Florida S.B. 1196 and Condominium Assessment Collection Measures Sweeping or Sleeping?

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ARTICLE

FLORIDA S.B. 1196 AND CONDOMINIUM ASSESSMENT COLLECTION MEASURES: SWEEPING OR SLEEPING?

By Rose Brill¹

I. Introduction

The present day “perfect storm” of mortgage, financial, and credit crises has placed residential condominium associations (“associations”) in a precarious position.² The crash in home prices, slowdowns in nearly every sector of the economy, and massive job losses have pushed thousands of condominium unit owners³ into foreclosure, increasing the likelihood that assessments⁴ will go unpaid.⁵ When a unit owner stops paying assessments, the association loses its only real source of income.⁶

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³ See FLA. STAT. § 718.116(1)(b) (2010) (defining “unit owner” as a record owner of legal title to a condominium parcel).

⁴ See FLA. STAT. § 718.103 (2010). An assessment is defined as a share of the funds which are required for the payment of common expenses, which is from time to time assessed against the unit owner. Id. Common expenses include the expenses of the operation, maintenance, repair, replacement, or protection of the common elements and association property, costs of carrying out the powers and duties of the association, and any other expense, whether or not included in the foregoing, designated as common expense by this chapter, the declaration, the documents creating the association, or the bylaws. See FLA. STAT. § 718.115(1)(a) (2010). A special assessment is any assessment levied against a unit owner other than the assessment required by a budget adopted annually. Id. For the purposes of this Article, the term “assessment” will only refer to the term assessment as it is defined in the Condominium Act and does not include special assessments. For clarity, and to distinguish from special assessments as they are defined in the Florida Condominium Act this author suggests that regular periodic assessments be termed general assessments.

⁵ Pinkerton supra, note 2, at 126.

⁶ See id. (citations omitted); Laura V. Scheel, Federal Form 1120-H, 990 or 1120?, NEW ENGLAND CONDO., July 2008 (describing other sources of income such as rental income, interest as from a reserve fund, dividends, or capital gains, special use charges such as laundry or vending machines, and revenue from non-member use of association property); THE FLORIDA BAR, FLORIDA CONDOMINIUM AND COMMUNITY ASSOCIATION LAW § 16.8 (2009) [hereinafter FL. CONDO. LAW] (“It is also the general practice that approval of assessments are part of the overall budget approval process, given that assessments are usually an association’s primary, if not sole, source of income.”).
While the general rule is that unit owners are liable for assessments jointly and severally (i.e. subsequent owners are still liable for unpaid assessments), since 1991 the Florida Legislature has granted an exception (“safe harbor”) to first mortgage lenders and their assignees which have acquired units by foreclosure or deed in lieu of foreclosure.\(^7\) Once a bank has foreclosed, the unpaid assessments owed by the bank-buyer are capped at a statutorily proscribed amount.\(^8\) In many cases, this amount is \textit{less} than the past due assessment balance, given the relatively long duration of a typical foreclosure.\(^9\) And despite this exception, banks have been slow to take back units, exacerbating the problem.\(^10\) Associations must then cover the losses by, \textit{inter alia}, increasing assessments, thereby feeding the proverbial “death spiral.”\(^11\)

Also, in many cases, current collection methods are unable to make associations whole. To collect unpaid assessments associations typically: (1) foreclose on an assessment lien\(^12\) and/or

\begin{itemize}
  \item [7] See infra Part II.
  \item [8] See infra Part III(A)(ii).
  \item [9] See, e.g., Daniel Vasquez, \textit{Should Florida banks pay condo associations more money, sooner when it comes to foreclosures?}, SUN-SENTINEL, Feb. 17, 2010, at Business and Financial News Section [hereinafter Vasquez I] (“Last year the association had several units fall into bank foreclosure, including one that took 17 months to complete. Of those, state law only requires the lender to pay [the association] six months’ worth of association assessments.”).
  \item [10] See Paul Owers & Lisa J. Huriash, \textit{South Florida homeowner associations get tough collecting delinquent fees}, SUN-SENTINEL, Aug. 11, 2010, at Business and Financial News Section (“Banks often delay taking back these troubled properties to avoid having to pay past-due assessments.”).
  \item [11] See Pinkerton \textit{supra}, note 2, at 125 In the current financial crisis, condominium associations face rising numbers of delinquent member dues, increased assessments, soaring foreclosure rates, and crushing association debt. This parade of horribles creates a circular “death spiral” of dues and debt, where high delinquency in dues payment leads to increased assessments, which produces even more delinquencies.
  \item [12] In short, the assessment lien process typically works as follows: the association (1) delivers notice of its intent to file a lien to the unit owner and files a claim of lien after 30 days of such delivery, (2) accelerates all assessments
\end{itemize}
(2) the file an action for a monetary judgment. Since there is no equity in a unit that is “underwater,” foreclosing on an assessment lien in this case is futile. Monetary judgments against owners likewise prove futile since many owners in foreclosure have no other assets. Both options are costly for all parties involved. It is mitigation of this problem, the gap of uncollectible assessments resulting (1) from non-payment by unit owners (typically investor-owners) who are nevertheless collecting rents on units both approaching and in foreclosure and owed within the budget year, and (3) has one year within which it must enforce the lien. See Fla. Stat. § 718.121 (2010).

13 See Fla. Stat. § 718.116(6)(a) (2010) (“The association may bring an action in its name to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed and may also bring an action to recover a money judgment for the unpaid assessments without waiving any claim of lien.”). Other options are available to associations but are just as costly and time consuming. The association can purchase the unit as a short sale. Condo Foreclosures Present Unique Challenges and Opportunities, Oct. 21, 2010, http://www.lakesidecdc.org-condo-foreclosures-present-unique-challenges-and-opportunities.html.

The association can also consider purchasing the unit from the owner, including through what is known as a short sale, or by exercising its first right of refusal [if applicable] if the unit is offered for sale at auction. Buying the unit outright serves at least two purposes. First, it helps salvage the unit owner before excessive costs, such as interest, penalties, and legal fees, have been piled onto the mortgage, making the purchase that much more expensive. Second, it allows the association to avoid having a foreclosure in the building, which impacts the sale prospects of other unit owners and their ability to get financing for projects, as well as other costs.

Id. Another option is receivership or blanket receivership. See Fla. Stat. § 718.116(11)(e) (2010); See Bruce Rodgers, Collecting Delinquent Assessments – Why the Old Ways Won’t Work and How to Play the Association’s Cards in the Great Recession, http://www.lmfunding.com/assets/Collecting-Delinquent-Assessments-in-Todays-Market.pdf [hereinafter Rodgers I]. Many declarations of condominium allow the association to appoint a receiver for rents once a foreclosure action is pending. See id. However, it is likely that if the tenant ceases to pay rents, the owner will not pay the mortgage and a mortgage foreclosure will ensue. See id.

14 See Broderick Perkins, Underwater? Alternatives to Walking Away, REALTY TIMES, July 8, 2010, http://realtytimes.com/rtpages/20100708_underwater.htm (“Mortgages are ‘underwater’ or ‘upside down’ when the property experiences negative equity -- the mortgage is larger than the current value of the property. Negative equity is caused by a decline property value, an increase in mortgage debt or, most likely, both.”).

15 The bank can subsequently foreclose on the association. If any rent the association can make in the interim does not cover the costs and fees involved, it seems futile for an association to foreclose on its assessment lien. See Pinkerton supra, note 2, at 138 (“This [personal monetary judgment] is probably not a viable option because the prior unit owners might be judgment-proof. Even if they are not, the association will have to endure a potentially costly lawsuit for each deficiency.”).

16 See Fla. Stat. § 718.1255 (2010). The statutory pre-suit alternate dispute resolution (ADR) requirement typically for disputes contesting the authority of the board of directors to take certain measures or failure to take certain measures expressly excludes disagreements involving the levy of a fee or assessment or the collection of an assessment levied against a party. See id. (emphasis added).
(2) from the statutorily imposed “safe harbor” for bank-buyers for units which have completed foreclosure, that this Article explores.18

On July 1, 2010, the Florida Legislature enacted Senate Bill 119619 (the “2010 Legislation”) amending certain provisions of the Condominium Act20 to address the problem experienced by associations of condominium unit owners defaulting on the payment of assessments.21 It falls short, however, in many respects. Firstly, this Article will review the association’s statutory power to levy assessments and highlight problems particular to collection of past due assessments from units in foreclosure.22 Secondly, it will address important issues with the two most “contentious” provisions of the 2010 Legislation which relate to the collection of unpaid assessments: (1) a provision granting associations the power to collect rent directly from the tenants of owners who have defaulted on paying their assessments,23 and (2) a provision which allows associations the potential to collect a larger portion of past due assessments from bank-buyers.24

18 See COMM. ASSOC. LIVING STUDY COUNCIL, FINAL REPORT, at 5 (Mar. 31, 2009), available at http://www.myfloridalicense.com/dbpr/lsc/documents/CALSCFinalReportMarch312009.pdf [hereinafter FINAL REPORT] (“It is imperative associations be made whole from unpaid assessments or the spiral of accelerating foreclosures and bankruptcies will continue.”); see infra Part IV.
19 See 2010 Fla. Sess. Law Serv. 174 (West) (codified as amended in scattered sections of FLA. STAT. § 718 (2010)).
20 See FLA. STAT. § 718 (2010).
21 See id.; As evidence of the climate in which the 2010 Legislation was passed see FLA. STAT. §§ 718.701–718.708 (2010); FLA. STAT. § 718.702 (2010). The legislative intent behind the Distressed Condominium Relief Act is as follows:

The Legislature finds that individuals and entities within this state and in other states have expressed interest in purchasing unsold inventory in one or more condominium projects, but are reticent to do so because of accompanying liabilities inherited from the original developer, which are by definition imputed to the successor purchaser, including a foreclosing mortgage. This results in the potential successor purchaser having unknown and unquantifiable risks that the potential purchaser is unwilling to accept. As a result, condominium projects stagnate, leaving all parties involved at an impasse and without the ability to find a solution.

Id.
22 See infra Part II(B) & II(C).
24 See FLA. STAT. § 718.116(1)(b) (2010).
While these amendments may seem “sweeping,” their effectiveness may be undermined by a host of ambiguities and practical insignificance. This Article will propose changes to the language and content of the two provisions with the intended purpose of minimizing the uncertainty surrounding enforcement of the 2010 Legislation’s provisions, and increasing the collection of unpaid assessments. For reference, this Article divides commercial condominium owners into two owner groups: (1) homestead-owner, (2) bank-owner or bank-buyer, and (3) investor-owner.

II. Background

A. The Legislative and Economic Backdrop

One reason for today’s unpaid assessment problem dates back to the Florida Legislature’s imposition of a “safe harbor” for banks in 1991 (the “1991 Legislation”). In 1991, the Florida Legislature first eroded the concept of complete joint and several liability for unpaid assessments by limiting a bank-buyer’s “pre-certificate of title” liability to six months of unpaid assessments. This protection applied only if banks filed for foreclosure within six months of the last payment of principal and interest, as a device to encourage banks to more rapidly

See infra Part III.

See infra Part IV.

BLAKE’S LAW DICTIONARY 802 (9th ed. 2009) (defining “homestead” as the house, outbuildings and adjoining land owned and occupied by a person or family as a residence). This term will refer to an owner occupied unit.

This term will refer to first mortgagees or their assignees which forecloses or take title by deed in lieu of foreclosure.

For this Article, this term will refer to unit owners who rent or lease their units, and do not live in their unit.

See FLA. STAT. § 718.116(1)(a) (1991). It states in pertinent part:

A first mortgagee who acquires title to the unit by foreclosure or by deed in lieu of foreclosure is not liable for the share of common expenses or assessments attributable to the condominium parcel . . . if the mortgagee . . . has filed a foreclosure proceeding . . . within 6 months after the last payment of principal or interest received by the mortgagee. . . . [A]nd in no event shall the mortgagee be liable for more than 6 months of the unit’s unpaid common expenses or assessment accrued before the acquisition of title to the unit by the mortgagee.

Id.
foreclose (or accept deed in lieu of foreclosure). The introduction of this amendment shows that even historically, a protracted foreclosure process has been problematic.

A second Legislative amendment in 1992 (the “1992 Legislation”) further laid groundwork for today’s unpaid assessment problem. The 1992 Legislation introduced a “lesser of test,” which states: RELEVANT PROVISION HERE. The effect of the “lesser of” test is that it makes an extended safe harbor virtually pointless because it limits the amount of assessments to the lesser of six months of 1% of the original mortgage balance.

A final and more recent contributing factor to today’s unpaid assessment problem is the sheer increase in condominium foreclosures and resulting lag time in processing them. Florida mortgage foreclosure filings in 2008 and 2009 were 368,748 and 398,825, respectively. As of February 2010, in Miami-Dade County there were more than 115,000 open foreclosure cases with 7,000 more being filed each month. The problem for associations lies not only in the large number of units in foreclosure driving down prices for neighboring units, but in the amount

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31 NEED FN
34 See infra Section III(A)(ii).
of time it takes from foreclosure filing to completed foreclosure sale. Recent sources indicate that in Florida the average property spends 518 days in foreclosure, second only to New York’s 561 days. It is likely this average will continue to increase as a 2010 foreclosure fraud event forced major banks across the nation to slow the processing of mortgage foreclosures in Florida during a Florida State Attorney General investigation, and a 2011 downgrade of the United States debt rating by at least one rating agency has driven down confidence in the strength of the economy. Consequently, more foreclosures and longer foreclosure periods translate into more bank-buyers which are shielded by the now-extended safe harbor.

In general, the economic crisis has put a strain on all owners, resulting in more delinquencies. When a unit owner falls into foreclosure he is less likely to pay his general assessments, which are needed by his associations to pay bills to “keep the community on track.” In recent news, some unit owners in common-interest communities are taking advantage of the general lag-time in foreclosures by not paying and, in fact, saving the money that they would otherwise be paying toward their mortgages. Analogously, “free rider[]”

37 See David Streitfeld, Owners Stop Paying Mortgages, and Stop Fretting, N.Y. TIMES, June 1, 2010, at A1; Daniel Vasquez, New Florida Supreme Court rules force lenders to explain stalled condo foreclosures, SUN-SENTINEL, Feb. 12, 2010, at Business and Financial News Section [hereinafter Vasquez II] (“Not too long ago, foreclosures could take around six months, now they can take close to two years.”).
38 See Streitfeld, supra note 37, at A1; Vasquez II, supra note 37, at Business and Financial News Section (“Not too long ago, foreclosures could take around six months, now they can take close to two years.”).
   Bank owned properties make up about 40 percent of home sales in South Florida, and suspensions by JP Morgan Chase, Bank of America and GMAC could deliver a debilitating blow to that crucial segment of the embattled real estate market. . . . There are mounting reports of approved foreclosure sales being stopped pre-closing, and buyers being left in limbo as banks try to deal with exposed “robo-signers” and unverified affidavits.

Id.
40 NEED SOURCE
41 See Vasquez I, supra note 9, at Business and Financial News Section.
42 See Streitfeld, supra note 37, at A1, for a discussion regarding a trend of “free rid[ing]” among homeowners in foreclosure. Given the lag time in the foreclosure process, the article highlights the fact that some homeowners in foreclosure are no longer attempting to make any payments, and instead are “free riders.” See id. It additionally
condominium owners facing foreclosure would likewise have no incentive to continue paying assessments.\textsuperscript{43} In fact, one practitioner has noted that the incentive to pay or not pay assessments may be related to a unit owner’s ownership status either as a homesteaded owner or investor-owner.\textsuperscript{44} Given the present day perfect storm of mortgage, financial, and credit crises, as well as legislated bank incentives such as the safe harbor provision, unpaid assessments are translating into ever increasing assessments for remaining unit owners, thereby fueling a death spiral of delinquency and debt.\textsuperscript{45} Note to sourcer: I can take out either of these last two paragraphs if the paper needs to be shortened. They address social factors, rather than legal factors.

B. The Associations’ Power to Levy and Collect Assessments Before Senate Bill 1196

The condominium is a “creature[] of statute.”\textsuperscript{46} As such, the Florida Condominium Act has recognized the condominium form of ownership since 1963.\textsuperscript{47} The Condominium Act grants the association the power to make and collect assessments\textsuperscript{48} and special assessments.\textsuperscript{49} notes the hard-to-swallow fact that, “[i]n Florida, the average property spends 518 days in foreclosure, second only to New York’s 561 days.” \textit{See id.} “Defense attorneys stress they can keep this number high.” \textit{See id.}

\textsuperscript{43} \textit{See}, e.g., Marie Auger, \textit{Keeping on Their Toes}, NEW ENGLAND CONDO., June 2008, at 127 (“[I]f unit owners are not paying their mortgage they’re probably not paying their condo fees either.”); Jasmine Martirossian, \textit{Community Perspectives: Top Five “Behavioral Traps” That Lead To Legal Problems}, NEW ENGLAND CONDO., June 2008, at 132 (noting that refusal to pay condominium assessments has been viewed as one “behavioral trap” in which homeowners turn a small financial molehill into a mountain by refusing to pay).

\textsuperscript{44} \textit{See Rodgers I, supra} note 13.

The [homesteaded] owner faces significant “moving and social costs if he fails to pay assessments and falls into a lien and foreclosure situation. This type of owner will pay assessments in full or enter into a payment plan prior to the filing of a lien 57% of the time according to [LM Funding] statistics. On the other hand, investor owned units with a mortgage in excess of their value present two options: (1) where the unit is unoccupied investor owners face no social stigma or additional cost even in a lien foreclosure but (2) where the owner with a tenant may be earning enough rent to keep his underwater mortgage current but not enough to pay his association dues, [he may be more likely to forgo his association dues].

\textit{Id.}

\textsuperscript{45} \textit{See} Pinkerton, \textit{supra} note 2, at 125.


\textsuperscript{47} \textit{See FLA. STAT.} § 718.102 (2010); see also \textit{DIV. OF FLA. CONDO., TIMESHARES AND MOBILE HOMES, DEP’T OF BUS. AND PROF’L REGULATION, CONDOMINIUM LIVING IN FLORIDA, July 2010, http://www.myfloridalicense.com/dbpr/lsc/documents/CondominiumLivingMaster06092010.pdf (“Condominium ownership is a concept that has existed in Florida since 1963.”).}

\textsuperscript{48} \textit{See} FLA. STAT. § 718.111(4) (2010) (granting the association the power to make and collect assessments and to lease, maintain repair, and replace the common elements or association property).
Conversely, the duty to pay assessments is conditioned solely upon “whether the unit owner holds title . . . and whether the assessment conforms to the declaration . . . and bylaws of the association.”

Assuming these conditions are met and a unit owner does not pay his or her assessments, the association must file a claim of lien on each condominium parcel to secure payment of past due, and to a limited extent, accelerated future assessments. To be effective, the lien has to be recorded and enforced within one year. Restated, as to the first mortgage of record, the lien is effective only after the association records a claim of lien in the public records, and it has up to one year to take action to enforce or collect on the lien.

In some cases, however, an association’s efforts to enforce assessment liens do not enable it to collect all past due assessments. Florida is a “superlien” state, which essentially gives associations, to the extent of six months assessments under the 1991 Legislation and its progeny, a limited superior lien over mortgage liens collectable by bank-buyers at foreclosure.

If a unit is sold to a third party, then the lien attaches to the unit and runs with the land, and any

49 See § 718.111(4) (granting the association the power to levy and collect special assessments through a vote of the majority of unit owners); FLA. STAT. § 718.1265(k)(1) (2010) (granting the association the power to levy and collect special assessments without a vote in emergencies to preserve health or safety or to mitigate further damage in the event of a declared disaster).

50 Ocean Trail Unit Owners Ass’n v. Mead, 650 So. 2d 4, 7 (Fla. 1994) cited in Westwood Cmty. Two Ass’n v. Barbee, 266 B.R. 223, 227–28 (S.D. Fla. 2001) (noting that the association could levy a special assessment to satisfy a judgment brought against it for violations of Federal and Florida Fair Housing Acts).

51 See Rones v. Charlisa, Inc., 948 So.2d 878 (Fla. 4th DCA 2007) (noting procedures to accelerate, if any, stated in the declaration or bylaws should be followed); FLA. STAT. § 718.116(5)(a) (2010); FLA. STAT. § 718.112(2)(g) (2010). Similar to the acceleration clause in mortgage documents, the Condominium Act provides condominium associations the power to accelerate the assessments owed by a delinquent owner in payment of common expenses including all amounts due for the remainder of the budget year in which the lien was filed. See id. See Jan Henkel & Garry Seltzer, Acceleration Clauses in Mortgages: Misuse in Period of Tight Money, AM. BUS. L.J. 441, 441 (2008) (“[A]n acceleration provision is a term which permits the mortgagee-lender to call in the outstanding indebtedness upon the happening of a specified contingency.”).

52 See FLA. STAT. § 718.116(5)(b).

53 See infra Part III(A)(ii).

54 See FLA. STAT. § 718.116(5)(b) (2010).

55 See infra Part III(A)(ii).

subsequent owner is jointly and severally liable with the previous owner for all back assessments. Subsequent owner is jointly and severally liable with the previous owner for all back assessments.57 There presumably is no “collection gap” in this scenario because all assessments are accounted for and payable by either the previous owner or new owner.58 In other words, successor purchasers are liable for all past due assessments, or the lien will otherwise be satisfied upon the unit’s sale.59

But the scenario is different if there is a first mortgage on the unit and a bank-buyer forecloses on its security interest. Bank-buyers are insulated from liability for unlimited past due assessments by the safe harbor. As discussed below, even though the 2010 Legislation has extended the safe harbor from six to twelve months, increasing a bank-buyer’s potential liability by six additional months, the protracted duration of foreclosures in Florida is still causing a “collection gap” of uncollectible assessments (i.e. the time it takes to complete foreclosure is typically longer than twelve months).60

C. Collection Problems Particular to Condominium Units in Mortgage Foreclosure

The unpaid assessment problem is exacerbated by delayed mortgage foreclosures. While, some first mortgage lenders are stepping in and paying past due assessments to protect their position, the more common scenario is that they are not. Since banks are not required to pay past-due assessments during the foreclosure process, they often delay taking back troubled units,

57 See A & P Investment Group, Inc. v. Circle Property Owners Ass’n, Inc., 741 So.2d 1139 (Fla. 4th DCA 1998) (finding that even though the association's authority to impose an assessment was unrecorded, a buyer's notice of the previous unrecorded agreement obligating the prior property owner to pay expenses would be binding on the buyer.); § 718.116(1)(a) (“[A] unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. This liability is without prejudice to any right the owner may have to recover from the previous owner the amount paid by the owner.”) (emphasis added).
58 See § 718.116(1)(a).
59 See § 718.116(1)(a).
60 See infra Part II(C).
61 See, e.g., Auger, supra note 43; Ann Fisher, Condo associations want plan to make owners pay, THE COLUMBUS DISPATCH.COM, July 5, 2009, http://www.dispatch.com/live/content/local_news/stories/2009/07/05/condofees.ART_ART_07-05-09_B1_78E CMU6.html (“[A]t least 14 states have enacted so-called "superlien" laws that would ensure that up to six months of association fees are paid before all other liens are settled in a foreclosure.”).
even canceling foreclosures at the last minute to avoid having to pay past-due assessments.\(^\text{62}\) Even banks that have completed the foreclosure process are avoiding taking record title to avoid assuming the legal duty to pay assessments.\(^\text{63}\) The problem with this situation is that every month of delay by the bank in its foreclosure process typically turns into an additional month of bad debt to the association, which then must be paid “unfairly” by the existing owners in the form of increased annual assessments.\(^\text{64}\)

The unpaid assessment problem cannot be insured away. Insurance, other than self-insurance in the form of a sinking fund, for the risk of special assessments resulting from budget shortfalls is currently non-existent.\(^\text{65}\) If associations can shore up their unpaid assessments, even in part, by collecting from the tenants of delinquent owners, this will reduce the need for imposing special assessments and thereby decrease the “unknown and unquantifiable risks” of purchasing units.\(^\text{66}\)

\(^{62}\) See Owers & Huriash, supra note 10, at Business and Financial News Section (“Banks often delay taking back these troubled properties to avoid having to pay past-due assessments.”); Vasquez I, supra note 9, at Business and Financial News Section. (defending the delay in foreclosures, “[b]anks contend that they must balance pressures to foreclose on a unit with helping homeowners stay in their homes.”); Vasquez II, supra note 37, at Business and Financial News Section (“Not too long ago, foreclosures could take around six months, now they can take close to two years.”).

\(^{63}\) Telephone Interview with Bruce Rodgers, Esq., Founder, Business Law Group, P.A., (Sept. 12, 2010); see Rodgers I, supra note 13 (“[A]ssociations commonly face mortgage foreclosures that drag on without resolution or payment of assessments sometimes even after certificate of title has been issued to the mortgagee.”).

\(^{64}\) See Owers & Huriash, supra note 10, at Business and Financial News Section.

\(^{65}\) STAFF OF FLA. S. COMM. ON THE JUDICIARY, BILL ANALYSIS AND FISCAL IMPACT STATEMENT: REGARDING SENATE BILLS 1196 AND 1222, Apr. 2010, available at http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s1196.ju.pdf. As further support, the Florida Senate Committee Report has revealed the following:

[T]he Florida Insurance Code does not define the term ‘special assessment coverage.’ [However,] [i]n a letter to the OIR Commissioner, Senator Jones (a sponsor of the 2008 legislation) stated that the use of the term “special assessment” had caused some confusion and that it was the intent of the Legislature that this term only apply to assessments for loss, as opposed to assessments for routine maintenance and upkeep, such as painting and repaving. It was not the intent of the sponsor to create a new liability for assessments that were not triggered by loss. See Letter from Senator Jones to Commissioner McCarty (September 8, 2008) (on file with the Senate Banking and Insurance Committee).

\(^{66}\) See Assessment Lien Enforcement, supra note 11 (“Since FHA, Fannie Mae, and Freddie Mac require a delinquency rate of less than 15% in order to write a purchase money mortgage on a condominium property, the condominium market has entered into a “death spiral.”) (emphasis added).
The legal community has responded through creative lawyering, judicial sanctions, and the legislative response (that is subject of this Article). While associations have ultimately failed in their attempt to invoke the law of equity to compel banks to either proceed to foreclosure or pay the secured unit’s share of assessments, creative lawyering at one Miami firm has essentially brought about a more speedy foreclosure process, dubbed “reverse foreclosure,” or the assignment of legal title to banks at the foreclosure hearing. In addition, the judicial response has taken the form of a recently enacted amendment from the Florida Supreme Court to the Florida Rules of Civil Procedure and its related forms, requiring banks to file a motion with the court to cancel and reschedule a foreclosure sale as opposed to cancel and postpone

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67 See Vasquez I, supra note 9, at Business and Financial News Section. In response to last minute canceling, the Florida Supreme Court recently issued a ruling requiring lenders to fill out a form explaining why any “last minute” foreclosure sales are canceled and directs courts to set new sale dates rather than allow lenders to keep properties in foreclosure limbo. See id.

68 See U.S. Bank Nat’l Ass’n ex rel. Harborview 2005-10 Trust Fund v. Tadmore, 23 So. 3d 822 (Fla. 3d DCA 2009). The Court overturned an order giving the bank an ultimatum to “diligently proceed with the [instant] pending foreclosure action . . . within thirty days” or pay monthly maintenance fees on the condominium unit in foreclosure. See id. The Court categorized this order as an injunction unavailable to claimants in the instant case. See id. It cited FLA. STAT. § 718.116(1)(b) (2009) which conditioned payment of assessments by banks on foreclosure to first mortgagees once they acquire title, but not before. See id. See Owers & Huriash, supra note 10, at Business and Financial News Section. Lawyers representing associations have gotten savvy, even developing a new legal strategy dubbed “reverse foreclosure,” which forces lenders to seize homes more quickly than they otherwise would. See id. The strategy, used first by the Association Law Group of Miami, works as follows:

The association, which already had taken title when the owner stopped paying fees, asked a judge to assign a certificate of title to the lender on the same day as the hearing. The judge granted the request, making the bank the legal owner. And with that came the responsibility of paying association fees.

Id.
foreclosure sales indefinitely. The legislative response has taken the form of an amendment of the Condominium Act as discussed infra.

III. Analysis

A. The Associations’ Power to Levy and Collect Assessments After Senate Bill 1196: Two Amendments

After the passage of Senate Bill 1196, associations seemingly gained two additional vehicles to collect unpaid assessments: (1) as rent from tenants of delinquent investor-owners, and (2) as an increase in the number of months of past due assessments potentially owed by bank-buyers. However, a closer analysis of the measures may leave more questions than answers. An examination of the 2010 Legislation’s two “contentious” provisions now follows.

(i) Fla. Stat. § 718.116(11) - A New Provision Allowing Associations to Collect Rents From Tenants of Delinquent Unit Owners

There are thousands of condominium owners in Florida who are collecting rent without paying assessments to their associations.” The Florida Legislature has acknowledged the inequity of a system which, absent a court order, has permitted unit owners to collect rent from

69 See In re Amendments to the Fla. Rules of Civil Procedure – Form 1.996 (Final Judgment of Foreclosure), 35 Fla. L. Weekly S 97 (2010). As justification for this new procedure, the Task Force on Residential Mortgage Foreclosure Cases charged with drafting the amendment stated in its petition: ‘
Currently, many foreclosure sales set by the final judgment and handled by the clerks of court are the subject of vague last-minute motions to reset sales without giving any specific information as to why the sale is being reset. It is important to know why sales are being reset so as to determine when they can properly be reset, or whether the sales process is being abused. . . . Again, this is designed at promoting effective case management and keeping properties out of extended limbo between final judgment and sale.

Id. (citations omitted).

70 See infra Part III.

71 See infra Part III(A)(i) & III(A)(ii).

72 Analysis of this provision assumes that rental of a unit is permitted in the condominium documents and that all the required paperwork to rent a unit is on file with the association, as each condominium may require (e.g. this provision is not analyzed with respect to undocumented rentals or prohibited rentals such as in some 55+ condominiums).

tenants while simultaneously defaulting on payment of assessments to associations. Prior to the passage of the 2011 Legislation, associations addressed this problem by collecting rents from the tenants of delinquent unit owners only if they had included a rent pay over or assignment-of-rents provision in the association’s governing documents (or had amended their condominium documents to include such provision). The new amendment codifies this power and reads, in part, as follows:

If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay the future monetary obligations related to the condominium unit to the association, and the tenant must make such payment. The demand is continuing in nature and, upon demand, the tenant must pay the monetary obligations to the association until the association releases the tenant or the tenant discontinues tenancy in the unit. The association must mail written notice to the unit owner of the association’s demand that the tenant make payments to the association. The association shall, upon request, provide the tenant with written receipts for payments made. A tenant who acts in good faith

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74 S. 2458, 118th Leg., (Fla. 2010) (withdrawn) [hereinafter Legislative Intent]. Even though this bill was ultimately withdrawn, the following language demonstrates the Florida Legislature’s consideration of the unpaid assessments problem:

[A] portion of the rent paid by a tenant in a condominium unit equitably belongs to the condominium association to pay for services provided by the association. The Legislature further finds that it is inequitable for a unit owner to receive the full rent from leasing a condominium unit while not paying assessments to the condominium association. The Legislature finds that it is necessary to the financial well-being of condominium associations to provide a means by which a condominium association may directly collect assessments from a tenant when a landlord fails to pay such assessments.

Id. See also Fla. Stat. § 697.07(4) (2010).

75 Black’s Law Dictionary 138 (9th ed. 2009) (defining “assignment-of-rents clause” as a mortgage provision or separate agreement that entitles the lender to collect rents from the mortgaged premises if the borrower defaults). However in this case, the assignment-of-rents provisions would grant the association the power to collect rents if the unit owner has rented his unit and defaults on payment of assessments. See id. (by analogy).

76 See Assessment Lien Enforcement, supra note 11.
in response to a written demand from an association is immune from any claim from the unit owner.\textsuperscript{77}

On its face, the provision seems straightforward: the association makes a demand from the tenant of a delinquent owner and the demand continues until the association says “stop” (or the tenant moves out).\textsuperscript{78} The significance of this amendment is that it allows an association to collect monies from tenants of delinquent investor-owners absent such a provision in the associations’ condominium documents.\textsuperscript{79} Practitioners have already revealed problems with the language and practical application of these amendments.\textsuperscript{80}

\textit{Issue #1: The law is not clear on exactly how associations are to apply the demand payments – retrospectively or prospectively}

Is the demand payment applied to latest or most recent delinquent assessments first?\textsuperscript{81}

The ambiguity of the phrase “the tenant pay[s] subsequent rental payments related to the

\textsuperscript{77} See § 718.116 (11) (emphasis added). The Florida Statute, subsec. 11, continues as follows:

(A) If the tenant prepaid rent to the unit owner before receiving the demand from the association and provides written evidence of paying the rent to the association within 14 days after receiving the demand, the tenant shall receive credit for the prepaid rent for the applicable period and must make any subsequent rental payments to the association to be credited against the monetary obligations of the unit owner to the association. (b) The tenant is not liable for increases in the amount of the monetary obligations due unless the tenant was notified in writing of the increase at least 10 days before the date the rent is due. The liability of the tenant may not exceed the amount due from the tenant to the tenant's landlord. The tenant's landlord shall provide the tenant a credit against rents due to the unit owner in the amount of monies paid to the association under this section. (c) The association may issue notices under § 83.56 and may sue for eviction under §§ 83.59-83.625 as if the association were a landlord under part II of chapter 83 if the tenant fails to pay a required payment to the association. However, the association is not otherwise considered a landlord under chapter 83 and specifically has no duties under § 83.51. (d) The tenant does not, by virtue of payment of monetary obligations to the association, have any of the rights of a unit owner to vote in any election or to examine the books and records of the association. (e) A court may supersede the effect of this subsection by appointing a receiver.

\textsuperscript{78} See infra Part III(A)(i)(Issues 1–4).

\textsuperscript{79} See Florida Stat. § 718.116(11) (2010). However, the 2010 Legislation does not foreclose the association’s ability to file and foreclose on assessment liens, but provides associations with an additional collection mechanism. See id. (“If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay the future monetary obligations related to the condominium unit.”).

\textsuperscript{80} See infra Part III(A)(i)(Issues 1–4).

\textsuperscript{81} See David Fletcher, Florida Distressed Condominium Relief Act, REALTY TIMES, July 2010, http://realtytimes.com/rtpages/20100708_reliefact.htm (“Tenants are responsible for the monthly association fee, but
condominium unit” begs the question whether the rent collected, or portion thereof (the “demand payment”), 82 is to be applied retrospectively to the unit owner’s accumulated past due assessments, or prospectively to all past due assessments going forward. 83

To analyze the Florida Legislature’s intent we start with the “plain meaning rule.” 84 The plain meaning follows here: (1) that “the tenant [must] pay” clearly means that whatever the amount is, the tenant is responsible for paying the amount. Florida Legislative history points toward an interpretation which is most beneficial to associations in applying the demand payment to oldest debts first. 85 The Legislature has found that a portion of the rent paid by a tenant in a condominium unit equitably belongs to the condominium association to pay for services provided by the association. 86 Also, since existing law requires that payments received

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83 See, e.g., Rodgers II, supra note 76, at 86.

The [provision] has some conflicting language as to how much rent an association may collect. Specifically, the [provision] states ‘the association may make a written demand that the tenant pay the future monetary obligations related to the condominium unit to the association.’ Does this mean the tenant pays only future assessments owed or all rents owned by the tenant?

Id. (quoting Fla. Stat. § 718.303 (2010)). One practitioner has concluded as follows:

Until this issue is addressed [he is] seeking all past due balances from the tenant but there is a possibility that a court could determine that in the future an [a]ssociation may only collect from the tenant the current [a]ssessment from the rent that is being paid.


One issue which is already being heavily debated is whether the statute’s statement that the tenant must “pay the future monetary obligations” related to the unit means only assessments and obligations that accrue after the association demands the rent, and not past-due obligations. Such a restrictive interpretation would certainly blunt the effectiveness of the new law.

Id.
84 See St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982) (“While legislative intent controls construction of statutes in Florida . . . that intent is determined primarily from the language of the statute. . . . The plain meaning of the statutory language is the first consideration.”) (citations omitted); Robert M. Rhodes & Susan Seereiter, The Search for Intent: Aids to Statutory Construction in Florida – An Update, 13 Fla. St. U.L. REV. 485, 486 (1985) (“The cardinal rule of interpretation is that ‘courts will look to legislative history only to resolve ambiguity in the statute.’ This principle, known as the ‘plain meaning rule,’ requires judicial determination of statutory ambiguity as a prerequisite for judicial interpretation.”) (citing Dep’t of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983)).
85 See Legislative Intent, supra note 74.

Id.
86 See id.
by the association be applied to oldest debts first, and keeping in mind that statutes are supposed to be read in harmony with each other, one would argue that the association may justly demand receipt of all rents until the unit’s account has brought current.\textsuperscript{87} Therefore, the most appropriate view is that the tenant’s subsequent rental payments be applied to the latest delinquent assessments first.

\textbf{Issue \#2: Associations cannot re-rent after eviction}\textsuperscript{88}

While the association may sue for eviction under Florida Statutes §§ 83.59-83.625 as if the association were the landlord if the tenant fails to pay a required payment to the association, the 2010 Legislation does not grant the association the power to re-rent the unit.\textsuperscript{89} Evicting the tenant thereby deprives the unit owner of rental income, presumably forcing the unit owner into mortgage foreclosure. One practitioner noted that “[w]ithout a paying tenant, the unit will likely slip into foreclosure and remain empty and non-paying for a year or more.”\textsuperscript{90} Other practitioners caution that this practice would only “hurt the association financially.”\textsuperscript{91}

\textbf{Issue \#3: Implications of the Fair Debt Collection Practices Act}

The final issue with respect to this “contentious” provision is the possible violation of the federal Fair Debt Collection Practices Act (the “FDCPA”)\textsuperscript{92} and the Florida “Little FDCPA.”\textsuperscript{93} The amendment requires that the association notify the tenant, a third party to the debt that his

\textsuperscript{87} Adams, \textit{supra} note 83, at Columnist Section.

\textsuperscript{88} See id.

\textsuperscript{89} See id.

\textsuperscript{90} Id.

\textsuperscript{91} See Rodgers II, \textit{supra} note 76, at 87.

\textsuperscript{92} See 15 U.S.C. § 1692 \textit{et seq.} (2010) [hereinafter FDCPA]; See Rodgers II, \textit{supra} note 76, at 86 (“Put simply, the FDCPA prohibits a creditor from discussing a consumer’s debt with a third party. In order to collect rents from a tenant, the association has to notify the tenant that the unit owner has an unpaid debt.”).

\textsuperscript{93} See Fla. Stat. § 559.55 \textit{et seq.} (2010).
landlord has failed to pay assessments to the association as a prerequisite to collecting demand payments. Therefore, it is likely that there is a FDCPA violation with requesting tenants to remit their rent payments, or portions thereof, to the association.

The FDCPA has been amended to include within its regulatory scope provisions governing collection of consumer debts. For these debt collection laws to apply to community association assessments, the assessments must be “primarily for personal, family, or household purposes.” As long as a transaction creates an obligation to pay, a debt is created for purposes of the FDCPA. However, federal appellate courts have been divided on the issue of whether community association assessments are a debt subject to the FDCPA.

In *Ladick v. Van Gemert*, the 10th Circuit Court of Appeals found that although the assessment at issue was used to maintain and repair the common area, it nevertheless had a primarily personal, family, or household purpose. Therefore, this majority view supports the conclusion that assessments of units which are owner occupied (homesteaded) are debts within the meaning of the FDCPA. But it is unlikely that a FDCPA violation allegation would be raised in an owner-occupied context, but in investor-owned context. There is case law which

94 See § 718.116(11).
95 See FL. CONDO. LAW, supra note 6, at § 16.20.
96 15 U.S.C. § 1692(a)(5) (2010). Under the FDCPA, a “debt” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. Id.
97 See Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) cited in Agan v. Katzman & Korr, P.A., 2004 U.S. Dist. LEXIS 4158 (S.D. Fla. 2004) (citing FLA. STAT. § 559.552 which provides that in the event of an inconsistency between the FDCPA and FCCPA, the provision which is more protective of the consumer or debtor shall prevail). That statute also casts doubt on the continued viability of the decision in Bryan v. Clayton, 698 So. 2d 1236 (Fla. 5th DCA 1997) which held that assessments were not debts within the meaning of the FDCPA. See id.
98 See FL. CONDO. LAW, supra note 6.
99 See Ladick v. Van Gemert, 146 F.3d 1205, 1206–07 (10th Cir. 1998) (holding that a condominium assessment constituted “a debt” within the meaning of the FDCPA and qualified as a debt with respect to “a transaction” following a Seventh Circuit Court of Appeals reasoning that the obligation to pay homeowners association fees based on a covenant running with the property constituted a “transaction” within the meaning of the FDCPA, and that although the assessment at issue there was used to maintain and repair the common area, it nevertheless was a primarily personal, family, or household purpose).
100 See Condominium Law and Practice: Forms § 45.15 (MB) (2010) (“[I]t appears that the majority opinion is that condominium assessments are debt under the FDCPA.”).
seems to indicate that unpaid assessments will not qualify as consumer debt under the FDCPA if
the assessments are imposed on units held for investment.\textsuperscript{101} This makes sense because the debt
is not longer levied against a unit that serves the “primarily personal, family, or household
purpose” of the unit owner, but of a third party, and the unit is serving as a commercial
investment.

\textbf{RECOMMENDATIONS}

As to Issue 1 — ambiguity — one seemingly simple solution is to clearly state within the
language of the statute that the demand payment is to be applied to latest debts first. The 2011
“glitch bill” H.B. 1195 did not resolve the issue relating to the priority of payment of outstanding
obligations.\textsuperscript{102} Also, it seems that if a bank-buyer is “on the hook” for the latest twelve months
general assessments, it would be futile to extinguish these debts first.

As to Issue 2 — re-renting — one solution would be to allow associations to re-rent the
unit after evicting a delinquent owner’s tenant. As mentioned supra, the association can request
appointment of a receiver to rent units.\textsuperscript{103} The request must go through the court system.\textsuperscript{104} The
Florida Legislature could have provided that in addition to the powers given to associations to
collect rent (demand payments) and evict tenants, that it could have also reserved the right for
associations to re-rent the units upon eviction without going through the costly and lengthy court
system. If the associations are given the power to re-rent units themselves, this would allow for
associations to collect their demand payments from delinquent units, and satisfy the unit’s
outstanding obligation.

\textsuperscript{101}See \textit{id.}; Baird v. ASA Collections, 910 N.E.2d 780, 787 (Ind. Ct. App. 2009).
\textsuperscript{102}See \textit{e.g.} H.B. 1195, 2011 Leg., 413 Sess. (Fla. 2011) (changing the word “monetary obligation” to “subsequent
rental payments”).
\textsuperscript{103}See supra note 11.
\textsuperscript{104}See supra note 11.
As to Issue 3 — the Fair Debt Collection Practices Act — this is a harder issue to resolve. Practitioners are trying to get around this potential violation by purposely excluding any mention in the demand letter that the unit owner has not paid his/her assessments or that the demand payment would be applied to pay off a delinquency. However, given the obvious inference that can be drawn from the receipt of a demand letter it is just a matter of time until a decision is rendered which declares this practice equally in violation of the FDCPA.

One existing solution is to go through the court system and have a court-appointed receiver\(^\text{105}\) collect rents from units in assessment lien foreclosure, as was the original procedure and is still an available, although seldom used, option.\(^\text{106}\) As we saw in the re-renting scenario, requiring this, though, would seemingly negate the speed and cost savings of bypassing the courts and collecting directly from the tenant. A second solution may be a structural change to how rents are collected. In order to prevent the tenant, a third party to the unpaid assessment, from knowing of the debt of his landlord the tenant can pay a “clearinghouse” which would remit the rent to the unit owner upon satisfaction of assessments. The clearinghouse can be as simple as the association itself, or the association’s management company. In this view, there would be no substantive or noticeable change in how rents are collected, but would operate “behind the scenes.” Therefore, if the tenant’s rent is applied to pay off assessments, the tenant would never know. This practice would presumably not violate the FDCPA because it will avoid any disclosure of the unit owner’s unpaid assessments to the tenant. The only problem this author

\(^{105}\) See Rodgers I, supra note 13.

\(^{106}\) E-mail from Bruce Rodgers, Esq., Founder, Business Law Group, P.A., (Nov. 12, 2010, 11:28 EST) (on file with author) (“[Florida Statutes § 718.116|11(e) is there as a place holder for the old way to collect rents where we had to foreclose and appoint a receiver. The only time I have seen it used lately is where the bank and the association are both claiming the rents.”).
can foresee with this collection method is that unit owners may claim property rights in the rent itself and argue impediment of his/her ability to privately contract.\textsuperscript{107}

\textbf{(ii) Fla. Stat. § 718.116(1)(b) – The Amendment of the “Safe Harbor Provision”}

The second “contentious” amendment that is subject of this Article increases the cap on the number of months of past unpaid assessments a bank-buyer must pay at foreclosure from six to twelve months.\textsuperscript{108} Prior to the amendment, associations could recover the lesser of only six months worth of assessments or 1\% of the original mortgage amount at a foreclosure sale (or deed in lieu of foreclosure).\textsuperscript{109} The purpose of the subject amendment was to remedy the problem that is under-funded association budgets by extending the number of months a bank-buyer is liable for a unit’s “unpaid common expenses\textsuperscript{110} and regular periodic assessments”\textsuperscript{111} from six to twelve (the “safe harbor provision.”).\textsuperscript{112} As amended, it reads as follows:

\begin{quote}
The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee’s acquisition of title is limited to the lesser of: (1) The unit’s unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or (2) One percent of the original mortgage debt.\textsuperscript{113}
\end{quote}

\textsuperscript{107} The author does not attempt to examine this argument, but only raises it as a consideration.
\textsuperscript{108} See § 718.116(1)(b).
\textsuperscript{109} See id.; see supra Part II(B).
\textsuperscript{110} See Fla. Stat. § 718.103(9) (2010) (defining common expenses as all expenses properly incurred by the association in the performance of its duties, including expenses specified in Fla. Stat. § 718.115).
\textsuperscript{111} See § 718.116(1)(b).
\textsuperscript{112} See Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass’n, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005) (noting that section 718.116(1)(b) is a safe harbor provision that “provides a statutory cap on liability of foreclosing mortgagees for unpaid condominium assessments that become due prior to the first mortgagee’s acquisition of title pursuant to a foreclosure proceeding.”).
\textsuperscript{113} See § 718.116(1)(b). It also continues:

The provisions of this paragraph [referring to the second option, “one percent of the original mortgage debt”] apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location which was known to or reasonably discoverable by the mortgagee.

\textit{Id.;} See Fla. Stat. § 718.116(1)(e) (2010) for an exception to the general amended law exempting first mortgagees and their successor or assignees from liability for all unpaid assessments if first mortgage was recorded prior to April 1, 1992.
While this *seems* to increase the liability of bank-owners who purchase condominiums at foreclosure sales or by deed in lieu of foreclosure, a closer look at the language indicates that a bank-buyer is limited to the *lesser of* twelve months’ back payments or 1% of the original mortgage debt (the “lesser of calculation”). I argue here that the 1% will almost always be lower. For example, assuming that a condominium unit’s initial mortgage balance was $300,000. Then, 1% of this amount is $3,000. Assume also that the monthly general assessment is $500. Twelve months multiplied by $500 is $6,000. A “lesser of calculation” would allow associations to recoup the lesser of $3,000 or $6,000, which in this case would be the 1% cap, of $3,000. The author hypothesizes that only associations with units with large mortgage original principal balances will be able to benefit from the increased time period from six to twelve months and that the remaining and majority of associations are able to collect only up to 1% of the unit’s principal mortgage balance. A farther reaching amendment would have been to increase the 1% “floor” to 2%, for example. Regardless, assuming that we are not caught in the “lesser of trap” and that it would matter, the Article will focus on issues with the new extended the safe harbor provision which increased from six to twelve the number of months owed by bank-buyers at foreclosure.

**Issue #1: Retroactivity**

It is unclear whether this amendment only affects mortgages entered into after July 1, 2010 (the bill’s effective date), or whether it affects mortgages which were in existence prior to the effective date as well (e.g., whether mortgages existing as of the effective date carry with them the extended safe harbor). There is a general presumption against retroactive application

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114 See § 718.116(1)(b).
115 See Adams, *supra* note 83, at Columnist Section (“There are a number of questions that remain unanswered about this new law. For example, does the law only affect mortgages entered into after July 1, 2010, or does it affect existing mortgages as well?”).
in the absence of an express manifestation of legislative intent to the contrary, especially where
the statute takes away *vested* rights. However, a retrospective provision of a legislative act is
not necessarily invalid.

Firstly, the amendment does not expressly indicate that it is retroactive, therefore we
begin with a presumption against retroactivity. However, an argument for retroactivity can
and should be made. The principle argument is that the amended provision does not “take away
vested rights” because (1) a mortgagee who has initiated but not completed a foreclosure sale has
no vested right in the unit yet and as against an adverse change of law and (2) in the alternative,
the amendment is either a procedural or remedial in nature, such that it is not substantive. The
two arguments are (1) either that the amended provision is *retrospective*, and applies to
mortgages which were originated prior to the effective date but which have completed
foreclosure after effective date or (2) the amended provision is *prospective*, and applies only
mortgages originated after the effective date.

**Argument for retroactivity.** First, banks which delay foreclosure should bear the risk of
adverse changes in the law. Secondly, if we classify the completion of foreclosure as the “injury”
then as long as the injury is felt after the effective date, the twelve month safe harbor should
apply. In *Recon Paving*, a medical benefits case, the 1982 increase in permanent impairment

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116 E.g., Island Manor Apartments of Marco Island, Inc. v. Div. of Fla. Land Sales, Condominiums &
Mobile Homes, 515 So.2d 1327 (Fla. 2d DCA 1987) (retroactive application of Condominium Act would
unconstitutionally impair vested contractual rights); see Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985)
(holding that in the absence of an explicit statement of legislative intent for retroactive application, a
statutory enactment is to be given prospective effect only) (citations omitted); Foley v. Morris, 339 So.2d
215 (Fla. 1976).
    A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases
wherein vested rights are adversely affected or destroyed or when a new obligation or duty is
created or imposed, or an additional disability is established, in connection with transactions or
considerations previously had or expiated.
118 See Fla. STAT. § 718.116 (2010).
119 Cohn v. The Grand Condo. Assoc., Inc. 36 Fla. L. Weekly S 129 (Fla. 2011)
120 See Recon Paving, Inc. v. Cook, 439 So. 2d 1019, 1020 (Fla. 1st DCA 1983).
benefits for injuries of a certain type were not retroactive to 1979 as assumed, but was prospective only, applying only to *injuries occurring after the effective date of the act, May 1, 1982.* Analogously, for associations, the “injury” giving rise to a determination of which “safe harbor” provision controls (being paid six months versus twelve months back assessments) is the termination of a foreclosure proceeding, not the origination of the mortgage nor the entering into of a foreclosure proceeding. In this view, because the “injury” triggering the determination is felt after the effective date, the amended provision should be applied to mortgages originated prior to the effective date but which *foreclosure proceedings end after the amendment’s effective date.* This means that as long as mortgage foreclosure was completed after July 1, 2010, regardless of its date of origination or entrance into foreclosure, the amended provision should apply. The following chart illustrates this concept:

<table>
<thead>
<tr>
<th>Date Mortgage was Originated</th>
<th>Date Mortgage Foreclosure was Initiated</th>
<th>Date Mortgage Foreclosure was Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before July 1, 2010</td>
<td>Before July 1, 2010</td>
<td>Before July 1, 2010 then</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unamended provision controls, 6-month safe harbor.</td>
</tr>
<tr>
<td>Before July 1, 2010</td>
<td>Before July 1, 2010</td>
<td><em>After</em> July 1, 2010 then</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amended provision <em>should</em> control, 12-month safe harbor.</td>
</tr>
<tr>
<td>Before July 1, 2010</td>
<td><em>After</em> July 1, 2010</td>
<td><em>After</em> July 1, 2010 then</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amended provision <em>should</em> control, 12-month safe harbor.</td>
</tr>
<tr>
<td><em>After</em> July 1, 2010</td>
<td><em>After</em> July 1, 2010</td>
<td><em>After</em> July 1, 2010 then</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Amended provision controls, 12-month safe harbor.</td>
</tr>
</tbody>
</table>

In support of this same view, one can also argue that the bank-buyers’ rights have vested. As persuasive support for this proposition, *In re Camelot Assoc. Ltd. Partnership*\(^{122}\) held that Florida law was not retroactive. It found that the law which was beneficial to debtors and was thereafter changed to be less beneficial where the lender was seeking retroactivity had no vested rights and such application would “impermissibly impair such parties’ rights and

\(^{121}\) See *id.*  
\(^{122}\) See *In re Camelot Associates Ltd. Partnership*, 102 B.R. 161, 166 (Bankr. D. Minn. 1989) (analyzing the retroactivity of a Florida statute which applied to a condominium in foreclosure and assignment of rents).
expectations.”

As support, it held that because the mortgagee was not (1) in actual possession of the condominium units subject to its mortgages when debtors commenced these cases, and (2) because it had not obtained the appointment of a receiver in the judicial foreclosure proceedings which it had commenced, it had not made its rights to rents fully-enforceable (prior to enactment of the new provision).

The mortgagee seeking retroactivity was deemed not to have vested rights prior to the legislative enactment. It is distinguishable from the instant case, since the party seeking retroactivity under the subject amendment presumably is the vested owner of the unit if he obtained “actual possession” or “appointed a receiver.” However, if banks sleep on their rights in pursuing a mortgage foreclosure, they should not be protected with retroactivity.

**Argument against retroactivity.** The alternate view is for prospective application: that the amended provision is applied to mortgages originated after the effective date of July 1, 2010 only. It is highly unlikely that a mortgage entered into after the effective date would have entered into foreclosure just a few months later in order to trigger the extended twelve month safe harbor (and allow associations to recoup twelve months instead of only six months back assessments).

**Issue #2: Need to amend condominium declaration?**

It is unclear whether associations must amend their documents for the amended law to apply. For condominium documents which include “automatic amendment” language, express reference to the Condominium Act “as it may be amended from time to time,” for example, subsequent amendments to the Condominium Act are automatically incorporated into the

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123 See id.
124 See id.
125 See FINAL REPORT, supra note 18, at 5.
126 See § 718.116(1)(b) (defining “declaration” or “declaration of condominium” as the instrument or instruments by which a condominium is created, as they are from time to time amended).
127 For the purposes of this Article “documents” include declaration of condominium, declaration of covenants and restrictions, bylaws, amendments to each, etc.)
128 See Adams, supra note 83, at Columnist Section.
condominium documents. Therefore, it not necessary to amend the condominium declaration to incorporate the amendment. However, language in other declarations of condominium often specifically cite the six-month limitation, the unamended language. Other declarations specifically state that the entire amount due an association is subordinated to the first or other mortgagees, offering the association no recourse for unpaid back assessments. It is advisable in these situations to amend the condominium documents to incorporate the new twelve-month safe harbor.

**Issue #3: Effect on lending**

It is unclear how the mortgage market for condominium units will respond. Fannie Mae’s lending guidelines expressly state that if a condominium is located in a jurisdiction that

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129 See Kaufman v. Shere, 347 So.2d 627, 628 (Fla. 3d DCA 1977) (incorporating the then § 711.236, which declared void and prohibited enforcement of escalation clauses in condominium recreation leases where the declaration of condominium expressly stated it adopted and included by express reference the Condominium Act as it may be amended from time to time). This “automatic amendment” language is also known as “Kaufman” language in reference to the decision in which the effectiveness of this language was first determined. See id. See also Halpern v. Retirement Builders, Inc., 507 So. 2d 622 (Fla. 4th DCA 1987) (incorporating § 718.302(5), which declared void and prohibited enforcement of escalation clauses in management contracts where the declaration of condominium, as in the instant case, incorporates future statutory amendments). The problem with automatic amendment language is that it accomplishes the stated goal only if all legislative changes are either mandatory or beneficial (if their application is optional). See FL. CONDO. LAW, supra note 105, at § 13.25.

130 See Kaufman v. Shere, 347 So.2d 627, 628.

131 See Rodgers II, supra note 76, at 89 ("Provisions like this will enable banks to continue to argue for the six month limitation even if the statute is found to apply to mortgages existing prior to July 1, 2010; see also Coral Lakes Cmty. Ass’n, v. Busey Bank, 30 So.2d 579 (Fla. 2d DCA 2010) (Refusing to require the foreclosing lender to pay any back assessments, where the declaration of covenants and restrictions expressly stated that a mortgagee who takes title pursuant to a foreclosure or deed in lieu of foreclosure shall not be liable for any assessments)."

132 See Adams, supra note 83, at Columnist Section.

There is also a significant question as to how the mortgage markets will react to this change in the law. Many banks that lend money to consumers for the purchase of real estate, including condominium units, do not hold on to the mortgage debt in their portfolio. Rather, many loans are sold on what is known as the "secondary mortgage market," which involves, among others, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corp. ("Freddie Mac"). Section B4-2.1-06 of Fannie Mae's lending guidelines states that if a condominium or PUD project (which would typically include a homeowners' association) is located in a jurisdiction that allows for more than six months of regular common expenses to have priority over Fannie Mae's lien, Fannie Mae will not purchase a mortgage loan secured by a unit in the project.

Id.; FANNIE MAE, SELLING GUIDE (2009), http://www.allregs.com/tpl/Main.aspx (follow “Section B4-2.1, General Project Standards” hyperlink; then follow “Section B4-2.1-06, Priority of Common Expense Assessments” hyperlink) [hereinafter SELLING GUIDE] ("If . . . the condo or PUD project is located in a jurisdiction that allows for more than six months of regular common expense assessments to have priority over Fannie Mae’s lien, Fannie Mae will not purchase a mortgage loan secured by a unit in the project.")
allows for *more than* six months of regular common expenses to have priority over Fannie Mae's mortgage lien, Fannie Mae will not purchase a mortgage loan secured by a unit in the project.\(^\text{134}\) This poses a problem because the amendment specifically allows for *more than* six months of regular common expenses to have priority over Fannie Mae's lien.\(^\text{135}\) While the law for homeowners' associations has contained a twelve-month liability standard for several years with seemingly no adverse effect as a result, it is unclear how the secondary mortgage market will react to this change for condominiums.\(^\text{136}\)

**RECOMMENDATIONS**

As to Issue 1 — retroactivity — a simple solution to the uncertainty surrounding what mortgages are affected [(1) all mortgages which have completed foreclosure after the effective date, because this is when the “injury” occurs or (2) only mortgages initiated after the effective date] would be the addition of a provision in the statute which clearly says which mortgages it affects. The recommendation of this Article is that the amendment be applied retroactively to all mortgages in which foreclosure proceedings had been initiated before the effective date of July 1, 2010. Sample language is something to the effect of “This provision is retroactive and applies to all qualifying mortgages (first mortgagees and assignees) which have entered foreclosure before the effective date of this amendment” or simply “This provision applies to all qualifying mortgages which complete foreclosure on or after the effective date of this

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133 Fannie Mae, http://www.fanniemae.com (follow “About Us” hyperlink) (last visited Nov. 15, 2010) (“Fannie Mae is a government-sponsored enterprise (GSE) chartered by Congress with a mission to provide liquidity, stability and affordability to the U.S. housing and mortgage markets.”).

134 SELLING GUIDE, supra note 7.

135 See § 718.116(1)(b).

136 See Adams, supra note 83, at Columnist Section. The author stated as follows:

[The author is] not aware of that issue [of the Fannie Mae guideline] having impacted the availability of mortgages for single-family homes. How the secondary mortgage market will react to Florida's change in the condominium law remains to be seen. Obviously, Florida is a major market for real estate and the related industries of lending money and the packaging and selling of mortgage loans.

*Id.*
amendment.” This way, it is clear that it applies to mortgages in existence prior to July 1, 2010 and not only mortgages that are made after that date, which for all practical purposes would likely be a very small number. This language would also clearly indicate that the amendment will not be applied retroactively to mortgages which completed foreclosure prior to July 1, 2010, but only to all mortgages which were currently in the foreclosure process and have completed foreclosure on or after July 1, 2010. Any other construction would limit the amendment’s effectiveness.

As to Issue 2 — amending the condominium documents — it is not necessary to amend the condominium documents if they already include language which expressly incorporates all changes to the Condominium Act. However, many declarations of condominium expressly refer to a six month limitation, the old provision or completely subordinate all assessments to the first mortgage. In such cases, associations should expressly incorporate the amendment into their documents. Sample language is as follows: “Florida Statutes § 718.116(1)(b) effective as of July 1, 2010, is hereby incorporated into this condominium declaration.” This will prevent foreclosing bank-buyers from contesting the amendment’s application as amended and put all parties on actual notice.

As to Issue 3 — effect on lending — this also is a harder issue to resolve. However, it is imperative that the Florida Legislature understand the implications of its laws on lending. Legislation cannot be made in a vacuum. One recommendation is that the Florida Legislature clearly indicate, either publicly announce or circulate a memorandum, that the amendment is not incompatible with, in particular, Fannie Mae lending guidelines which prohibit the purchase of mortgage loans secured by condominium units located in jurisdictions that allows for more than six months of regular common expenses to have priority over Fannie Mae's mortgage lien. Of

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137 See supra Part III(A)(ii)(Issue 2).
course, such a statement can only be made after members of the Florida Legislature confer with members of the major lending organizations (secondary market makers) and ensure that the purchase of loans of Florida condominium units is available and functioning properly. Therefore, the ultimate recommendation is that Florida leaders meet with national lenders and not restrict the availability of loans which were made at the six month safe harbor, but accept the new amendment of twelve months as beneficial to all parties. Also, condominiums can state in their declarations that in no way will its assessment collection practices conflict with Fannie Mae requirements, implicitly accepting the six month safe harbor, if Fannie Mae is not willing to accept twelve months liability.

IV. Conclusion

In conclusion, the 2010 Legislation has amended the Florida Condominium Act in a big way. This Article examined two of the 2010 Legislation’s most “contentious” amendments, Florida Statutes §§ 718.116(11) and 718.116(1)(b), with the goal of proposing recommendations to close the gap of uncollectible assessments, thereby lessening the likelihood of increased annual assessments, and ultimately lessening the “unknown and unquantifiable risks” inherent in the purchase of Florida condominiums. Looking forward, the federal government has recently allocated Florida more than $1 billion in federal funds for the purpose of foreclosure prevention, and combined with a few seemingly simple revisions to these amendments and

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138 See Paul Owers, Florida given $1 billion for foreclosure prevention, SUN-SENTINEL, Oct. 20, 2010, at Business Section, http://articles.sun-sentinel.com/2010-10-20/business/sfl-foreclosure-prevention-link-102010_1_foreclosure-prevention-foreclosure-prevention -programs-pilot-program. The federal government [K]eep[s] giving more money to Florida to help with foreclosure-prevention programs, but the aid is not expected to begin statewide until 2011. Four rounds of funding have increased Florida's allocation to more than $1 billion. State housing officials will use the money to pay first mortgages for unemployed or underemployed borrowers for up to 18 months.

Id.
consideration of the less simple issues, it is hoped that condominium assessment payment and collection will be maximized.\textsuperscript{139}

\textsuperscript{139} In undertaking this research the author has been left with a series of questions for further research in an effort to “close the gap” of uncollectible assessments, including:

1. What happens to past due \textit{special} assessments? The plan language of the statute seems to only require bank-buyers to pay past due regular or annual assessments, but makes no mention of the bank’s liability with respect to past-due special assessments.

2. What happens to the amount that is left uncollected after a “safe harbor” amount is paid? Is the debt “wiped out” or can the associations go after the previous owner for the difference? In practice?

3. How can an association go after someone it does not know is there? The amendments allow for the collection of rents from tenants of delinquent owners but do not account for unit owners who are renting their units in violation of rental restrictions in the condominium’s declaration (e.g. renting where it is prohibited, or failing to provide the association with an executed lease or tenant information, making service to an unregistered tenant difficult. In the author’s experience, these challenges are overcome by serving “Jane Doe” and “John Doe” tenants. But the solution to this issue is more difficult if there is no knowledge of a tenant at all.

4. Can an association “default on payment of assessments” to itself? Is the bank still responsible for 12 month previous assessments per § 718.116(1)(b) or does “unclean hands” prevent the association from being made whole? (The 2011 “glitch bill” provides that an association “is not liable for any unpaid assessments, late fees, interest or reasonable attorneys’ fees and costs that came due prior to the association’s acquisition of title in favor or any other association which holds a superior lien interest on the unit,” but this is only against another association (e.g. where there is are both sub and master associations). The question still remains.