

TO: ...(Name and address of association)... You are notified that the undersigned contests the claim of lien filed by you on ...., ...(year)..., and recorded in Official Records Book .... at Page ...., of the public records of .... County, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days from the date of service of this notice. Executed this .... day of ...., ...(year).... Signed: ...(Owner or Attorney)...

After notice of contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien; and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time during which the association is

prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the unit owner or by any other person claiming an interest in the parcel.

(d) A release of lien may be in substantially the following form:

RELEASE OF LIEN

The undersigned lienor, in consideration of the final payment in the amount of $_____, hereby waives and releases its lien and right to claim a lien for unpaid assessments through (insert date) , for the following described real property:

UNIT NO. ____ OF (NAME OF COOPERATIVE) , A COOPERATIVE AS SET FORTH IN THE COOPERATIVE DOCUMENTS AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK _____, PAGE _____, OF THE PUBLIC RECORDS OF _____ COUNTY, FLORIDA. THE ABOVE DESCRIPTION INCLUDES, BUT IS NOT LIMITED TO, ALL APPURTENANCES TO THE COOPERATIVE UNIT ABOVE DESCRIBED, INCLUDING THE UNDIVIDED INTEREST IN THE COMMON ELEMENTS OF SAID COOPERATIVE.

(signature of witness) (signature of authorized agent)

(signature of witness)

(insert notary clause as appropriate)

Section 4. Subsection (1) of section 720.3085, Florida Statutes, is amended to read:

720.3085 Payment for assessments; lien claims.—

(1) When authorized by the governing documents, the association has a lien on each parcel to secure the payment of assessments and other amounts provided for by this section. Except as otherwise set forth in this section, the lien is effective from and shall relate back to the date on which the original declaration of the community was recorded. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the parcel is located. This subsection does not bestow upon any lien, mortgage, or certified judgment of record on July 1, 2008, including the lien for unpaid assessments created in this section, a priority that, by law, the lien, mortgage, or judgment did not have before July 1, 2008.

(a) ~~To be valid,~~ A claim of lien may be in substantially the following form: ~~must~~

CLAIM OF LIEN

BEFORE ME, the undersigned notary public, personally appeared (insert name) who was duly sworn and says that he is the authorized agent of the lienor, (insert name of association)

, whose address is (insert address) , and that in accordance with the Florida Statutes and the homeowners' association documents of (insert name of association) , a homeowners' association, and the Articles of Incorporation and Bylaws of the Association, the Association makes this claim of lien for (insert basis for claim of lien) , for the following described real property:

(PARCEL NO. OR LOT AND BLOCK) OF (NAME OF HOMEOWNERS' ASSOCIATION) , A HOMEOWNERS' ASSOCIATION AS SET FORTH IN THE HOMEOWNERS' ASSOCIATION DOCUMENTS AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK , PAGE , OF THE PUBLIC RECORDS OF COUNTY, FLORIDA.

(or insert appropriate metes and bounds description here)

upon which the Association asserts this lien. The property is owned by (insert name of debtor) , Debtor. There remains unpaid to the association, the sum of $. This lien secures these amounts, as well as any amounts and assessments and interest that may accrue in the future.

(signature of witness) (signature of authorized agent)

(signature of witness)

(insert notary clause as appropriate)

~~state the description of the parcel, the name of the record owner, the name and address of the association, the assessment amount due, and the due date.~~ The claim of lien secures all unpaid assessments that are due and that may accrue subsequent to the recording of the claim of lien and before entry of a certificate of title, as well as interest, late charges, and reasonable costs and attorney's fees incurred by the association incident to the collection process. The person making payment is entitled to a satisfaction of the lien upon payment in full.

(b) By recording a notice in substantially the following form, a parcel owner or the parcel owner's agent or attorney may require the association to enforce a recorded claim of lien against his or her parcel:

NOTICE OF CONTEST OF LIEN

TO: ...(Name and address of association)...

You are notified that the undersigned contests the claim of lien filed by you on ...., ...(year)..., and recorded in Official Records Book .... at page ...., of the public records of .... County, Florida, and that the time within which you may file suit to enforce your lien is limited to 90 days following the date of service of this notice. Executed this .... day of ....,

...(year)....

Signed: ...(Owner or Attorney)...

After the notice of a contest of lien has been recorded, the clerk of the circuit court shall mail a copy of the recorded notice to the association by certified mail, return receipt requested, at the address shown in the claim of lien or the most recent amendment to it and shall certify to the service on the face of the notice. Service is complete upon mailing. After service, the association has 90 days in which to file an action to enforce the lien and, if the action is not filed within the 90-day period, the lien is void. However, the 90-day period shall be extended for any length of time that the association is prevented from filing its action because of an automatic stay resulting from the filing of a bankruptcy petition by the parcel owner or by any other person claiming an interest in the parcel.

(d) A release of lien may be in substantially the following form:

RELEASE OF LIEN

The undersigned lienor, in consideration of the final payment in the amount of $, hereby waives and releases its lien and right to claim a lien for unpaid assessments through (insert date) , for the following described real property:

(PARCEL NO. OR LOT AND BLOCK) OF (NAME

OF HOMEOWNERS' ASSOCIATION) , A HOMEOWNERS' ASSOCIATION AS SET FORTH IN THE HOMEOWNERS' ASSOCIATION DOCUMENTS AND THE EXHIBITS ANNEXED THERETO AND FORMING A PART THEREOF, RECORDED IN OFFICIAL RECORDS BOOK , PAGE , OF THE PUBLIC RECORDS OF COUNTY, FLORIDA.

(or insert appropriate metes and bounds description here)

(signature of witness) (signature of authorized agent)
(signature of witness)

(insert notary clause as appropriate)

(e) ~~(d)~~ If the parcel owner remains in possession of the parcel after a foreclosure judgment has been entered, the court may require the parcel owner to pay a reasonable rent for the parcel. If the parcel is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver must be paid by the party who does not prevail in the foreclosure action.

(f) ~~(e)~~ The association may purchase the parcel at the foreclosure sale and hold, lease, mortgage, or convey the parcel.

Section 5. This act shall take effect July 1, 2014.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing PCB: Civil Justice Subcommittee

Representative Spano offered the following:

Amendment

Remove lines 26-37 and insert:

association meetings, determining the number of days required for statutory notices, determining amounts due the association, collecting amounts due the association prior to the filing of a civil action, calculating the votes required for a quorum or to approve a proposition or amendment, completing forms related to the management of a community association that have been created by statute or by a state agency, drafting letters of intended action, drafting meeting notices and agendas, calculating and preparing certificates of assessments, responding to requests for an estoppel letter, negotiating monetary or performance terms of a contract subject to approval by an association, drafting pre-arbitration demands, preparing statutory

construction lien documents for association projects, coordinating or performing maintenance for real or personal property and other routine services involved in the operation of a community association, and complying with the association's governing documents and the requirements of law as necessary to perform any of the foregoing ~~and coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association~~. A person

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 14-03 Unlicensed Practice of Law
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Cary JMC	Bond MB

SUMMARY ANALYSIS

The unlicensed practice of law is prohibited in Florida. There are two means for enforcement: civil action governed by court rules and a statutory criminal penalty, a third-degree felony.

The bill amends the statutory offense to provide that certain activities do not constitute the unlicensed practice of law punishable as a felony.

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

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Florida Constitution grants the Supreme Court the "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."[1] The Florida Supreme Court regulates the unlicensed practice of law (UPL) by court rule. Chapter 10 of the Rules Regulating the Florida Bar governs the investigation and prosecution of UPL. According to the Court, "pursuant to the provisions of article V, section 15, of the Florida Constitution, the Supreme Court of Florida has inherent jurisdiction to prohibit the unlicensed practice of law."[2] The Supreme Court has delegated to the Florida Bar "the duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders."[3]

Neither court rule nor statute specifically defines the practice of law. Similarly, neither lists in general what activities constitute the unlicensed practice of law, nor activities authorized. The definition of the practice of law has developed from case law and from the few advisory opinions that examine specific businesses or professions.[4]

The seminal case regarding what is the unlicensed practice of law in Florida dates back to 1950.[5] Leading up to the decision, the Dade County Bar Association had obtained an injunction in the Circuit Court prohibiting real estate brokers or agents from drafting or filling in blank deeds, contracts, notes, leases, rental contracts, mortgages (or satisfaction of mortgages) options and other legal instruments used in the real estate business. The Supreme Court partially reversed the Circuit Court, holding that certain activities belong within the sphere of activity of a real estate broker or agent, even if that involves the broker drafting legal instruments. However, the Court also held that certain activities belong within the sphere of the lawyer, primarily the consummation of the sale through the exchange of permanent instruments. The opinion looked to the Florida Statutes in determining the scope of activities in which a real estate brokers and agents may operate.[6]

Since 1950, through case law and advisory opinions, the Court has continued to define the boundaries of the unlicensed practice of law. Restrictions based on the unlicensed practice of law may apply to many professions and businesses. For example:

- A real estate agent may fill out the court-approved residential lease form on behalf of a landlord.[7]
- A non-lawyer property manager may prepare eviction notices and uncontested residential evictions on behalf of a landlord, but may not file a complaint for eviction or motion for default in the court.[8]

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[1] Fla. Const., Art. V, Sec. 15. This section originated from the 1956 amendment to Article V of the 1885 Constitution (Article V, section 23) and provided that the Supreme Court had exclusive jurisdiction over the admission and discipline of attorneys.
[2] Bar Rule 10-1.1. *See also The Florida Bar v. Flowers*, 320 So.2d 809, 809 (Fla. 1975).
[3] Bar Rule 10-1.2.
[4] There are 9 advisory opinions covering 8 professions, the first in 1988 and the last in 1997. There are 2 pending opinions, one related to Community Association Managers (CAMs) and the other related to Medicaid Planning Activities. See http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument#FAORequestReMedicaidPlan (last accessed on January 21, 2014).
[5] *Keyes Co. v. Dade County Bar Ass'n*, 46 So.2d 605 (Fla. 1950).
[6] *Id.* at 606.
[7] *The Florida Bar re: Advisory Opinion – Nonlwayer Preparation of Residential Leases up to One Year in Duration*, 602 So.2d 914 (Fla. 1992).

- A non-lawyer may not prepare a living trust document,[9] but a non-lawyer may prepare pension plans.[10]
- A title insurance agent may prepare abstracts, deeds, mortgages and other real property transfer documents.[11]
- Bank employees prepare liens and mortgages.[12]
- Accountants advise persons on tax and business matters.[13]

In addition to the civil penalties created in the Rules, there is a statutory criminal offense for the unlicensed practice of law:[14]

> Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.[15]

Activities prohibited by this statute include taking a deposition[16] and appearing pro se on behalf of a trust.[17] According to a Florida appellate court, "the definition of the practice of law in Florida is not confined to the language in section 454.23, but, rather, is shaped by the decisional law and court rules as well as common understanding and practices."[18]

So far in Fiscal Year 2014, there have been 286 civil cases opened across the state by the Florida Bar for the unlicensed practice of law. In 2013, there were 550 cases; in 2012, there were 714 cases, and in 2011, there were 655 cases.[19] While enforcement of the unlicensed practice of law by the Florida Bar is civil in nature, the Court may find a person guilty of indirect criminal contempt, punishment for which is a fine of up to $2500 and up to 5 months imprisonment, or both.[20]

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[8] *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So.2d 485 (Fla. 1993).
[9] *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla. 1992).
[10] *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So.2d 430 (Fla. 1990).
[11] *Cooperman v. West Coast Title Co.*, 75 So.2d 818, 821 (Fla. 1954)("So we decide that what the companies do to inform themselves about the advisability of issuing a commitment and what they do to accomplish a transfer of a title or interest of such kind that a policy of title insurance is warranted are not services the performance of which amount to unauthorized practice of law.").
[12] Whether this activity is the unlicensed practice of law is currently unresolved. See *Goldberg v. Merrill Lynch Credit Corp.*, 35 So.3d 905 (Fla. 2010).
[13] There is no formal advisory opinion regarding the scope of practice of accountants and at what point an accountant may be engaging in the unlicensed practice of law.
[14] Section 454.23, F.S.
[15] A person convicted of a 3rd degree felony is eligible for a maximum sentence of 5 years imprisonment and a $5,000 fine and is also eligible to be sentenced as a habitual felony offender if the person has been convicted of two prior felonies for an offense other than the purchase or possession of a controlled substance, or if the person committed the unlicensed practice of law while serving a prison sentence or other court-ordered or lawfully imposed supervision imposed as a result of a prior felony conviction or other qualifying offense, or within 5 years of the date of the conviction of the last prior felony or other qualified offense or within 5 years of release from a prison sentence or parole or other sanction.
[16] *State v. Foster*, 674 So.2d 747 (Fla. 1st DCA 1996).
[17] *EHQF Trust v. S & A Capital Partners, Inc.*, 947 So.2d 606 (Fla. 1st DCA 2007).
[18] *Foster* at 750-51.
[19] Information provided by the Florida Bar by email to Civil Justice Committee staff. (On file with the Civil Justice Subcommittee.)
[20] Florida Bar Rule 10-7.2.(f).

There have been 14 people arrested in the last two years for the criminal unlicensed practice of law. The offense is classified as a third-degree felony, which is punishable by up to five years imprisonment and a $5,000 fine.[21]

Effect of the Bill

The bill amends s. 454.23, F.S., to better define the offense of the unlicensed practice of law by listing activities that do not constitute the unlicensed practice of law:

- Pro se representation;
- Practicing law authorized by a limited license to practice, such as pro hac vice representation;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of a lawyer in compliance with the rules of Rules of Professional Conduct;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state or federal government;
- Giving legal notice in the more and matter required by law; and
- Representation before a legislative body, committee, commission or board.

In general, these exceptions do not constitute a substantive change to existing law. Rather, this list of exceptions is a codification of existing rules, case law, and practice already recognized by the Court.

B. SECTION DIRECTORY:

Section 1 amends s. 454.23, F.S., relating to unlicensed practice of law, definitions, and penalties.

Section 2 provides an effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have 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:

The bill does not appear to have any direct economic impact on the private sector.

[21] Sections 775.082 and 775.083, F.S.

D. FISCAL COMMENTS:

A conviction under s. 454.23, F.S., may include a fine of up to $5,000. There are very few annual convictions under this statute, and since the bill codifies existing court rules and/or case law, the bill is not expected to impact the number of arrests or convictions under this statute.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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 revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article V, s. 15 of the Florida Constitution provides:

> The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

The bill does not affect civil enforcement by the Florida Bar. It will only affect the few criminal prosecutions for the unlicensed practice of law.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

PCB CJS 14-03 ORIGINAL 2014

A bill to be entitled

An act relating to the unlicensed practice of law; amending s. 454.23, F.S.; creating exceptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 454.23, Florida Statutes, is amended to read:

454.23 Unlicensed practice of law; prohibition; penalties; exceptions.—

(1) Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Notwithstanding subsection (1), the following activities are not prohibited by this section:

(a) Pro se representation by an individual;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a business or profession regulated by the state;

(f) The giving of a legal notice in the form and manner required by law; or

(g) Representation before a legislative body, committee, commission or board.

Section 2. This act shall take effect July 1, 2014.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing PCB: Civil Justice Subcommittee

Representative Hill offered the following:

Amendment

Remove lines 22-33 and insert:

activities are exempt from criminal prosecution under this section:

(a) Pro se representation by an individual;

(b) Serving as a mediator or arbitrator;

(c) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct;

(d) Providing services authorized by court rule;

(e) Acting within the lawful scope of practice of a business or profession regulated by the state;

(f) The giving of a legal notice in the form and manner required by law; however, this exception shall not apply to notices required as part of a court proceeding or required by

court rule; or

(g) Representation before a legislative body, committee, commission or board in accordance with the rules of the respective legislative body, committee, commission or board.