Civil Justice Committee Meeting

Revised

March 8th, 2006
10:00 AM - 12:00 PM
24 House Office Building

Allan G. Bense
Speaker

Mark Mahon
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Civil Justice Committee

Start Date and Time:	Wednesday, March 08, 2006 10:00 am
End Date and Time:	Wednesday, March 08, 2006 12:00 pm
Location:	24 HOB
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 803 Child Support Guidelines by Rice
HB 839 Homeowners' Associations by Kottkamp
HB 841 Supersedeas Bond by Attkisson
HB 1089 Construction Contracting by Galvano

Consideration of the following proposed committee bill(s):

PCB CJ 06-04 -- Electronic Recording

NOTICE FINALIZED on 03/06/2006 15:59 by Hay.Tracey

HB 803

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 803 Child Support Guidelines
SPONSOR(S): Rice
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1762

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Future of Florida's Families Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

One of the issues involved in the computation of child support is voluntary unemployment or underemployment of a parent. This issue often arises in the context of parents who intentionally reduce their income to avoid paying support obligations.

The bill creates a rebuttable presumption that for the purposes of establishing child support, any parent of a child in this state is presumed able to earn the federal minimum wage, or $5.15 per hour.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill appears to increase personal responsibility for payment of child support.

B. EFFECT OF PROPOSED CHANGES:

Background

Parents are obligated to support their minor children.[1] "The issue of voluntary unemployment or underemployment, also known as voluntary impoverishment, most often arises in the context of parents who reduce their income to avoid paying support obligations by quitting, retiring, or changing jobs."[2] Thus when attempting to compute child support obligations, imputation of income or attributing income to a parent even when it may not have been earned becomes important.

Current Law

The child support guidelines, at s. 61.30(1)(a), F.S., establish a presumptive amount of child support for use by a court when establishing child support. The formula used to determine the presumptive amount is based on a number of factors, income being the primary factor. The court may vary the amount of the award plus or minus five percent from the amount stated in the guidelines, after consideration of all relevant factors. However, to vary more than five percent, the court must provide a written finding as to why payment of the guideline amount would be unjust or inappropriate.[3]

A court looks to the financial situation of the parents before determining the appropriate amount of child support. First, the court reviews the monthly gross income[4] for each party. Then public assistance, if any, and allowable deductions[5] are deducted from gross income.[6] Finally, the net income for the parents is added together for a combined net income.[7]

After determining the combined net income figure, the court looks to the presumptive dollar amounts[8] within the child support guidelines. These dollar amounts depend upon the combined monthly income of the parents, beginning with a minimum monthly combined income of $650, and the number of children being supported. For example, the child support need for parents with a combined monthly available income of $650 is $74 per month for one child, up to $78 per month for six children.[9] In the event that the combined monthly income is less than $650 per month, "the parent should be ordered to

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[1] Elizabeth Trainor, Annotation, *Basis for imputing income for purpose of determining child support where obligor spouse is voluntarily unemployed or underemployed*, 76 A.L.R. 5th, 191 (2000).
[2] *Id.*
[3] Section 61.30(1)(a), F.S.
[4] Gross income is includes, but is not limited to, the following: salary; bonuses, commissions, tips or similar payments; business income from self employment; disability benefits; workers' compensation benefits; unemployment compensation; pensions or retirement payments; social security benefits; spousal support from a previous marriage or court ordered in the marriage before the court; interest and dividends; rental income; income from royalties, trusts, or estates; reimbursed expenses; and gains from dealings in property. Section 61.30(2)(a), F.S.
[5] Allowable deductions from gross income include: federal, state, and local income tax deductions; mandatory union dues and retirement payments; health insurance payments; court-ordered support for other children when that support is actually paid; and spousal support paid pursuant to court order. Section 61.30(3), F.S.
[6] Public assistance, as defined in s. 409.2554, F.S.; is not to be included in a parent's gross income. Section 61.30(2)(c), F.S.
[7] Section 61.30(4)-(5), F.S.
[8] Section 61.30(6), F.S.
[9] *Id.*

pay a child support amount, determined on a case-by-case basis, to establish the principle of payment and lay the basis for increased orders should the parent's income increase in the future."[10]

When computing the appropriate level of support, courts may encounter situations in which a parent has intentionally reduced their income, at times to earning no income, to avoid paying support obligations. In such a situation, a court is required to impute income to that parent. In other words, the court attributes income to a parent even when it may not have been earned. However, this imputation only occurs when the employment or underemployment is determined by the court to be voluntary on that parent's part to avoid paying child support obligations.[11] In so doing the trial court "must find that the parent owing a duty of support has the actual ability to earn more than he or she is currently earning, and that he or she is deliberately refusing to return to work at that higher capacity to avoid support obligations."[12]

In general, any attempt to impute income to a parent must be supported by appropriate findings.[13] Yet it can be difficult for an order imputing income to the noncustodial parent to be upheld on appeal.[14] The is one exception to imputing income is when the court finds it is necessary for the primary residential parent to stay home with the child.[15]

Nevertheless, imputation of income is many times more difficult than it would seem. When a parent fails to appear at a hearing determining child support, the trial court and the party seeking to enforce the child support payments, typically the Department of Revenue ("department") or the child's other parent, are placed in a difficult position. If the department or the parent seeking child support lacks sufficient evidence of the absentee parent's income, the court is unable to determine the proper level of income to impute to the absentee parent. Although displeased with a father's absence at one such hearing, the Second District Court of Appeal reversed an award of child support because the evidence was insufficient to support the trial court's imputation of $30,000 annual income to the father.[16] On remand, the trial court was ordered to consider any further evidence presented by the mother that might show that the father was "earning less than he could, and has the capability of earning more by using his best efforts."[17] If the mother could not provide sufficient evidence of the father's earning capability, the father's child support payment was to be "based on his actual income."[18]

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[10] *Id.*

[11] Section 61.30(2)(b), F.S., specifically provides:

> Income on a monthly basis shall be imputed to an unemployed or underemployed parent when such employment or underemployment is found to be voluntary on that parent's part, absent physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community; however, the court may refuse to impute income to a primary residential parent if the court finds it necessary for the parent to stay home with the child.

[12] *Smith v. Smith*, 872 So. 2d 397, 398 (Fla. 1st DCA 2004) (citing *Stebbins v. Stebbins*, 754 So. 2d 903, 907 (Fla. 1st DCA 2000)) (internal quotations omitted). *See also Nicholas v. Nicholas*, 870 So. 2d 245, 247 (Fla. 2d DCA 2004)(stating "[g]enerally, a court may impute income if a spouse is earning less than he could, of there is a showing that he has the capability of earning more by using his best efforts.").

[13] Section 61.30(2)(b), F.S.; *Neal v. Meek*, 591 So. 2d 1044, 1046 (Fla. 1st DCA 1991).

[14] *See Neal*, 591 So. 2d 1046, (reversing the imputation of income and remanding for appropriate factual findings, noting that "it is apparent that the trial court desired to impute income to [the father]," but the court "did not make the requisite findings under the statute to impute such income" and failed to "determine the 'probable earnings level' of [the father] upon imputation of such income.")

[15] Section 61.30(2)(b), F.S.

[16] *Nicholas v. Nicholas*, 870 So. 2d 245, 247-48 (Fla. 2d DCA 2004).

[17] *Id.* at 248.

[18] *Id.*

In addition to proceedings in circuit court, the Department of Revenue ("DOR") has the ability to administratively establish child support obligations in Title IV-D[19] cases.[20] This section provides DOR with a fair and expeditious method for establishing child support when there is no court order of support.[21] DOR may use this administrative procedure on behalf of an applicant, recipient, or former recipient of public assistance, an individual who has applied for services, a state or local government of another state, or on behalf of the child or DOR itself.[22] If the noncustodial parent requests in writing, within twenty days of receipt of the department's initial notice to proceed in circuit court, DOR must terminate the administrative proceeding and file an action in circuit court.[23]

In calculating the noncustodial parent's child support obligation pursuant to s. 61.30, F.S., DOR must rely on timely filed financial affidavits and other information available.[24] However, "[i]f there is a lack of sufficient reliable information concerning a parent's actual earnings for a current or past pay period, it shall be presumed for the purpose of establishing a support obligation that the parent had an earning capacity equal to the federal minimum wage during the applicable period."[25] An administrative support order issued under this section has the same force and effect as a court order and remains in effect until modified by DCF, vacated on appeal, or superseded by a subsequent court order.[26]

Effect of Bill

Section 61.30(2)(b), F.S. is amended to include a rebuttable presumption that any person found to be the parent of a child or children in this state is able to earn the federal minimum wage, which is currently $5.15 per hour. To rebut this income presumption, a parent may present contrary evidence at a noticed child support hearing to the court.[27]

It appears that the language of the presumption is susceptible to two different interpretations. The first interpretation is that the presumption is in addition to the current requirements that the court consider the unemployed or underemployed parent's recent work history, occupational qualifications, and the prevailing earning levels in the community.[28] Once that has been reviewed the presumption becomes effective.

The second interpretation is that this presumption is applied to any parent at the outset of the proceedings. Every parent would be presumed to make the federal minimum wage each month, and that level of income would automatically be imputed to each parent, including a primary residential parent who remains at home. It would then be the parent's responsibility to demonstrate to the court through the parent's recent work history, occupational qualifications, and the prevailing earning levels in the community why the minimum wage would be to high or low a sum to impute to the parent.

C. SECTION DIRECTORY:

Section 1 amends s. 61.30(2)(b), F.S. and creates a rebuttable presumption that a parent is able to earn minimum wage.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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[19] A Title IV-D case is defines as "a case or proceeding in which the department is providing child support services within the scope of Title IV-D of the Social Security Act ...." Section 409.2563(1)(f), F.S.
[20] Section 409.2563(2)(a), F.S.
[21] *Id.*
[22] Section 409.2563(2)(c)(1)-(5), F.S.
[23] Section 409.2563(2)(f), F.S.
[24] Section 409.2563(5)(a), F.S.
[25] *Id.*
[26] Section 409.2563(11).
[27] Section 61.30(2)(b), F.S.
[28] Section 61.30(2)(b), F.S.

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:

This bill has the potential to increase child support obligations.

D. FISCAL COMMENTS:

A number of examples of the potential outcomes as a result of this bill have been prepared. The following chart explains those results.[29]

CURRENT SITUATION			
Present Monthly Income	Number of Children	Mandatory Imputed Income	Support Obligation for Child(ren)
$0	1	$0	$0
$1000	1	$0	$235
$2000	2	$0	$686

EFFECT OF BILL ON ONE INCOME			
Present Monthly Income	Number of Children	Mandatory Imputed Income	Support Obligation for Child(ren)
$0	1	$825	$190
$1000	1	$0	$235
$2000	2	$0	$686

EFFECT OF BILL ON TWO INCOMES			
Present Monthly Income	Number of Children	Mandatory Imputed Income	Support Obligation for Child(ren)
$0-Father/$0-Mother	1	$825-Father/$825-Mother	$185-by obligor
$1000-Father/$1000-Mother	1	$0	$221-by obligor
$2000-Father/$2000-	2	$0	$644-by obligor

[29] Each of the first two tables was calculated with the primary residential parent being approved by the court to remain at home with the child(ren). However, for all tables the federal minimum wage was calculated to be $825 a month after taxes ($5.15 multiplied by 40 hours a week, multiplied by 52 weeks in a year then divided by 12 subtracting 7.65% for social security and medicare) and that is the figure utilized in the calculations. Of course, these calculations are merely for example and do not take into account the child care, health insurance and medical costs that can effect child support obligations of the parents, nor do they consider the effect should the noncustodial parent be awarded visitation at least 40% of the overnights in a year.

EFFECT OF BILL ON TWO INCOMES			
Mother			

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

In February 2003, the Legislature contracted with the Department of Economics at Florida State University to provide a report analyzing issues related to the child support guidelines. This report was presented in March 2004.[30] The FSU report recommended reducing reliance on imputed income, limiting this procedure to those cases where one of the parties does not appear and no information is available from any other source.[31] The reasons given for reducing the reliance on imputed income were a federal study showing that the evidence indicates that compliance with child support orders is systematically lower in cases where income is imputed[32] and the opinion of experts that "it does little good to set child support awards that low-income noncustodial parents cannot pay. This only increases arrearages, creates resentment against the child support system, and puts the child support agency in the unproductive role of trying to collect money where none exists."[33]

The Department of Revenue requests that the words "in this state" on line 29 of the bill be removed.[34]

It is unclear why the bill ties the imputed income level to the federal minimum wage when Florida has a greater minimum wage of $6.40 per hour.[35]

It is unclear how the interpretation of the presumption would effect employees who are paid per-piece or commission only.

It is unclear why the bill refers to the U.S. Department of Labor when the federal minimum wage is established in 29 U.S.C. s. 206.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

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[30] McCaleb, Macpherson, et al, *Review and Update of Florida's Child Support Guidelines*, Department of Economics, Florida State University (March 5, 2004).
[31] McCaleb, *ibid,* at 46.
[32] Office of the Inspector General, *The Establishment of Child Support Orders for Low-Income Noncustodial Parents,* #OEI-05-99-00390, Washington, D.C.; U.S. Department of Health and Human Services (2000).
[33] McCaleb, *ibid,* at 46, quoting Paul Legler, *Low Income Fathers and Child Support: Starting Off on the Right Track,"* Denver: Policy Studies, Inc., (2003), at 13.
[34] Department of Revenue Bill Analysis, on file with Civil Justice Committee.
[35] *Florida's Minimum Wage*, (visited Feb. 15, 2006) <http://www.floridajobs.org/resources/fl_min_wage.html>.

1 A bill to be entitled
2 An act relating to child support guidelines; amending s.
3 61.30, F.S.; creating a rebuttable presumption that a
4 parent is able to earn minimum wage, as set by the United
5 States Department of Labor; providing for the parent to
6 present his or her rebuttal before a trier of fact;
7 providing an effective date.
8
9 Be It Enacted by the Legislature of the State of Florida:
10
11 Section 1. Paragraph (b) of subsection (2) of section
12 61.30, Florida Statutes, is amended to read:
13 61.30 Child support guidelines; retroactive child
14 support.--
15 (2) Income shall be determined on a monthly basis for the
16 obligor and for the obligee as follows:
17 (b) Income on a monthly basis shall be imputed to an
18 unemployed or underemployed parent when such employment or
19 underemployment is found to be voluntary on that parent's part,
20 absent physical or mental incapacity or other circumstances over
21 which the parent has no control. In the event of such voluntary
22 unemployment or underemployment, the employment potential and
23 probable earnings level of the parent shall be determined based
24 upon his or her recent work history, occupational
25 qualifications, and prevailing earnings level in the community;
26 however, the court may refuse to impute income to a primary
27 residential parent if the court finds it necessary for the
28 parent to stay home with the child. Any person found to be the

29 parent of a child or children in this state is presumed to be
30 able to earn minimum wage, as set by the United States
31 Department of Labor. This presumption is a rebuttable
32 presumption. Any parent seeking to rebut this presumption may
33 present evidence at a hearing noticed for the purpose of
34 establishing child support before a trier of fact.
35 Section 2. This act shall take effect July 1, 2006.

Bill No. **HB 0803**

COUNCIL/COMMITTEE ACTION

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

1

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Rice offered the following:
3
4 **Amendment (with title amendments)**
5 Remove line(s) 28-35 and insert:
6 (b) Income on a monthly basis shall be imputed to an
7 unemployed or underemployed parent when such employment or
8 underemployment is found to be voluntary on that parent's part,
9 absent physical or mental incapacity or other circumstances over
10 which the parent has no control. In the event of such voluntary
11 unemployment or underemployment, the employment potential and
12 probable earnings level of the parent shall be determined based
13 upon his or her recent work history, occupational
14 qualifications, and prevailing earnings level in the community.
15 For the purpose of establishing imputed income pursuant to this
16 paragraph, there is hereby created a rebuttable presumption that
17 a parent is presumed to be able to earn the Florida minimum
18 wage, on a full-time basis, unless evidence produced at a
19 hearing demonstrates that the parent is a resident of another
20 state, in which case the state minimum wage applicable to the
21 parent's state of residence shall apply if it is greater than
22 the Florida minimum wage. In the absence of a state minimum

23 wage, or if the other state's minimum wage is lower than the
24 Florida minimum wage, then the federal minimum wage shall apply.
25 ~~; however,~~ The court may refuse to impute income to a primary
26 residential parent if the court finds it necessary for the
27 parent to stay home with the child.
28 Section 2. Paragraph (a) of subsection (5) of section
29 409.2563, Florida Statutes, is amended to read:
30 409.2563 Administrative establishment of child support
31 obligations.--
32 (5) PROPOSED ADMINISTRATIVE SUPPORT ORDER.--
33 (a) After serving notice upon the noncustodial parent in
34 accordance with subsection (4), the department shall calculate
35 the noncustodial parent's child support obligation under the
36 child support guidelines as provided by s. 61.30, based on any
37 timely financial affidavits received and other information
38 available to the department. If either parent fails to comply
39 with the requirement to furnish a financial affidavit, the
40 department may proceed on the basis of information available
41 from any source, if such information is sufficiently reliable
42 and detailed to allow calculation of guideline amounts under s.
43 61.30. If the custodial parent receives public assistance and
44 fails to submit a financial affidavit, the department may submit
45 a financial affidavit for the custodial parent pursuant to s.
46 61.30(15). If there is a lack of sufficient reliable information
47 concerning a parent's actual earnings for a current or past
48 period, it shall be presumed for the purpose of establishing a
49 support obligation that a ~~the~~ parent who is a Florida resident
50 or whose residence is unknown had an earning capacity equal to
51 the Florida ~~federal~~ minimum wage during the applicable period,
52 unless the parent shows that he or she is a resident of another
53 state, in which case the state minimum wage applicable to the

54 parent's state of residence shall apply if it is greater than
55 the Florida minimum wage. In the absence of a state minimum
56 wage or if the state minimum wage is lower than the Florida
57 minimum wage then the federal minimum wage shall apply.
58
59 ========== T I T L E A M E N D M E N T ==========
60 Remove line(s) 4-7 and insert:
61 parent who is a resident of Florida or whose residence is
62 unknown is able to earn the Florida minimum wage; unless the
63 parent shows that he or she is a resident of another state, in
64 which case the minimum wage applicable to the parent's state of
65 residence will apply or in the absence of a state minimum wage
66 the federal minimum wage will apply; providing for the parent to
67 present his or her rebuttal before a trier of fact; amending s.
68 409.2563(5)(a), F.S.; creating a rebuttable presumption that a
69 parent who is a Florida resident or whose residence is unknown
70 is able to earn the Florida minimum wage; unless the parent
71 shows that he or she is a resident of another state, in which
72 case the state minimum wage applicable to the parent's state of
73 residence will apply or in the absence of a state minimum wage
74 the federal minimum wage shall apply; providing an effective
75 date.
76

HB 839

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 Homeowners' Associations
SPONSOR(S): Kottkamp; Baxley; Davis, D.; Ross; Zapata
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2358

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Judiciary Committee			
3) Economic Development, Trade & Banking Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

A homeowners' association is a corporation responsible for the operation of a community in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. This bill revises the powers and duties of a homeowners' association by:

- Requiring that homeowners' associations be incorporated in the state of Florida;
- Limiting an association to only those powers and duties of the association specifically established in the governing documents;
- Decreasing the amount in controversy limit from $100,000 to $50,000 for when an association must get member approval to bring an action against any party in the name of the association;
- Providing that an association cannot restrict a member's freedom of association and may not limit the number of guests a member can have in a 24-hour period;
- Providing that officers and directors can be held personally liable for actions designed to harass a member; and
- Providing that a member's plans for building on his or her property cannot be denied unless they violate a specific provision of the declaration of covenants.

This bill increases the regulation of homeowners' associations and establishes conformity in the laws regulating homeowners' associations and condominium associations by:

- Revising what must be included in the associations' annual budget;
- Revising the financial reporting requirements; and
- Providing for guarantees of common expenses when they are not included in the declaration.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases regulation of homeowners' associations.

Ensure lower taxes -- This bill appears to require currently unincorporated homeowner's associations to pay the state for initial registration and for annual registration fees.

B. EFFECT OF PROPOSED CHANGES:

Background

A homeowners' association is an entity responsible for the operation of a subdivision in which voting membership is made up of parcel ownership and in which membership is mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.[1] Homeowners' associations are regulated under ch. 720, F.S.

The purposes of the statutory provisions relating to homeowners' associations are to give statutory recognition to corporations that operate residential communities in Florida, to provide procedures for operating a homeowners' association, and to protect the rights of association members without unduly impairing the ability of the association to perform its functions.[2]

Effect of Bill

Section 720.303, F.S., regulates several aspects of a homeowners' association including the powers and duties of the homeowners' association, the homeowners' association budget, and financial reporting requirements.

Incorporation of Homeowners' Associations; Multiple Communities

Homeowner's associations were first regulated by statute in 1992 when laws regarding homeowner's associations were placed in ch. 617, F.S., which chapter regulates not for profit corporations.[3] By placing the regulation in a chapter that regulates corporations, the implication was that a homeowner's association must be incorporated; however, this was not specifically required. In 1995, the regulation was amended to specifically require that an association be incorporated, and to require that the initial governing documents of the association be recorded in the public records.[4] In 2000, the regulation of homeowner's associations was moved out of the chapter on not for profit corporations, and into its own chapter, ch. 720, F.S.

Currently, s. 720.303(1), F.S., provides that a homeowner's association must be operated by an association that is a Florida corporation, and provides that after October 1, 1995, the association must be incorporated and the initial governing documents of an association must be recorded in the official records of the county in which the community is located.[5] "Governing documents" means the recorded declaration of covenants for a community and all duly adopted and recorded amendments, supplements, and recorded exhibits,[6] the articles of incorporation and bylaws of the homeowners'

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[1] Section 720.301(9), F.S.
[2] Section 720.302(1), F.S.
[3] See sections 33 through 39 of ch. 92-49, L.O.F.
[4] See section 54 of ch. 95-274, L.O.F.
[5] Section 720.303(1), F.S.
[6] Section 720.303(6)(a), F.S.

association and any adopted amendments.[7] It appears that associations created before October 1, 1995 are grandfathered in and thus are not required to be incorporated in Florida and are not required to record their governing documents in the public records. Section 720.303(1), F.S., also provides that an association may operate more than one community.

This bill amends s. 720.303(1), F.S., by removing the language "after October 1, 1995 an association must be incorporated". This change appears to require any association created before October 1, 1995, and not required to be incorporated in Florida, to now become incorporated in Florida. This bill also requires all homeowner's associations to record their governing documents in the public records. This change should only affect those associations formed prior to October 1, 1995, and that have not already recorded their governing documents.

This bill also removes the specific provision granting homeowners' associations the authority to operate more than one community. It is unclear whether removing the language specifically allowing operation of more than one community would eliminate the ability of a homeowners' association from being able to operate more than one community. There are no provisions under current law that specifically prohibit a homeowners' association from operating more than one community. However, this change could have a significant impact on homeowners' associations if a court ruled that the legislative intent of this change was to disallow a homeowners' association from operating more than one community.

Expressed Powers and Duties of a Homeowners' Association

Section 720.303(1), F.S., provides that the powers and duties of an association include the powers and duties provided in ch. 720, F.S., except as expressly limited by ch. 720, F.S., and include the powers and duties included in the governing documents.[8]

This bill amends s. 720.303(1), F.S., by removing the provision, "except as expressly limited or restricted in ch. 720, F.S.", and adds that the powers and duties of an association only include those "specifically" set forth in the governing documents. This change limits the powers and duties of an association to only those powers and duties provided in ch. 720, F.S. and those expressly provided in the governing documents.

This bill also amends s. 720.303(1), F.S., to provide that the officers and directors of the association may not take any action that is inconsistent with the declaration of covenants. This provision in the bill also limits the power of the association by not allowing the officers and directors of the association to take any action that is not expressly granted in the declaration of covenants. It is unclear how this provision will be applied where the declaration of covenants conflict with applicable federal, state and local laws.

Powers and Duties after Control of the Association is Obtained by Members

Section 720.303(1), F.S., provides that after control of the association is obtained by members other than the developer (commonly known as "turnover"), the association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all members concerning matters of common interest to the members.[9]

This bill amends s. 720.303(1), F.S., to provide that an association "may institute, maintain, or settle on appeal action in its name on behalf of the members . . . ." One reading of this change is that the phrase "on appeal" modifies all of the previous words, which would mean that an association would only be able to prosecute or defend lawsuits in the appellate stage, and not in the trial court. However, homeowners' associations that are incorporated are also governed by ch. 617, F.S., and s. 617.0302, F.S., grants powers to sue and be sued and appear and defend in all actions and proceedings in its

[7] Section 720.303(6)(b), F.S.
[8] Section 720.303(1), F.S.
[9] Section 720.303(1), F.S.

corporate name to the same extent as a natural person. Therefore, incorporated homeowners' associations would not be limited in bringing or defending any causes of action due to changes made in this bill to s. 720.303(1), F.S.

Authority to Commence Litigation

Section 720.303(1), F.S., provides that before commencing litigation against any party in the name of the association involving amounts in controversy in excess of $100,000, the association must obtain the approval of a majority of the voting interests at a meeting at which a quorum has been attained.

This bill decreases the applicable amount in controversy from $100,000 to $50,000.

Limiting an Individual Member's Statutory and Common Law Remedies

Section 720.303(1), F.S., provides that "this subsection does not limit any statutory or common law right of any individual member or class of members from bringing any action without the participation by the association".

This bill removes this entire provision from s. 720.303(1), F.S.

Entering into Contracts

Under current law, one implied power of a homeowner's association is the power to contract for the benefit of the association and its members.

This bill also adds language to s. 720.303(1), F.S., which specifically grants the association the power to enter into contracts for the benefit of the members of the association such as contracts for maintaining, repairing, or improving the common areas of the association.

Classes of Membership

Section 720.303(1), F.S., provides that a homeowner's association may have more than one class of members, and may issue membership certificates.

This bill deletes the provisions regarding classes of members and the issuance of membership certificates. These provisions are already provided for in other statutes and this bill is removing the redundant language. As stated above, incorporated homeowners' associations are governed by ch. 617, F.S., and s. 617.0601, F.S., provides that a corporation may have one or more classes of members or may have no members, and a corporation may issue certificates of membership. However, if the homeowners' association is not incorporated in Florida and if this provision is interpreted to prevent classes of memberships, then this change could have the effect of prohibiting continuing control of an association by a developer during the construction and sales phase. Also, it is unclear how this might affect a homeowners' association that has different classes of members due to the mixed nature of the association, such as where condominium units, commercial units, and townhouses and single family homes are all part of a homeowners' association that provides some common benefit to all of the members, each of whom may be in a different class because of the different levels of service provided.

Prohibited Legal Defense

This bill creates s. 720.303(1)(g), F.S., to provide that "in any action between a member and the association, it shall not be a defense by the association that the association's actions, although inconsistent with the declaration of covenants, have been uniformly applied".

Prohibiting Restrictions on Number of Guests and Freedom of Association

This bill creates s. 720.303(1)(h), F.S., to provide that an association cannot "restrict a member's freedom of association or limit the number of guests a member can have over a 24-hour period".

Enforcing Deed Restrictions

Section 720.303(1), F.S., provides that "an association of 15 or fewer parcel owners" may enforce only the requirements of those deed restrictions established prior to the purchase of each parcel upon an affected parcel owner or owners. As more than one person may own a real estate parcel, the applicability of this provision may vary.

This bill amends s. 720.303(1), F.S., to replace the phrase "parcel owners" with the more accurate "parcels".

Personal Liability of Officers and Directors

This bill creates s. 720.303(1)(j), F.S., to create a cause of action against the officers and directors of the association. The bill provides that the officers and directors may be personally liable to a member if their actions "demonstrate a pattern of behavior designed harass a member of the association." There is no definition of harassment or pattern of harassment provided.

Limitations on Use of a Member's Property

This bill creates s. 720.303(1)(k), F.S., to provide that any action of the association that is inconsistent with the declaration of covenants and which limits the use of a member's property entitles the member to compensation for the fair market value of the property being restricted. This bill appears to allow property owners to bring a form of an inverse condemnation claim against the association for limiting their use of property in a way that is inconsistent with the declaration of covenants.[10]

Front Setback Requirements

This bill creates s. 720.303(1)(l), F.S., to provide that in any association with more than 50 but less than 75 parcels, for the purpose of setting setbacks, any parcel of 1 acre or less must be deemed to have one front for the purpose of determining the required front setback, if any. This bill also provides that the association can enforce only setbacks specifically provided for in the declaration of covenants, and county or municipal setback provisions will apply when the covenants are silent. It is unclear whether the second clause regarding enforcement of setbacks applies to all associations or just those of between 50 and 75 parcels.

Denial of a Member's Building Plans

The covenants and restrictions of a homeowner's association typically require prior approval of the association before commencing construction of a home on the parcel.

This bill creates s. 720.303(1)(m), F.S., to provide that when a member seeks to build on his or her property, the association cannot deny or refuse to approve the member's plans for building unless the plan under consideration violates a specific provision of the declaration of covenants.

[10] Inverse condemnation is court remedy for a private land owner whose interest or ownership in land has been interfered with or taken away outright by a governmental body.

Homeowners' Association Budgets

Section 720.303(6), F.S., provides that an association must prepare an annual budget. This bill amends s. 720.303(6), F.S., to require that the annual budget provide for the annual operating expenses.

This bill also amends 720.303(6), F.S., to provide that the annual budget must include reserve accounts for capital expenditures and deferred maintenance, in addition to annual operating expenses. This bill provides that these accounts must provide for items such as roof replacement, building painting, and pavement resurfacing, and for any other item for which the expense or cost is more than $10,000. The amount to be reserved must be computed by using a formula estimating the remaining useful life and replacement cost or deferred maintenance expense of each reserve item. This subsection does not apply to a budget where a majority of the members of an association has voted to provide no reserves or fewer reserves required by this subsection. This bill also provides that prior to turning over control of an association to the unit owners, the developer may vote to waive or reduce the reserves for the first 2 fiscal years of the association's operation. After this time, reserves can be waived or reduced by a majority vote of all nondeveloper voting interests at an association meeting. After the turnover, the developer may vote its voting interest to waive or reduce the funding of reserves.

Homeowners' Association Financial Reporting

Section 720.303(7), F.S., requires homeowners' associations to prepare an annual financial report within 60 days after the close of the fiscal year. The association must provide each member with a copy of the annual financial report or a written notice that a copy of the financial report is available upon request at no charge to the member.

This bill amends s. 720.303(7), F.S., to increase from 60 to 90 days the time that an association has to prepare and complete an annual financial report after the close of the fiscal year. Within 21 days after the final financial report is completed by the association, but no later than 120 days after the end of the fiscal year, the association must provide each member with a copy of the annual financial report. Homeowners' associations and condominium associations are generally operated and managed the same way, and the language used in this bill is identical in form to language contained in s. 718.111(13), F.S., regarding financial reporting for condominium associations.

This bill amends s. 720.303(7)(a), F.S., to provide that financial statements are to be completed in accordance with the accounting principles adopted by the Florida Board of Accountancy.

Transition of Homeowners' Association Control

Section 720.307, F.S., provides procedures for turning over control of an association from the developer to parcel owners. The transition of association control begins with the election of the board of directors of the homeowners' association by the members. At the time the members elect a majority of the board of directors, the developer must deliver various documents to the board.

This bill amends s. 720.307, F.S., to provide additional documents that the developer must provide to the board of directors. Along with the documents that must be provided by the developer under current law, this bill requires that the developer also provide the board of directors the financial records, including the statements of the association, and source documents from the incorporation of the association through the date of turnover. This bill also provides that an independent certified public accountant must audit the records and determine that the developer was charged with, and paid, the proper amounts of assessments.

The language in this section of the bill is taken from language found in s. 718.301(4)(c), F.S., of the Condominium Act. The current law for homeowners' associations pertaining to transition of association control is very similar to the current condominium act and this bill provides conformity between the homeowners' associations and the condominium associations.

Guarantees of Common Expenses

The developer of a community is responsible for paying the costs of the common expenses of the community until the sale of the parcels to a purchaser in which time the developer pays a proportionate share of the common expenses with the parcel owners. Condominium law allows a developer to be excused from payment of common expenses if the common expenses of all unit owners are guaranteed not to increase and the developer agrees to pay all common expenses incurred but not covered by unit owner payments during the period of the guarantee.[11]

This bill amends s. 720.308, F.S., to incorporate the guarantees of common expenses provision found in condominium law into homeowners' association law. Currently, s. 720.308, F.S., provides for guarantees of common expenses if it is provided for in the declaration. This bill amends s. 720.308, F.S., to provide for guarantees of common expenses if a guarantee is not included in the purchase contract or declaration. This bill provides that a guarantee is effective only upon approval of a majority of the voting interests of the members other than the developer. This bill also provides that:

- The time period of a guarantee must have a specific beginning and ending date or event;
- The dollar amount of the guarantee must be an exact dollar amount for each parcel identified in the declaration;
- The cash payments required from the developer must be when the revenue collected by the association are not sufficient to provide payment for all common expenses; and
- The expenses incurred in the production of non-assessment revenues, not in excess of the non-assessment revenues, must not be included in the common expenses. If expenses attributable to non-assessment revenues exceed non-assessment revenues, then the developer must only fund the excess expenses.

This section of the bill mirrors what is currently contained in s. 718.116(9)(a)2, F.S., of the Condominium Act and provides conformity between condominium associations and homeowners' associations.

C. SECTION DIRECTORY:

Section1 amends s. 720.303(1), F.S., to revise provisions related to the powers and duties of an association. This section amends s. 720.303(6), F.S., to require the annual budget of an association to set out the annual operating expenses and include reserve accounts for capital expenditures and deferred maintenance. This section amends 720.303(7), F.S., to revise the time period for when an association must prepare and complete a financial report for the preceding fiscal year.

Section 2 amends s. 720.307, F.S., to require that at the time the members are entitled to elect at least a majority of the board of directors the developer must deliver the financial records of the association.

Section 3 amends s. 720.308, F.S., to establish guarantees of common expenses if a guarantee is not included in the purchase contract or declaration.

Section 4 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

[11] Section 718.116, F.S.

This bill may have an unknown positive nonrecurring and recurring fiscal impact on state revenue. This bill appears to require certain associations to be incorporated, although there is no known means for determining the number of such associations.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears to require associations created before October 1, 1995 to be incorporated in Florida, and to require all associations to record their governing documents in the public records (associations formed after October 1, 1995 should have already recorded their governing documents). The following costs are associated with these requirements:

Initial filing of a corporation:	$70.00[12]
Legal fees (estimated)	$500.00[13]
Annual filing of a corporation:	$61.25[14]
Estimated cost of recording:	$256.50[15]

This bill requires that an accountant audit the financial records at the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association. It is unclear in the bill whether the developer or the members of the association are responsible for the cost of the audit. The cost of such an audit cannot be estimated as it would depend on the amount of time and effort required.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, 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:

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[12] Sections 617.0122(1) and 617.0122(5), F.S.
[13] Legal fees are not required. The Secretary of State provides forms for use by the public. See http://www.dos.state.fl.us/doc/pdf/cr2e006.pdf
[14] Section 617.0122(17), F.S.
[15] Assuming 30 pages at $10.00 for first page and $8.50 each for subsequent pages. See s. 28.24(12), F.S.

This bill requires that homeowners' associations, which contain between 50 and 75 parcels and are 1 acre or less, must be deemed to have one front for the purpose of determining setbacks. It is possible that this provision may be challenged as a substantive due process violation. Substantive due process is a doctrine that "requires legislation to be fair and reasonable in content as well as application."[16] Substantive due process guarantees that laws will be reasonable and arbitrary or irrational. Because the provision is only being applied to such a narrow group of homeowners' associations, this provision could be held to be arbitrary and capricious, and not rationally related to an important government interest.

It is also possible that certain provisions in the bill may be challenged as violating the Contract Clause of the Florida Constitution. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[17] "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."[18] [19]

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[20] The *Pomponio* Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

> [T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The

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[16] Blacks Law Dictionary, 1429 (8th ed. 2004)
[17] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "
[18] 10a Fla. Jur. s. 414, Constitutional Law.
[19] The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.
[20] The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

> requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

U.S. Fidelity and Guar. Co., 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

This bill may perhaps impair existing contract rights between parcel owners and a homeowners' association, in that the changes required by this bill apply to existing associations.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that the powers and duties of an association only include those set forth in ch. 720, F.S. and those specifically set forth in the governing documents. By only granting powers and duties expressly provided in the governing documents this bill appears to require the drafters of governing documents to try to provide for each circumstance that might arise where the association might need to act. If some circumstance arose, where an association needed to act, but the power to act or the duty to act was not specifically provided for and set forth in ch. 720, F.S., then the association could only act if the association is able to convince the membership to amend the covenants.

This bill entitles owners to be compensated fair market value when the association limits the use of their property by enforcing a restriction not provided for in the declaration of covenants. An issue that could possible arise pertaining to this provision is whether an association will be required to compensate a member whose use of property is temporarily limited by an association action. In addition, it is unclear under this bill what kind of association actions would constitute "limiting" the use of a member's property. Furthermore, it is unclear how this provision is applicable under current law. Under current law, a homeowners' association cannot limit the use of a parcel owner's property if the association is not granted this power in the declaration of covenants.

This bill requires that homeowners' associations set up reserve accounts. However, like all other regulation of homeowner's associations, there is currently no government entity to enforce or oversee this requirement. It is unclear whether a property owner who has moved out of the homeowners association would be liable for inadequately funding past reserves if an association that has not implemented this provision is later forced to provide funds for reserve accounts.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

1 A bill to be entitled
2 An act relating to homeowners' associations; amending s.
3 720.303, F.S.; revising the powers and duties of
4 homeowners' associations; requiring certain associations
5 to be incorporated in this state; removing a provision
6 authorizing associations to operate more than one
7 community; prohibiting officers and directors from taking
8 any action that is inconsistent with the declaration of
9 covenants; authorizing associations to settle actions on
10 appeal; revising procedures relating to legal actions
11 commenced by the association; lowering the dollar amount
12 for which the association must obtain approval by the
13 members of the association before proceeding with the
14 legal action; authorizing the association to enter into
15 certain contracts; removing provisions authorizing an
16 association to have more than one class of members and to
17 issue membership certificates; prohibiting certain
18 association defenses; prohibiting associations from
19 restricting a member's freedom of association and from
20 limiting the number of guests a member may have within a
21 24-hour period; providing that officers and directors of
22 an association may be personally liable for damages under
23 certain circumstances; providing compensation for certain
24 members under certain circumstances; providing criteria
25 for establishing setback limits; prohibiting the
26 association from denying or refusing to approve a member's
27 plans for building on the member's property under certain
28 circumstances; requiring the budget to provide for annual

29 operating expenses; requiring the budget to include
30 reserve accounts for capital expenditures and deferred
31 maintenance; providing the amount to be reserved;
32 authorizing the association to adjust replacement reserve
33 assessments annually; authorizing the developer to vote to
34 waive the reserves or reduce the funding of reserves for a
35 certain period; revising provisions relating to financial
36 reporting; revising time periods in which the association
37 must complete its reporting; amending s. 720.307, F.S.;
38 requiring developers to deliver financial records to the
39 board; requiring certain information to be included in the
40 records and for the records to be prepared in a specified
41 manner; amending s. 720.308, F.S.; providing that a
42 guarantee of common expenses shall be effective under
43 certain circumstances; requiring the guarantee to meet
44 certain requirements; authorizing the guarantee to provide
45 certain requirements; requiring the stated dollar amount
46 of the guarantee to be an exact dollar amount for each
47 parcel identified in the declaration; providing payments
48 required from the guarantor to be determined in a certain
49 manner; providing a formula to determine the guarantor's
50 total financial obligation to the association; providing
51 that certain expenses incurred in the production of
52 certain revenues shall not be included in the common
53 expenses; providing an effective date.
54
55 Be It Enacted by the Legislature of the State of Florida:
56

57 Section 1. Subsections (1), (6), and (7) of section
58 720.303, Florida Statutes, are amended to read:
59 720.303 Association powers and duties; meetings of board;
60 official records; budgets; financial reporting; association
61 funds; recalls.--
62 (1) POWERS AND DUTIES.--
63 (a) An association which operates a community as defined
64 in s. 720.301~~,~~ must be incorporated in this state, ~~operated by~~
65 ~~an association that is a Florida corporation. After October 1,~~
66 ~~1995, the association must be incorporated~~ and the initial
67 governing documents must be recorded in the official records of
68 the county in which the community is located. ~~An association may~~
69 ~~operate more than one community.~~
70 (b) The officers and directors of an association have a
71 fiduciary relationship to the members of ~~who are served by~~ the
72 association.
73 (c) The powers and duties of an association include those
74 set forth in this chapter and~~, except as expressly limited or~~
75 ~~restricted in this chapter,~~ those specifically set forth in the
76 governing documents. The officers and directors of the
77 association may not take any action that is inconsistent with
78 the declaration of covenants.
79 (d) After control of the association is obtained by
80 members from the developers ~~other than the developer~~, the
81 association may institute, maintain, or settle on~~, or~~ appeal
82 actions ~~or hearings~~ in its name on behalf of the ~~all~~ members
83 concerning matters of common interest to the members~~, including,~~
84 ~~but not limited to, the common areas; roof or structural~~

85 ~~components of a building, or other improvements for which the~~
86 ~~association is responsible; mechanical, electrical, or plumbing~~
87 ~~elements serving an improvement or building for which the~~
88 ~~association is responsible; representations of the developer~~
89 ~~pertaining to any existing or proposed commonly used facility;~~
90 ~~and protesting ad valorem taxes on commonly used facilities. The~~
91 ~~association may defend actions in eminent domain or bring~~
92 ~~inverse condemnation actions~~. Before commencing any legal action
93 ~~litigation~~ against any party in the name of the association
94 involving amounts in controversy in excess of $50,000 ~~$100,000~~,
95 the association must obtain ~~the~~ affirmative approval of a
96 majority of the members of the association ~~voting interests~~ at a
97 meeting of the association ~~membership~~ at which a quorum is
98 present ~~has been attained~~.
99 (e) The association may enter into contracts for the
100 benefit of the members of the association, including, but not
101 limited to, contracts for maintaining, repairing, or improving
102 the common areas of the association. ~~This subsection does not~~
103 ~~limit any statutory or common-law right of any individual member~~
104 ~~or class of members to bring any action without participation by~~
105 ~~the association.~~
106 (f) A member does not have the authority to act for the
107 association by virtue of being a member of the association. ~~An~~
108 ~~association may have more than one class of members and may~~
109 ~~issue membership certificates.~~
110 (g) In any action between a member and the association, it
111 shall not be a defense by the association that the association's

112 actions, although inconsistent with the declaration of
113 covenants, have been uniformly applied.
114 (h) An association may not restrict a member's freedom of
115 association and may not limit the number of guests a member may
116 have within a 24-hour period.
117 (i) An association of 15 or fewer parcels ~~parcel owners~~
118 may enforce only ~~the requirements of~~ those deed restrictions
119 established prior to the purchase of each parcel upon an
120 affected parcel owner or owners.
121 (j) The officers and directors of an association may be
122 personally liable for damages to a member if the actions of the
123 officers and directors demonstrate a pattern of behavior
124 designed to harass a member of the association.
125 (k) Any action of the association by and through the
126 officers and directors that limits the legal use of any portion
127 of a member's property which is inconsistent with the
128 declaration of covenants shall entitle the member to
129 compensation for the fair market value of that portion of the
130 member's property the use of which is being restricted.
131 (l) In any association with more than 50 but fewer than 75
132 parcels, for purposes of establishing setback limits, any parcel
133 of 1 acre or less shall be deemed to have one front for purposes
134 of determining the required front setback, if any. Only those
135 setbacks specifically set forth in the declaration of covenants
136 may be enforced by the association. Where the covenants are
137 silent, the applicable county or municipal setbacks shall apply.
138 (m) The association may not deny or refuse to approve a
139 member's plans for building on the member's property unless the

140 plan under consideration violates a specific provision of the
141 declaration of covenants.
142 (6) BUDGETS.--
143 (a) The association shall prepare an annual budget
144 providing for the annual operating expenses. The budget must
145 reflect the estimated revenues and expenses for that year and
146 the estimated surplus or deficit as of the end of the current
147 year. The budget must set out separately all fees or charges for
148 recreational amenities, whether owned by the association, the
149 developer, or another person. The association shall provide each
150 member with a copy of the annual budget or a written notice that
151 a copy of the budget is available upon request at no charge to
152 the member. The copy must be provided to the member within the
153 time limits set forth in subsection (5).
154 (b) In addition to annual operating expenses, the budget
155 shall include reserve accounts for capital expenditures and
156 deferred maintenance. These accounts shall include, but are not
157 limited to, roof replacement, building painting, and pavement
158 resurfacing, regardless of the amount of deferred maintenance
159 expense or replacement cost, and any other item for which the
160 deferred maintenance expense or replacement cost exceeds
161 $10,000. The amount to be reserved shall be computed by means of
162 a formula that is based upon estimated remaining useful life and
163 estimated replacement cost or deferred maintenance expense of
164 each reserve item. The association may adjust replacement
165 reserve assessments annually to take into account any changes in
166 estimates or extension of the useful life of a reserve item
167 caused by deferred maintenance. This paragraph does not apply to

168 an adopted budget for which the members of an association have
169 determined, by a majority vote at a duly called meeting of the
170 association, to provide no reserves or fewer reserves than
171 required by this paragraph. However, prior to turnover of
172 control of an association by a developer to unit owners, the
173 developer may vote to waive the reserves or reduce the funding
174 of reserves for the first 2 fiscal years of the association's
175 operation, beginning with the fiscal year in which the initial
176 declaration is recorded, after which time reserves may be waived
177 or reduced only upon the vote of a majority of all nondeveloper
178 voting interests voting in person or by limited proxy at a duly
179 called meeting of the association. If a meeting of the unit
180 owners has been called to determine whether to waive or reduce
181 the funding of reserves and no such result is achieved or a
182 quorum is not attained, the reserves as included in the budget
183 shall go into effect. After the turnover, the developer may vote
184 its voting interest to waive or reduce the funding of reserves.
185 (7) FINANCIAL REPORTING.--Within 90 days after the end of
186 the fiscal year, or annually on the date provided in the bylaws,
187 the association shall prepare and complete, or contract for the
188 preparation and completion of, a ~~an annual~~ financial report for
189 the preceding fiscal year. Within 21 ~~60~~ days after the final
190 financial report is completed by the association or received
191 from the third party, but not later than 120 days after the end
192 of the fiscal year or other date as provided in the bylaws,
193 ~~close of the fiscal year.~~ the association shall, within the time
194 limits set forth in subsection (5), provide each member with a
195 copy of the annual financial report or a written notice that a

196 copy of the financial report is available upon request at no
197 charge to the member. Financial reports shall be prepared as
198 follows:
199 (a) An association that meets the criteria of this
200 paragraph shall prepare or cause to be prepared a complete set
201 of financial statements in accordance with generally accepted
202 accounting principles as adopted by the Board of Accountancy.
203 The financial statements shall be based upon the association's
204 total annual revenues, as follows:
205 1. An association with total annual revenues of $100,000
206 or more, but less than $200,000, shall prepare compiled
207 financial statements.
208 2. An association with total annual revenues of at least
209 $200,000, but less than $400,000, shall prepare reviewed
210 financial statements.
211 3. An association with total annual revenues of $400,000
212 or more shall prepare audited financial statements.
213 (b)1. An association with total annual revenues of less
214 than $100,000 shall prepare a report of cash receipts and
215 expenditures.
216 2. An association in a community of fewer than 50 parcels,
217 regardless of the association's annual revenues, may prepare a
218 report of cash receipts and expenditures in lieu of financial
219 statements required by paragraph (a) unless the governing
220 documents provide otherwise.
221 3. A report of cash receipts and disbursement must
222 disclose the amount of receipts by accounts and receipt
223 classifications and the amount of expenses by accounts and

224 expense classifications, including, but not limited to, the
225 following, as applicable: costs for security, professional, and
226 management fees and expenses; taxes; costs for recreation
227 facilities; expenses for refuse collection and utility services;
228 expenses for lawn care; costs for building maintenance and
229 repair; insurance costs; administration and salary expenses; and
230 reserves if maintained by the association.
231 (c) If 20 percent of the parcel owners petition the board
232 for a level of financial reporting higher than that required by
233 this section, the association shall duly notice and hold a
234 meeting of members within 30 days of receipt of the petition for
235 the purpose of voting on raising the level of reporting for that
236 fiscal year. Upon approval of a majority of the total voting
237 interests of the parcel owners, the association shall prepare or
238 cause to be prepared, shall amend the budget or adopt a special
239 assessment to pay for the financial report regardless of any
240 provision to the contrary in the governing documents, and shall
241 provide within 90 days of the meeting or the end of the fiscal
242 year, whichever occurs later:
243 1. Compiled, reviewed, or audited financial statements, if
244 the association is otherwise required to prepare a report of
245 cash receipts and expenditures;
246 2. Reviewed or audited financial statements, if the
247 association is otherwise required to prepare compiled financial
248 statements; or
249 3. Audited financial statements if the association is
250 otherwise required to prepare reviewed financial statements.

251 (d) If approved by a majority of the voting interests
252 present at a properly called meeting of the association, an
253 association may prepare or cause to be prepared:
254 1. A report of cash receipts and expenditures in lieu of a
255 compiled, reviewed, or audited financial statement;
256 2. A report of cash receipts and expenditures or a
257 compiled financial statement in lieu of a reviewed or audited
258 financial statement; or
259 3. A report of cash receipts and expenditures, a compiled
260 financial statement, or a reviewed financial statement in lieu
261 of an audited financial statement.
262 Section 2. Paragraph (t) is added to subsection (3) of
263 section 720.307, Florida Statutes, to read:
264 720.307 Transition of association control in a
265 community.--With respect to homeowners' associations:
266 (3) At the time the members are entitled to elect at least
267 a majority of the board of directors of the homeowners'
268 association, the developer shall, at the developer's expense,
269 within no more than 90 days deliver the following documents to
270 the board:
271 (t) The financial records, including financial statements
272 of the association, and source documents from the incorporation
273 of the association through the date of turnover. The records
274 shall be audited by an independent certified public accountant
275 for the period from the incorporation of the association or from
276 the period covered by the last audit, if an audit has been
277 performed for each fiscal year since incorporation. All
278 financial statements shall be prepared in accordance with

279 generally accepted accounting principles and shall be audited in
280 accordance with generally accepted auditing standards, as
281 prescribed by the Board of Accountancy, pursuant to chapter 473.
282 The certified public accountant performing the audit shall
283 examine to the extent necessary supporting documents and
284 records, including the cash disbursements and related paid
285 invoices to determine whether expenditures were for association
286 purposes and the billings, cash receipts, and related records to
287 determine whether the developer was charged and paid the proper
288 amounts of assessments.
289 Section 3. Section 720.308, Florida Statutes, is amended
290 to read:
291 720.308 Assessments and charges.--
292 (1) For any community created after October 1, 1995, the
293 governing documents must describe the manner in which expenses
294 are shared and specify the member's proportional share thereof.
295 Assessments levied pursuant to the annual budget or special
296 assessment must be in the member's proportional share of
297 expenses as described in the governing document, which share may
298 be different among classes of parcels based upon the state of
299 development thereof, levels of services received by the
300 applicable members, or other relevant factors. While the
301 developer is in control of the homeowners' association, it may
302 be excused from payment of its share of the operating expenses
303 and assessments related to its parcels for any period of time
304 for which the developer has, in the declaration, obligated
305 itself to pay any operating expenses incurred that exceed the
306 assessments receivable from other members and other income of

307 the association. This subsection ~~section~~ does not apply to an
308 association, no matter when created, if the association is
309 created in a community that is included in an effective
310 development-of-regional-impact development order as of the
311 effective date of this act, together with any approved
312 modifications thereto.
313 (2) If a guarantee of common expenses is not included in
314 the purchase contracts, declaration, or prospectus, any
315 agreement establishing a guarantee shall be effective only upon
316 the approval of a majority of the voting interests of the
317 members other than the developer. Approval shall be expressed at
318 a meeting of the members, voting in person or by limited proxy,
319 or by agreement in writing without a meeting if provided in the
320 bylaws. Such guarantee shall meet the requirements of this
321 section.
322 (a) The period of time for the guarantee shall be
323 indicated by a specific beginning and ending date or event. The
324 ending date or event shall be the same for all of the members of
325 a homeowners' association, including members in different phases
326 of the homeowners' association.
327 (b) The guarantee may provide:
328 1. Different intervals of time during a guarantee period
329 with different dollar amounts for each such interval.
330 2. That after the initial stated period the developer has
331 an option to extend the guarantee for one or more additional
332 stated periods. The extension of a guarantee is limited to
333 extending the ending date or event; therefore, the developer

334 does not have the option of changing the level of assessments
335 guaranteed.
336 (3) The stated dollar amount of the guarantee shall be an
337 exact dollar amount for each parcel identified in the
338 declaration. Regardless of the stated dollar amount of the
339 guarantee, assessments charged to a member shall not exceed the
340 maximum obligation of the member based on the total amount of
341 the adopted budget and the member's proportionate ownership
342 share of the common elements.
343 (4) The cash payments required from the guarantor during
344 the guarantee period shall be determined as follows:
345 (a) If at any time during the guarantee period the funds
346 collected from member assessments at the guaranteed level and
347 other revenues collected by the association are not sufficient
348 to provide payment, on a timely basis, of all common expenses,
349 including the full funding of the reserves unless properly
350 waived, the guarantor shall advance sufficient cash to the
351 association at the time such payments are due.
352 (b) Expenses incurred in the production of non-assessment
353 revenues, which expenses are not in excess of the non-assessment
354 revenues, shall not be included in the common expenses. If the
355 expenses attributable to non-assessment revenues exceed non-
356 assessment revenues, only the excess expenses must be funded by
357 the guarantor. For example, if the association operates a rental
358 program in which rental expenses exceed rental revenues, the
359 guarantor shall fund the rental expenses in excess of the rental
360 revenues. Interest earned on the investment of association funds
361 may be used to pay the income tax expense incurred as a result

362 of the investment, such expense shall not be charged to the
363 guarantor, and the net investment income shall be retained by
364 the association. Each such non-assessment revenue-generating
365 activity shall be considered separately. Capital contributions
366 collected from members are not revenues and shall not be used to
367 pay common expenses.
368 (5) The guarantor's total financial obligation to the
369 association at the end of the guarantee period shall be
370 determined on the accrual basis using the following formula: the
371 guarantor shall fund the total common expenses incurred during
372 the guarantee period, including the full funding of the reserves
373 unless properly waived, less the total regular periodic
374 assessments earned by the association from the members other
375 than the guarantor during the guarantee period, regardless of
376 whether the actual level charged was less than the maximum
377 guaranteed amount.
378 (6) Expenses incurred in the production of non-assessment
379 revenues, which expenses are not in excess of the non-assessment
380 revenues, shall not be included in the common expenses. If the
381 expenses attributable to non-assessment revenues exceed non-
382 assessment revenues, only the excess expenses must be funded by
383 the guarantor. For example, if the association operates a rental
384 program in which rental expenses exceed rental revenues, the
385 guarantor shall fund the rental expenses in excess of the rental
386 revenues. Interest earned on the investment of association funds
387 may be used to pay the income tax expense incurred as a result
388 of the investment, such expense shall not be charged to the
389 guarantor, and the net investment income shall be retained by

390 the association. Each such non-assessment revenue-generating
391 activity shall be considered separately. Capital contributions
392 collected from members are not revenues and shall not be used to
393 pay common expenses.
394 Section 4. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 839**

COUNCIL/COMMITTEE ACTION

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

1

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) offered the following:
3
4 **Amendment**
5 Remove line(s) 292-393 and insert:
6 (1) ASSESSMENTS.--For any community created after October
7 1, 1995, the governing documents must describe the manner in
8 which expenses are shared and specify the member's proportional
9 share thereof. Assessments levied pursuant to the annual budget
10 or special assessment must be in the member's proportional share
11 of expenses as described in the governing document, which share
12 may be different among classes of parcels based upon the state
13 of development thereof, levels of services received by the
14 applicable members, or other relevant factors. While the
15 developer is in control of the homeowners' association, it may
16 be excused from payment of its share of the operating expenses
17 and assessments related to its parcels for any period of time
18 for which the developer has, in the declaration, obligated
19 itself to pay any operating expenses incurred that exceed the
20 assessments receivable from other members and other income of
21 the association. This section does not apply to an association,

22 no matter when created, if the association is created in a
23 community that is included in an effective development-of-
24 regional-impact development order as of the effective date of
25 this act, together with any approved modifications thereto.
26 (2) GUARANTEES OF COMMON EXPENSES.--
27 (a) Establishment of guarantee.--If a guarantee is not
28 included in the purchase contracts, declaration, or prospectus,
29 any agreement establishing a guarantee shall only be effective
30 either upon the vote of a majority of all nondeveloper voting
31 interests voting in person or by limited proxy at a duly called
32 meeting of the association or by agreement in writing without a
33 meeting if provided in the bylaws. Such guarantee shall meet the
34 requirements of this section.
35 (b) Guarantee period.--The period of time for the
36 guarantee shall be indicated by a specific beginning and ending
37 date or event.
38 1. The ending date or event shall be the same for all of
39 the members of a homeowners' association, including members in
40 different phases of homeowners' associations.
41 2. The guarantee may provide for different intervals of
42 time during a guarantee period with different dollar amounts for
43 each such interval.
44 (c) Guarantee extension.--The guarantee may provide that
45 after the initial stated period, the developer has an option to
46 extend the guarantee for one or more additional stated periods.
47 The extension of a guarantee is limited to extending the ending
48 date or event; therefore, the developer does not have the option
49 of changing the level of assessments guaranteed.
50 (3) MAXIMUM LEVEL OF ASSESSMENTS.--The stated dollar
51 amount of the guarantee shall be an exact dollar amount for each

52 parcel identified in the declaration. Regardless of the stated
53 dollar amount of the guarantee, assessments charged to a member
54 shall not exceed the maximum obligation of the member based on
55 the total amount of the adopted budget and the member's
56 proportionate ownership share of the common elements.
57 (4) CASH FUNDING REQUIREMENTS DURING GUARANTEE.--The cash
58 payments required from the guarantor during the guarantee period
59 shall be determined as follows:
60 (a) If at any time during the guarantee period the funds
61 collected from member assessments at the guaranteed level and
62 other revenues collected by the association are not sufficient
63 to provide payment, on a timely basis, of all common expenses,
64 including the full funding of the reserves unless properly
65 waived, the guarantor shall advance sufficient cash to the
66 association at the time such payments are due.
67 (b) Expenses incurred in the production of nonassessment
68 revenues, not in excess of the nonassessment revenues, shall not
69 be included in the common expenses. If the expenses attributable
70 to nonassessment revenues exceed nonassessment revenues, only
71 the excess expenses must be funded by the guarantor. For
72 example, if the association operates a rental program in which
73 rental expenses exceed rental revenues, the guarantor shall fund
74 the rental expenses in excess of the rental revenues. Interest
75 earned on the investment of association funds may be used to pay
76 the income tax expense incurred as a result of the investment,
77 such expense shall not be charged to the guarantor, and the net
78 investment income shall be retained by the association. Each
79 such nonassessment revenue-generating activity shall be
80 considered separately. Capital contributions collected from

81 members are not revenues and shall not be used to pay common
82 expenses.
83 (5) CALCULATION OF GUARANTOR'S FINAL OBLIGATION.--The
84 guarantor's total financial obligation to the association at the
85 end of the guarantee period shall be determined on the accrual
86 basis using the following formula:
87 (a) The guarantor shall fund the total common expenses
88 incurred during the guarantee period, including the full funding
89 of the reserves unless properly waived; less
90 (b) The total regular periodic assessments earned by the
91 association from the members other than the guarantor during the
92 guarantee period regardless of whether the actual level charged
93 was less than the maximum guaranteed amount.
94 (6) EXPENSES.--Expenses incurred in the production of
95 nonassessment revenues, not in excess of the nonassessment
96 revenues, shall not be included in the common expenses. If the
97 expenses attributable to nonassessment revenues exceed
98 nonassessment revenues, only the excess expenses must be funded
99 by the guarantor. For example, if the association operates a
100 rental program in which rental expenses exceed rental revenues,
101 the guarantor shall fund the rental expenses in excess of the
102 rental revenues. Interest earned on the investment of
103 association funds may be used to pay the income tax expense
104 incurred as a result of the investment, such expense shall not
105 be charged to the guarantor, and the net investment income shall
106 be retained by the association. Each such nonassessment revenue-
107 generating activity shall be considered separately. Capital
108 contributions collected from members are not revenues and shall
109 not be used to pay common expenses.
110

HB 841

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 841 Supersedeas Bond
SPONSOR(S): Attkisson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2250

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Business Regulation Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

Where a money judgment is entered by a court, the prevailing party may enforce the judgment even though an appeal is pending. In order to prevent collection on that judgment during the appeal process, an appealing party may post a supersedeas bond. A supersedeas bond also protects a prevailing party by insuring that a judgment can be enforced against the nonprevailing party.

The bill places an upper limit on a supersedeas bond at $25 million dollars regardless of the type of appeal or case except for class actions. As to "an individual or independently owned and operated business with 400 or fewer full-time employees," the cap is lowered to $1 million or 5% of the appealing party's net worth. These caps will not apply if the appellee can show that the appellant is moving assets in an attempt to avoid paying the judgment.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

When a money judgment is entered, a defendant[1] has a couple of options to consider. First the defendant must decide whether or not to appeal. If an appeal is to be taken, then the issue of a bond is to be considered. If no bond is posted, defendant risks the possibility that the plaintiff may begin collecting on the judgment while the appeal is ongoing.[2] It is possible that defendant could prevail on appeal but the judgment has already been executed and the defendant's money and assets have vanished.

A defendant can avoid this situation by posting a bond. A sufficient bond entitles defendant to an automatic stay of the judgment while the appellate court rules on the matter.[3] A sufficient bond, or a supersedeas bond, is a defendant's bond to stay the execution on a judgment during the appeal. Such a bond is obtained from a surety company authorized to do business in the state.[4] The amount of the supersedeas bond, set by the Florida Rules of Appellate Procedure and automatically accepted by the Clerk of the Court, is a combination of the final judgment plus two years of interest.[5] However, the trial court retains jurisdiction to determine the sufficiency of any bond.[6] The mandatory conditions of a bond will include a "condition to pay or comply with the order in full, including costs; interest; fees; and damages for delay, use, detention, and depreciation of property, if the review is dismissed or order affirmed...."[7]

The purpose behind a supersedeas bond requirement is that it will protect a plaintiff from the possibility that a judgment cannot be enforced because the defeated party has become insolvent. In other words, "[t]he effect of perfecting a supersedeas [bond] is that it 'stays further [collection] proceedings, but does not interfere with what has already been done.'"[8]

The following excerpt from "*Just what is a civil supersedeas bond and do I need one?*"[9] provides a short primer on supersedeas bonds.

> Supersedeas bonds are issued by a surety company authorized to do business in the State of Florida. Each circuit maintains a list of approved bonding companies. An insurance broker or surety underwriter is used to procure the bond. Almost all surety companies which issue supersedeas bonds require that

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[1] This analysis uses the terms plaintiff and defendant for ease of reference and should not be understood to imply that a plaintiff prevails in every legal action or that a defendant is always the nonprevailing party.
[2] A stay pending review may be essential to effective relief on appeal, yet one is not required for appellate review. *Freedom Insurors, Inc. v. M.D. Moody & Sons, Inc.*, 869 So. 2d 1283, 1285 (Fla. 4th DCA 2004)(quoting *Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 525 (1904)).
[3] Florida Rule of Appellate Procedure 9.310 provides: "[a] stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both."
[4] Rule 9.310(c)(1), Fla. R. App. P. In the absence of a bond, cash may be deposited in the circuit court clerk's office.
[5] Rule 9.310(b)(1), Fla. R. App. P.
[6] *Id.*
[7] Rule 9.310(c)(2), Fla. R. App. P.
[8] *Freedom Insurors, Inc.*, 869 So. 2d 1285.
[9] *Just what is a civil supersedeas bond and do I need one?*, Angela C. Flowers, The Record, Florida Bar Journal Appellate Practice Section, Fall, 1999.

security be given to protect them in the event the judgment debtor is unable to pay the sum due if the judgment is affirmed. A bond may be "fully collateralized" or "not fully collateralized." A "fully collateralized" bond usually means one that is secured by money, government securities, or other type of securities that can be immediately converted into cash. The premium for a "not fully collateralized" bond will be higher to account for the absence of liquid assets to back the bond. A large corporate judgment debtor or insurance company may be able to obtain a bond based upon its financial statement alone. An individual or small company will usually be required to post collateral for the bond....

The bond amount is a combination of the final judgment amount plus two years of interest at the statutory rate. Section 55.03 (1), Fla. Stat., requires the state comptroller to set the statutory rate of interest payable on judgments each year on December 1[10].... By statute, the "interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid."

Effect of Bill

In any civil action, under any legal theory, granting any type of relief, regardless of the amount of the judgment, the amount of a supersedeas bond necessary to stay execution of a judgment during the appeals or discretionary reviews may not exceed $25 million dollars for all defendants in the aggregate.[11] If a defendant is an individual or independently owned and operated business with 400 or fewer full-time employees, the supersedeas bond, at the discretion of that defendant, may not exceed 5 percent of the defendant's net assets or $1 million dollars in the aggregate.[12] However, if a plaintiff proves that an appealing defendant, who has posted a supersedeas bond, is moving assets to avoiding paying the judgment, then a court may require the defendant post a supersedeas bond in the total amount of the judgment.[13]

C. SECTION DIRECTORY:

Section 1 creates s. 768.734, placing limitations on supersedeas bonds.

Section 2 provides for an effective date of July 1, 2006.

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:

[10] The interest rate established for calendar year 2006 has been set at 9.0% per annum or .0002466 per day, <http://www.fldfs.com/aadir/aam612.htm>, (last visited Feb. 9, 2006).
[11] Except for certified class actions subject to s. 768.733, F.S. Section 768.734(1).
[12] Section 768.734(2).
[13] Section 768.734(3).

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may reduce the amount of fees collected by bonding companies for providing large supersedeas bonds to appealing parties. Furthermore, the party seeking to post a supersedeas bond will be able to procure such a bond at a reduced rate.

D. FISCAL COMMENTS:

In cases in which verdicts over $25 million are awarded or substantially less for "an individual or independently owned and operated business with 400 or fewer full-time employees," it may be substantially less expensive to appeal the judgment. This may increase the amount of appellate litigation. However, in those same judgments the prevailing party may be less able to enforce the judgment above the supersedeas bond due to the insolvency of the defeated party.

There may be a minimal but unknown fiscal impact on state government. The courts would be required to hold additional proceedings regarding determine whether or not an appellant is intentionally dissipating or diverting assets necessitating an increase in the supersedeas bond.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, 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:

Exclusive Rulemaking/Separation of Powers

This bill might raise an exclusive rulemaking/separation of powers issue. Supersedeas bonds are requirements of the Florida Rules of Appellate Procedure. Those rules of procedure are established by the Florida Supreme Court. The legislature has the authority to promulgate substantive laws,[14] whereas, matters of practice and procedure in all state courts are the exclusive domain of the Florida Supreme Court.[15]

The Florida Supreme Court has defined the terms as follows:

> Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions. Procedural law concerns the means and method to apply and enforce those duties and rights. Procedural rules concerning the judicial branch are the responsibility of this Court, subject to repeal by the legislature in accordance with our constitutional provisions.[16] [17]

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[14] *Allen v. Butterworth*, 756 So. 2d 52 (2000).
[15] *Id.*
[16] *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002)(citing *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975)).
[17] *See also Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991)(internal citations and quotations omitted) which stated:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. On the other hand, practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion.

"The judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other's constitutional powers."[18]

This bill could raise a constitutional concern if the limits imposed on supersedeas bonds were considered a procedural rather than a substantive law. However, it should be noted that the legislature has imposed other limitations on supersedeas bonds. Section 768.733, F.S., which became effective in 2000, imposes a limitation of $100 million dollars on such bonds in class actions.

Prospective and Retrospective Effect of a Change in Statutory Law

The distinction between substantive and procedural law is important for a determination regarding the effect of a statutory change. If a statute is substantive, then the statute is presumed to apply prospectively unless the Legislature expresses its clear intent to have the statute operate retrospectively. The rationale is that retrospective operation of law can act to impair or destroy an existing right. On the other hand, procedural or remedial statutes, would apply retrospectively and apply to pending cases. Accordingly, it would appear that any statutory change to the bond requirements in accordance with Rule 9.310, Fla. R. App. P, would apply to all pending cases where an award has not been reduced to judgment.

Access to Courts

"The right to go to court to resolve disputes is a fundamental right. Whether represented by an attorney or proceeding pro se, all litigants are afforded equal access to the courts. The Florida Constitution establishes the right commonly known as access to courts. It provides that the courts shall be open to any person for the redress of any injury and justice shall be administered without sale, denial, or delay."[19]

"There is no principle of law more fundamental than that which declares for every wrong there is a remedy. The constitutional right of access to courts guaranteed by the Florida Constitution, protects only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution. In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida."[20] However,"[a] reasonable restriction, or a condition precedent, to the filing of a claim is not a denial of access to courts."[21]

The bill would not appear to impinge upon an individual's Florida Constitutional right of access to courts since the legislature is not abolishing any cause of action, but is merely changing the procedures for a supersedeas bond.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Word Choice

Section 768.734(2) provides:

Practice and procedure may be described as the machinery of the judicial process as opposed to the product thereof.

[18] 10A Fla. Jur 2d, Constitutional Law, s. 197.

[19] 10A Fla. Jur 2d, Constitutional Law, s. 360.

[20] *Id.*

[21] 10A Fla. Jur 2d, Constitutional Law, s. 362.

> If an appellant is an *individual or independently owned and operated business with 400 or fewer full-time employees*, the supersedeas bond, at the *discretion of the appellant*, may not exceed 5 percent of the appellant's net assets or $1 million in the aggregate (*emphasis added*).

It is unclear from the above language if a single individual is covered by this language. The words, "individual or independently owned and operated business" are susceptible to two interpretations. It could be that a single individual is included. Alternatively, it could be that a single individual is not protected by this provision and would be required to post a supersedeas bond up to $25 million.

Further, it would seem inappropriate to rely upon the "discretion of the appellant" standard. Typically such a phrase is reserved for a court. Perhaps a better choice of words would be "at the election of the appellant." Additionally, the bill provides that an "individual or independently owned and operated business" is treated differently than other businesses, yet these terms are not defined.

Chapter Placement

The bill places this new language in s. 768.734, which is in ch. 768, F.S. dealing with negligence. The bill places limitations on supersedeas bonds for all civil actions brought under any legal theory, with the exception of class actions. Civil actions effected by this bill would include for example contract claims, anti-trust actions, and claims under Florida's Racketeering Influenced and Corrupt Organizations (RICO). It would seem more appropriate to place this new section in ch. 45, F.S. which pertains to civil practice and procedure.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to supersedeas bond; creating s. 768.734,
3 F.S.; providing limits on the amount of supersedeas bond
4 in the aggregate necessary to stay execution of a
5 judgment; limiting the amount of supersedeas bond required
6 for certain appellants; providing an exception to limits
7 if an appellant engages in certain conduct for the purpose
8 of avoiding payment of the judgment; providing an
9 effective date.
10
11 Be It Enacted by the Legislature of the State of Florida:
12
13 Section 1. Section 768.734, Florida Statutes, is created
14 to read:
15 768.734 Limitations on supersedeas bond; exception.--
16 (1) Except for certified class actions subject to s.
17 768.733, in any civil action brought under any legal theory, the
18 amount of a supersedeas bond necessary to stay execution of a
19 judgment granting any type of relief during the entire course of
20 all appeals or discretionary reviews shall not exceed $25
21 million for all appellants in the aggregate, regardless of the
22 amount of the judgment appealed.
23 (2) If an appellant is an individual or independently
24 owned and operated business with 400 or fewer full-time
25 employees, the supersedeas bond, at the discretion of the
26 appellant, may not exceed 5 percent of the appellant's net
27 assets or $1 million in the aggregate.

28 (3) Notwithstanding subsections (1) and (2), if an
29 appellee proves by a preponderance of the evidence that an
30 appellant who has posted a supersedeas bond is intentionally
31 dissipating or diverting assets outside the course of its
32 ordinary business for the purpose of avoiding payment of the
33 judgment, a court may enter orders necessary to protect the
34 appellee or that require the appellant to post a supersedeas
35 bond in an amount up to and including the total amount of the
36 judgment.
37 Section 2. This act shall take effect July 1, 2006.

HB 1089

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1089 Construction Contracting
SPONSOR(S): Galvano
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1940

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Blalock	Bond
2) Justice Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

A statute of limitations establishes a fixed time period within which a lawsuit must be commenced after a cause of action has accrued.

This bill reduces the 4-year statute of limitations for actions founded on the design, planning, or construction of an improvement to real property, with the time running from the earliest (instead of the latest) occurrence of specified events. However, the 4-year statute will not start to run as to a latent defect until the defect is discovered or should have been discovered by the owner. This bill also reduces the absolute time limit for commencing an action on the design, planning, or construction of an improvement to real property from 15 years to 10 years with the time running from the earliest (instead of latest) occurrence of specified events.

This bill provides that converter reserve accounts and warranties only apply to the conversion of existing improvements where construction of the improvement was commenced prior to its designation by the developer as a condominium.

This bill provides that the reductions to the length of the statute of limitations in this bill apply to any action commenced on or after July 1, 2006, regardless of when the cause of action accrued. There is an exception providing that any action that would not have been barred prior to the changes made by this bill can be commenced before July 1, 2007. If the action is not commenced by this date and is barred by the changes made to the statute of limitations and repose in this bill, then it will be barred.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill reduces the length of the statute of limitations and repose for actions founded on the design, planning, or construction of an improvement to real property.

Promotes personal responsibility -- This bill requires that litigants commence their cause of action in a more timely fashion from when the cause of action has accrued.

B. EFFECT OF PROPOSED CHANGES:

Background

Limitations Other Than for the Recovery of Real Property

A statute of limitations establishes a fixed time period within which lawsuits must be commenced after a cause of action has accrued.[1] Once a claim has been extinguished by the applicable statute of limitations, the claim cannot be revived because a constitutionally protected property right to be free from the claim has vested in the defendant.[2] At common law, there is no fixed time limit for filing a lawsuit, however, the common law does follow the doctrine of laches. The doctrine of laches is the legal doctrine that a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party. The legislature codified the common law theory of laches in statutes of limitations so that the courts would apply the doctrine of laches uniformly and not just at their discretion. The statutes of limitation are primarily governed by ch. 95, F.S., although statutes of limitation are found in other parts of the statutes as well.

Statutes of limitation are based on public policy,[3] and are designed to encourage plaintiffs to assert their causes of action with reasonable diligence when evidence is fresh and available.[4] Statutes of limitation protect defendants against claims asserted when evidence is lost and after the facts have become obscure from the lapse of time, defective memory, or death and removal of witnesses.[5]

Section 95.11(3)(c), F.S. currently provides that actions founded on a deficiency in the design, planning, or construction of an improvement to real property, whether founded on contract or on negligence,[6] are subject to a 4-year statute of limitations. The 4-year time period of the statute of limitations begins to run from the latest date of the following events:

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

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[1] Am. Jur. 2d, Limitation of Actions § 9.
[2] *Wood v. Eli Lilly & Co.*, 701 So. 2d 344 (Fla. 1997); *In re Estate of Smith*, 685 So. 2d 1206 (Fla. 1996); *Boyce v. Cluett*, 672 So. 2d 858 (Fla. 4th DCA 1996).
[3] *Florida Dept. of Health and Rehabilitative Services v. S.A.P*, 835 So. 2d 1091 (Fla. 2002); *Major League Baseball v. Morsani*, 790 So. 2d 1071 (Fla. 2001).
[4] *Thermo Air Contractors, Inc. v. Travelers Indem. Co.*, 277 So. 2d 47 (Fla. 3rd DCA 1973); *Foremost Properties, Inc. v. Gladman*, 100 So. 2d 669 (Fla. 1st DCA 1958).
[5] *Whaley v. Wotring, 225 So. 2d 177 (Fla. Dist. Ct. App. 1st Dist. 1969).*
[6] *Dubin v. Dow Corning Corp.*, 478 So. 2d 71 (Fla. 2nd DCA 1985).

An exception to the 4-year statute of limitations is provided for when an action involves a latent defect. A latent defect is a hidden flaw, weakness or imperfection in an article which a seller knows about, but the buyer cannot discover by a reasonable inspection. Under these circumstances the 4-year statute of limitation begins to run from the time the defect is discovered or should have been discovered through due diligence. In either circumstance, the action must be commenced within 15 years after the date of the following, whichever is earliest:

- Date of actual possession by the owner;
- The date of the issuance of a certificate of occupancy;
- The date of abandonment of construction if not completed; or
- The date of completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

Warranties by Contractors, Subcontractors, and Suppliers to the Developer and Unit Owners

Section 718.203, F.S. provides that the contractor, subcontractors, and suppliers grant to the developer and to the purchaser of each unit an implied warranty of fitness as to the work performed or materials supplied by them.[7] Specifically, there is an implied warranty of fitness for three years from the completion of the construction of a building or improvement as to the roof and structural components of the building or improvement and as to mechanical and plumbing elements serving a building or an improvement, except for mechanical elements serving only one unit.[8] As to all other improvements and materials, there is an implied warranty of fitness for one year after all construction is completed.[9] In order to comply with the implied warranty of fitness, the contractor must provide work and materials that conform to the generally accepted standards of workmanship and performance of similar work and materials meeting the requirements specified in the contract.[10]

Warranties by the developer and warranties by contractors inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.[11] They are conditioned upon routine maintenance being performed, unless the maintenance is an obligation of the developer or a developer-controlled association.[12] Such provisions do not affect a condominium or cooperative as to which rights are established by contracts for sale of 10% or more of the units in the condominium or cooperative by the developer to prospective unit owners prior to July 1, 1974, or as to condominium or cooperative buildings on which construction has been commenced prior to July 1, 1974.[13]

Converter Reserve Accounts; Warranties

By complying with the general provisions regarding condominiums, a developer may create a condominium by converting existing, previously occupied improvements to condominium ownership. Prior to or simultaneous with the first offering of individual units to any person, each developer must deliver a notice of intended conversion to all the tenants of the existing improvements being converted to a residential condominium or residential cooperative. All such notices must be given within a 72-hour period.[14] The developer is also required to distribute certain economic information to tenants having a right of first refusal.[15] Furthermore, the developer must disclose the condition of the improvements and certain components, as well as the current estimated replacement costs.[16]

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[7] Section 718.203(2), F.S.
[8] Section 718.203(2)(a), F.S.
[9] Section 718.203(2)(b), F.S.
[10] *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 20 Fla. L. Weekly S184 (Fla. 1995)
[11] Section 718.203(5), F.S.
[12] Section 718.203(4), F.S.
[13] Section 718.203(6), F.S.
[14] Section 718.608(1), F.S.
[15] Section 718.614(1), (2), F.S.
[16] Section 718.614(1), (2), F.S.

When existing improvements are converted to ownership as a residential condominium each residential tenant who has resided in the existing improvements for at least the 180 days preceding the date of the written notice of intended conversion has the right to extend an expiring rental agreement upon the same terms for a period that will expire no later than 270 days after the date of the notice. If the rental agreement expires more than 270 days after the date of the notice, the tenant may not unilaterally extend the rental agreement.[17] Each other residential tenant has the right to extend an expiring rental agreement upon the same terms for a period that will expire no later than 180 days after the date of the written notice of intended conversion. If the rental agreement expires more than 180 days after the date of the notice, the tenant may not unilaterally extend the rental agreement.[18]

Each tenant, who for the 180 days preceding a notice of intended conversion has been a residential tenant of the existing improvements, has the right of first refusal to purchase the unit in which he or she resides on the date of the notice, under the following terms and conditions:[19]

- Within 90 days following the written notice of the intended conversion, the developer must deliver to the tenant certain purchase materials;[20]
- The tenant has the right of first refusal to purchase the unit for a period of not less than 45 days after mailing or personal delivery of the purchase materials; and[21]
- if, after any right of first refusal has expired, the developer offers the unit at a price lower than that offered to the tenant, the developer must in writing notify the tenant prior to the publication of the offer.[22]

Section 718.618, F.S. provides that when existing improvements are converted to ownership as a residential condominium, the developer must establish reserve accounts for capital expenditures and deferred maintenance. When the existing improvements include an air-conditioning system serving more than one unit or property, which the association is responsible to repair, maintain, or replace, the developer shall fund an air-conditioning reserve account.[23] The developer must fund a plumbing reserve account[24] and a roof reserve account[25]. The developer must also establish other reserve accounts as required by s. 718.112(2)(f), F.S.[26] [27]

Effect of Bill

Limitations Other than for the Recovery of Real Property

This bill amends s. 95.11(3)(c), F.S., to provide that the 4-year time period of the statute of limitations begins to run from the "earliest" of the following events (except when the action involves a latent defect):

- Actual possession by the owner;
- The issuance of a certificate of occupancy;
- Abandonment of construction if not completed; or
- Completion or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer.

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[17] Section 718.606(1)(a), F.S.
[18] Section 718.606(1)(b), F.S.
[19] Section 718.612(1), F.S.
[20] Section 718.612(1)(a), F.S.
[21] Section 718.612(1)(b), F.S.
[22] Section 718.612(1)(c), F.S.
[23] Section 718.618(1)(a)1, F.S.
[24] Section 718.618(1)(a)2, F.S.
[25] Section 718.618(1)(a)3, F.S.
[26] Section 718.618(1)(d), F.S.
[27] Section 718.112(2)(f), F.S. requires reserve accounts for "roof replacement, building painting, and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost, and for any other item for which the deferred maintenance expense or replacement cost exceeds $10,000".

This bill also provides that whatever the circumstances, an action founded on the design, planning, or construction of an improvement to real property must be commenced within 10 years after the date of actual possession by the owner, the date of issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion or termination of the contract between the engineer, architect, or contractor and his ir her employer, whichever date is "earliest"

Warranties by Contractors, Subcontractors, and Suppliers to the Developer and Unit Owners

This bill amends s. 720.203(2), F.S., to provide that the implied warranties that the contractor, subcontractors, and suppliers grant to the developer only pertain to the work performed or materials supplied by them that are specified in their respective contracts and any amendments to those contracts. This bill also amends s. 718.203(6), F.S., to provide that the warranty provided in s. 718.203(2), F.S. applies only to a building or improvement that was designated as a condominium by the developer in its construction contract with the contractor or any amendment to the contract executed by the parties. This bill removes the language in current law which provides that nothing in this section affects condominiums where rights are established by contracts for the sale of 10% or more of the units in the condominium by the developer to prospective unit owners prior to July 1, 1974, or as to condominium buildings where construction has been commenced prior to July 1, 1974.

Converter Reserve Accounts; Warranties

This bill amends s. 718.618, F.S., creating subsection (9), which provides that section s. 718.618, F.S. applies only to the conversion of existing improvements where construction of the improvement was commenced prior to its designation by the developer as a condominium. Where these circumstances do occur, s. 718.203 (providing that the developer is deemed to have granted to each unit owner an implied warranty of fitness and merchantability) does not apply. Therefore, reserve accounts will only have to be established for the purposes of conversion, where construction of the improvement started before it was designated as a condominium. Under these circumstances, the developer is not deemed to have granted a unit owner an implied warranty of fitness and merchantability.

Application of the Proposed Changes to s. 95.11(3)(c), F.S.

This bill provides that the proposed changes made by the bill to s. 95.11(3)(c), F.S. will apply to any action commenced on or after July 1, 2006, regardless of when the cause of action accrued. The changes made by this bill, shortening the statute of limitations for actions founded on the design, planning, or construction of an improvement to real property, would apply to any party whose action commenced on or after July 1, 2006, even if the cause of action accrued much earlier. Therefore, a party whose cause of action accrued prior to the changes in this bill, but the action commenced after July 1, 2006, could be barred from bringing the action by the shortening of the statute of repose from 15 years to 10 years. This bill does provide an exception, which deals with this issue, and provides that any action that would not have been barred under s. 95.11(3)(c), F.S., prior to the amendments made by this act may be commenced before July 1, 2007. If the action is not commenced by July 1, 2007 and is barred by the amendments to s. 95.11(3)(c), F.S., then the action will be barred. Therefore, people who would be barred from bringing a cause of action based on the new statute of limitations and repose, but not under the old statute have until July 1, 2007 to commence their cause of action or are forever barred. Some constitutional questions may be raised concerning this section of the bill, however, these provisions are not unconstitutional (see constitutional issues section below).

C. SECTION DIRECTORY:

Section 1 amends s. 95.11(3)(c), F.S., shortening the statute of limitations and repose for actions founded on the design, planning, or construction of an improvement of real property.

Section 2 amends s. 718.203, F.S., to revise provisions related to when contractors, subcontractors, and suppliers must grant implied warranties of fitness to the developer and unit owners.

Section 3 amends s. 718.618(9), F.S., to provide for when provisions related to conversion reserve accounts and warranties are applicable.

Section 4 establishes specific provisions pertaining to the application of the changes to s. 95.11(3)(c), F.S. in this bill.

Section 5 provides an effective date of July 1, 2006.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, 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:

   Although the right to commence an action is a valid and protected property interest,[28] a plaintiff has no vested right in a statute of limitations in effect when his or her cause of action accrues.[29] Thus, the time allowed for a suit may be either initially imposed or reduced by legislation enacted after the cause of action arose, provided the litigant still has a reasonable time left in which to enforce his or her right.[30] The changes to s. 95.11(3)(c), F.S., made in this bill does reduce the time allowed for a

[28] *Wiley v. Roof*, 641 So. 2d 66 (Fla. 1994).
[29] *Lamb By and Through Donaldson v. Volkswagenwerk Aktiengesellschaft*, 631 F. Supp. 1144 (S.D. Fla. 1986), judgment aff'd, 835 F.2d 1369 (11th Cir. 1988).
[30] McCloskey & Co. v. Eckart, 164 F.2d 257 (C.C.A. 5th Cir. 1947); Walter Denson & Son v. Nelson, 88 So. 2d 120 (Fla. 1956).

suit, after the cause of action arose, but the bill appears to give a litigant reasonable time to enforce his or her right before being completely barred.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

1 A bill to be entitled
2 An act relating to construction contracting; amending s.
3 95.11, F.S.; revising commencement periods for actions
4 founded on the design, planning, or construction of
5 improvements to real property; providing application;
6 amending s. 718.203, F.S.; requiring implied warranties of
7 fitness for certain materials and work with respect to
8 condominiums to be specified by contract; providing that
9 the warranty applies only to certain buildings or
10 improvements; amending s. 718.618, F.S., relating to
11 converter reserve accounts and warranties; limiting
12 applicability to certain improvements; providing an
13 effective date.
14
15 WHEREAS, architects, engineers, and contractors of an
16 improvement to real property may find themselves named as
17 defendants in a damage suit many years after the improvement was
18 completed and occupied, and
19 WHEREAS, to permit the bringing of such actions without an
20 appropriate limitation as to time places the defendant in an
21 unreasonable, if not impossible, position with respect to
22 asserting a defense, and
23 WHEREAS, architects, engineers, and contractors have no
24 control over an owner whose neglect in maintaining an
25 improvement may cause dangerous or unsafe conditions to develop
26 over a period of years, who uses an improvement for purposes for
27 which it was not designed, or who makes alterations or changes
28 that, years afterward, may be determined to be unsafe or

29 defective and that may appear to be a part of the original
30 improvement, and
31 WHEREAS, liability insurance for the engineer, architect,
32 or contractor is more difficult and more expensive to obtain the
33 longer he or she is exposed to potential liability after an
34 improvement to real property has been completed, and
35 WHEREAS, Florida currently limits the liability exposure of
36 architects, engineers, and contractors to a period of 15 years
37 after completion of an improvement to real property, and
38 WHEREAS, liability insurance coverage is increasingly
39 difficult and more expensive to acquire to cover a period of
40 more than 10 years after an improvement to real property is
41 completed, especially for small and medium-sized architecture,
42 engineering, and construction firms, and
43 WHEREAS, liability insurance coverage for work on
44 residential construction projects, such as condominiums, is
45 generally not available to cover a period of more than 10 years
46 after the improvement to real property is completed, and
47 WHEREAS, the increased cost of such insurance coverage and
48 liability exposure adds to the total cost of construction and is
49 ultimately borne by residential and commercial property owners,
50 and
51 WHEREAS, Florida's current 15-year limit on liability is
52 considerably longer than most other states, some of which have
53 adopted limits as low as 5 years and most of which have adopted
54 a 10-year limit, and
55 WHEREAS, the best interest of the people of the state will
56 be served by reducing the period of time an engineer, architect,

57 or contractor may be exposed to potential liability after an
58 improvement has been completed, and
59 WHEREAS, a recent increase in the conversion of completed
60 or partially completed buildings to condominiums has caused
61 confusion regarding the scope of the warranties specified in
62 sections 718.203 and 718.618, Florida Statutes, and necessitates
63 the clarification of these statutes, NOW, THEREFORE,
64
65 Be It Enacted by the Legislature of the State of Florida:
66
67 Section 1. Paragraph (c) of subsection (3) of section
68 95.11, Florida Statutes, is amended to read:
69 95.11 Limitations other than for the recovery of real
70 property.--Actions other than for recovery of real property
71 shall be commenced as follows:
72 (3) WITHIN FOUR YEARS.--
73 (c) An action founded on the design, planning, or
74 construction of an improvement to real property, with the time
75 running from the date of actual possession by the owner, the
76 date of the issuance of a certificate of occupancy, the date of
77 abandonment of construction if not completed, or the date of
78 completion or termination of the contract between the
79 professional engineer, registered architect, or licensed
80 contractor and his or her employer, whichever date is earliest
81 ~~latest~~; except that, when the action involves a latent defect,
82 the time runs from the time the defect is discovered or should
83 have been discovered with the exercise of due diligence. In any
84 event, the action must be commenced within 10 ~~15~~ years after the

85 date of actual possession by the owner, the date of the issuance
86 of a certificate of occupancy, the date of abandonment of
87 construction if not completed, or the date of completion or
88 termination of the contract between the professional engineer,
89 registered architect, or licensed contractor and his or her
90 employer, whichever date is earliest ~~latest~~.
91 Section 2. Subsections (2) and (6) of section 718.203,
92 Florida Statutes, are amended to read:
93 718.203 Warranties.--
94 (2) The contractor, and all subcontractors and suppliers,
95 grant to the developer and to the purchaser of each unit implied
96 warranties of fitness as to the work performed or materials
97 supplied by them, as such work or materials are specified in
98 their respective contracts and any amendments thereto, as
99 follows:
100 (a) For a period of 3 years from the date of completion of
101 construction of a building or improvement, a warranty as to the
102 roof and structural components of the building or improvement
103 and mechanical and plumbing elements serving a building or an
104 improvement, except mechanical elements serving only one unit.
105 (b) For a period of 1 year after completion of all
106 construction, a warranty as to all other improvements and
107 materials.
108 (6) The warranty provided for in subsection (2) applies
109 only to a building or improvement that was designated as a
110 condominium by the developer in its construction contract with
111 the contractor or any amendment thereto executed by the parties.
112 ~~Nothing in this section affects a condominium as to which rights~~

113 ~~are established by contracts for sale of 10 percent or more of~~
114 ~~the units in the condominium by the developer to prospective~~
115 ~~unit owners prior to July 1, 1974, or as to condominium~~
116 ~~buildings on which construction has been commenced prior to July~~
117 ~~1, 1974.~~
118 Section 3. Subsection (9) is added to section 718.618,
119 Florida Statutes, to read:
120 718.618 Converter reserve accounts; warranties.--
121 (9) This section applies only to the conversion of
122 existing improvements where construction of the improvement was
123 commenced prior to its designation by the developer as a
124 condominium. In such circumstances, s. 718.203 does not apply.
125 Section 4. The amendments to s. 95.11(3)(c), Florida
126 Statutes, made by this act shall apply to any action commenced
127 on or after July 1, 2006, regardless of when the cause of action
128 accrued, except that any action that would not have been barred
129 under s. 95.11(3)(c), Florida Statutes, prior to the amendments
130 made by this act may be commenced before July 1, 2007, and if it
131 is not commenced by that date and is barred by the amendments to
132 s. 95.11(3)(c), Florida Statutes, made by this act, it shall be
133 barred.
134 Section 5. This act shall take effect July 1, 2006.

PCB CJ 06-04

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJ 06-04 Electronic Recording
SPONSOR(S): Civil Justice Committee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2106

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Civil Justice Committee		Shaddock	Bond
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Current law provides for electronic signatures and electronic notarization of documents, but does not clearly provide for electronic recording of documents that affect real property titles. This PCB adopts the Uniform Real Property Electronic Recording Act. The act starts the process towards electronic recording of real property documents with county recorders.

This PCB provides county recorders the legal authority to prepare for electronic recording of real property instruments, and authorizes county recorders to begin accepting records in electronic form, storing electronic records, and setting up systems for searching for and retrieving these land records. The PCB equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality (paper document or manual signature) is satisfied by an electronic document and signature.

The standards and practices for electronic recording will be promulgated by rule by the Secretary of State after consultation with an advisory council made up of 5 representatives of county recorders, 2 representatives of title companies, and 2 representatives of mortgage lenders.

This PCB appears to require insignificant recurring expenditures by the Secretary of State. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This PCB creates additional rulemaking power for the Secretary of State. This PCB may lead to decreased administrative burdens on government and on individuals regarding the recording of documents affecting land titles.

B. EFFECT OF PROPOSED CHANGES:

Background[1]

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 114 years old, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL's work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state."[2] In 2004, the conference finalized and approved the Uniform Real Property Electronic Recording Act ("URPERA"). Currently, the act has been enacted in four states and the District of Columbia, and is filed in the legislature of seven more.[3] They provided the following information regarding the proposed act:[4]

As a result of the enactments of the Uniform Electronic Transactions Act ("UETA")[5] in most states, and the Electronic Signatures in Global National Commerce Act ("E-sign") at the federal level, it is now possible to have sale contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction. However, real estate transactions require another step not addressed by UETA or E-sign. Real estate transaction documents must be recorded on public records in order to protect the current interest in the real estate and clarify who owns title to the property.

Real estate records establish a chain of title which is based upon the originality and authenticity of the paper documents presented for recording. There must be an orderly conversion of recording offices in the United States for implementation of an electronic recording system. The essential starting point for this monumental process is the URPERA.

URPERA modernizes real property law for the 21st Century. It is designed to help state administrative agencies meet the demands of the public for quick identification of title ownership. It should also streamline the real estate transaction at a benefit to consumers and every facet of the real estate industry.

Electronic communications make it possible to conduct old transactions in new forms. Some of the oldest kinds of transactions governed by law are transactions in real estate: for example, sales, leases and mortgages. In the Middle Ages transactions in real estate were conducted symbolically, without

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[1] The bulk of this analysis is specifically derived from "Uniform Real Property Electronic Recording Act" promulgated by the National Conference of Commissioners on Uniform State Laws in 2004, hereinafter referred to as "NCCUSL". The members of the Drafting Committee on the Uniform Real Property Electronic Recording Act were: David D. Biklen, Owen L. Anderson, Patrick C. Guillot, Carl H. Lisman, James J. White, W. Jackson Willoughby, Lee Yeakel, Arthur R. Gaudio, Fred H. Miller, Lani Liu Ewart, Dale Whitman, William H. Henning, and William J. Pierce..

[2] *Uniform Law Commissioners*, (Mar. 6, 2006) < http://www.nccusl.org/Update/>.

[3] *A few facts about the Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006) <http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp>. Florida is not included in this list.

[4] *Summary, Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006) <http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-urpera.asp>.

[5] Section 668.50, F.S.

paper or signatures. Most people were illiterate. Writing, printing and more universal literacy brought paper deeds, mortgages and leases, memorialized by words on paper with manual signatures. These were filed in public records to establish who had rightful title to any piece of land. Several centuries have gone by since that initial migration to the then new technology of paper documents and manual signatures. A new technology of computers, software to run them and electronic communications have come to replace paper. The law of real property must now make a transition to accommodate the new technology. The efficiency of real estate markets make this imminently necessary.

This long dependence on paper, however, casts up certain barriers to using electronic communications to carry on real estate transactions. The law of the states of the United States has many "statute of fraud" requirements that inhibit the use of electronic communications. Statute of fraud requirements put total and express reliance upon paper documents and manual signatures to make transactions enforceable. No paper, no enforcement. These same requirements have also made it more difficult to develop electronic analogues to transactions in paper that are equally enforceable.

The first step to remedy the problem took place in 1999 when the Uniform Law Commissioners promulgated the UETA. This act adjusted statute of fraud provisions to include electronic "records" and "signatures" for the memorialization of all kinds of transactions, including basic transactions in real estate. It is possible to have sale contracts, mortgage instruments (in whatever form a jurisdiction uses) and promissory notes memorialized in electronic form with electronic signatures that will now be treated the equal of the same paper documents with manual signatures. This is the result of the wide-spread enactment of UETA and of the subsequent enactment of E-Sign by Congress.

Real estate transactions, however, require another step not addressed by either UETA or E-Sign. Real estate documents must be recorded on public records to be effective. Recording takes place in most states in a county office devoted to keeping these records. Recording protects current interests in real estate by clarifying who holds those interests. The chain of title leading to the current title-holder, meaning the historic record of documents relating to transactions for a specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interests in it. The real estate records establish this chain of title. State law governs these local recording offices, and there are requirements in the law of every state relating to the originality and authenticity of paper documents that are presented for recording. These are themselves "statute of fraud" provisions that must be specifically adjusted before electronic recording may take place. Neither UETA nor E-Sign help.

There must be an orderly conversion of every recording office in the United States for electronic recording to become accepted universally. That will be a complex process, but it needs a starting point in the law. The URPERA, promulgated by the Uniform Law Commissioners in 2004, is that essential start.

The act does three fairly simple things that will have monumental effect. First, it establishes that any requirement for originality, for a paper document or for a writing manually signed before it may be recorded, is satisfied by an electronic document and signature. This is essentially an extension of the principles of UETA and E-Sign to the specific requirements for recording documents relating to real estate transactions in any state. Second, it establishes what standards a recording office must follow and what it must do to make electronic recording effective. For example, the office must comply with standards set by the board established in a state to set them. It must set up a system for searching and retrieving electronic documents. There are a minimum group of requirements established in URPERA. Third, URPERA establishes the board that sets state-wide standards and requires it to set uniform standards that must be implemented in every recording office.

These may be simple steps in the law, but the entire process of implementing electronic recording of electronic real estate documents will be complex from state to state. Inserting URPERA in the law of a state requires careful scrutiny of its real estate law. If paper documents are effective, for example, when they are time-stamped when delivered to a recording office, when should electronic documents that may be delivered electronically when an office is closed be considered effective? Answers to questions

like this one will take some work and some complex decisions as URPERA is considered for enactment in any state.

Effect of Bill

This PCB adopts the URPERA, with Florida modifications. The PCB defines the following terms:[6]

- "Document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and eligible to be recorded in the land records maintained by a county recorder.[7][8]

- "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.[9]

- "Electronic document" means a document that is received by a county recorder in an electronic form.[10]

- "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.[11]

- "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.[12]

This PCB authorizes a clerk to accept and record electronic documents. Therefore, if a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section.[13] This PCB further provides that, if a law requires, as a condition for recording, that a document be signed or notarized, that the requirement is satisfied by an electronic signature or electronic notarization.[14] A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.[15]

This PCB provides that the Secretary of State shall promulgate rules creating standards for electronic recording, and requires county recorders to follow those rules should a county recorder accept documents filed electronically.[16] The county recorder may elect to receive electronic documents.[17] The county recorder may store those electronic documents, or the information contained in them, and create an index of the documents or information.[18] The county recorder may also transmit electronic documents and communications to the recording party or to other parties.[19] The county recorder may

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[6] The Uniform Act includes a definition of "person" that is not included in this PCB. The term "person" is defined, applicable to all of the Florida Statutes, at s. 1.01(3), F.S.
[7] Section 695.27(2)(a).
[8] The PCB uses the generic term "county recorder" to represent the clerks of the circuit court, who are the county recorder in most of the counties in Florida, and the other officials who are designated as the county recorder in select counties.
[9] Section 695.27(2)(b).
[10] Section 695.27(2)(c).
[11] Section 695.27(2)(d).
[12] Section 695.27(2)(e).
[13] Section 695.27(3)(a).
[14] Sections 695.27(3)(b)-(c).
[15] Section 695.27(3)(c).
[16] Section 695.27(4)(b).
[17] Section 695.27(4)(b)(2).
[18] *Id.*
[19] *Id.*

archive the electronic documents or the information in them as well as the index in order to preserve and protect them.[20] A county recorder may enter into agreements with other jurisdictions regarding electronic recording.[21]

This PCB does not require that persons engaging in real estate transactions use electronic documents in order to have their documents recorded. It merely permits the county recorder to accept electronic documents if they are presented electronically. The county recorder must continue to receive paper documents and include those documents in the same index with the electronic ones.[22]

In promulgating rules, the Department of State must consult with the Electronic Recording Advisory Council created by this PCB. The Electronic Recording Advisory Council will consist of nine members. The Secretary of State must provide administrative support to the Electronic Recording Advisory Council. The members of the Electronic Recording Advisory Council are appointed by the Secretary of State, and members of the council are:[23]

- Five clerks of circuit court or county recorders who are members of the Florida Association of Court Clerks & Comptrollers.
- Two persons working in the title insurance industry who are members of the Florida Land Title Association.
- One banker who is a member of the Florida Bankers Association.
- One mortgage broker who is a member of the Florida Association of Mortgage Brokers.

The first meeting of the Electronic Recording Advisory Council must be held on or before July 30, 2006.[24] Thereafter, the council meets at the call of the chair.[25] The members of the Electronic Recording Advisory Council serve without compensation, and cannot claim per diem and travel expenses from the Secretary of State.[26]

To keep the standards and practices of county recorders in this state in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this PCB and to keep the technology used by county recorders in this state compatible with technology used by recording offices in other jurisdictions that enact substantially this act, the Department of State in consultation with the Electronic Recording Advisory Council, so far as is consistent with the purposes, policies, and provisions of s. 695.27 created by this PCB, in adopting, amending, and repealing standards must consider:[27]

- Standards and practices of other jurisdictions.
- The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.[28] National standard-setting organizations such as PRIA will likely

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[20] Section 695.27(4)(b)(6).
[21] Section 695.27(4)(b)(8).
[22] Section 695.27(4)(b)(4).
[23] Section 695.27(5)(a).
[24] Section 695.27(5)(b).
[25] *Id.*
[26] Section 695.27(5)(c).
[27] Section 695.27(5)(d).
[28] The Property Records Industry Association's mission is "to serve the property records industry by facilitating recordation and access to public property records, by formulating and disseminating model standards, systems and procedures while preserving the integrity of those records." *What is PRIA's Mission?*, (last visited Mar. 6, 2006) <http://www.pria.us/index.html>.

have considered the issue that is now before the Department of State and the Electronic Recording Advisory Council and have developed a protocol or standard to deal with it.

- The views of interested persons and governmental officials and entities. Among others, these persons should include county clerks and potential users of the electronic recording system such as real estate attorneys, mortgage lenders, representatives from the title and escrow industries, real estate brokers, and notaries public. Also included might be potential suppliers of hardware, software and services for electronic recording systems.

- The needs of counties of varying size, population, and resources. Because most states are quite diverse in the size, population and resources of their recording venues, it is important that the Department of State and the Electronic Recording Advisory Council consider all of their needs. This section recognizes that the standards should promote the overall good of the entire state and not just the good of certain types of recording venues.

- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering. The authenticity of a documents stored in any recording system is of utmost importance. If forged or invalid documents are accepted for recording, landowners and those depending on their titles can be seriously affected. The Department of State and the Electronic Recording Advisory Council is also directed to consider standards for the proper preservation of electronic documents once they are in the electronic recording system.

In applying and construing s. 695.27, created by this PCB, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Responding to the specific language of E-sign, this PCB is designed to avoid preemption of state law under that federal legislation. This PCB modifies, limits, and supersedes E-sign, 15 U.S.C. ss. 7001 et seq.,[29] but this section does not modify, limit, or supersede s. 101(c) of that act,[30] 15 U.S.C. s. 7001(c),[31] or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).[32]

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[29] The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., was enacted on June 30, 2000. Congress enacted the Act, "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. *Executive Summary*, (last visited Mar. 6, 2006) <http://www.ftc.gov/os/2001/06/esign7.htm>.

[30] In the Electronic Signatures in Global and National Commerce Act Congress:

> imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.

Executive Summary, (last visited Mar. 6, 2006) <http://www.ftc.gov/os/2001/06/esign7.htm>.

[31] 15 U.S.C. s.7001(c) states that a consumer's consent to receive electronic records is valid only if the consumer has affirmative consented and prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer's rights.

[32] 15 U.S.C. s.7003(b) excludes from the Electronic Signatures in Global and National Commerce Act "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings" and notices of: cancellation of utility services; defaults or foreclosures or other such proceedings on a primary residence; cancellation or termination of health or life insurance; or recall of a product because of health or safety issues, or documents required to transport toxic or dangerous materials.

C. SECTION DIRECTORY:

Section 1 creates s. 695.27, F.S., to adopt the Uniform Real Property Electronic Recording Act, with Florida modifications.

Section 2 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   There is a minimal fiscal impact on the Secretary of State for rulemaking.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Electronic recording of documents holds the promise of significantly lower costs to government and to the private sector.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This PCB 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 PCB creates additional rulemaking authority for the Secretary of State. It is anticipated that the Bureau of Archives would be assigned the responsibility for the rulemaking. An advisory body is created to assist in crafting the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a

1 A bill to be entitled
2 An act relating to real property electronic recording;
3 providing a short title; providing definitions; providing
4 for the validity of electronic documents relating to real
5 property; providing for the recording of electronic
6 documents by the county recorder; granting the Secretary
7 of State rulemaking authority; creating an advisory
8 council; providing for membership and duties of the
9 advisory council; providing for uniformity of application
10 and construction; specifying the relation to a federal
11 act; providing an effective date.
12
13 Be It Enacted by the Legislature of the State of Florida:
14
15 Section 1. Section 695.27, Florida Statutes, is created to
16 read:
17 695.27 Uniform Real Property Electronic Recording Act.--
18 (1) Short title.--This section may be cited as the "Uniform
19 Real Property Electronic Recording Act."
20 (2) Definitions.--As used in this section:
21 (a) "Document" means information that is:
22 1. Inscribed on a tangible medium or that is stored in an
23 electronic or other medium and is retrievable in perceivable
24 form; and
25 2. Eligible to be recorded in the land records maintained
26 by a county recorder.
27 (b) "Electronic" means relating to technology having
28 electrical, digital, magnetic, wireless, optical,
29 electromagnetic, or similar capabilities.
30 (c) "Electronic document" means a document that is received

31 by a county recorder in an electronic form.
32 (d) "Electronic signature" means an electronic sound,
33 symbol, or process attached to or logically associated with a
34 document and executed or adopted by a person with the intent to
35 sign the document.
36 (e) "State" means a state of the United States, the
37 District of Columbia, Puerto Rico, the United States Virgin
38 Islands, or any territory or insular possession subject to the
39 jurisdiction of the United States.
40 (3) Validity of electronic documents.--
41 (a) If a law requires, as a condition for recording, that a
42 document be an original, be on paper or another tangible medium,
43 or be in writing, the requirement is satisfied by an electronic
44 document satisfying the requirements of this section.
45 (b) If a law requires, as a condition for recording, that a
46 document be signed, the requirement is satisfied by an electronic
47 signature.
48 (c) A requirement that a document or a signature associated
49 with a document be notarized, acknowledged, verified, witnessed,
50 or made under oath is satisfied if the electronic signature of
51 the person authorized to perform that act, and all other
52 information required to be included, is attached to or logically
53 associated with the document or signature. A physical or
54 electronic image of a stamp, impression, or seal need not
55 accompany an electronic signature.
56 (4) Recording of documents.--
57 (a) In this section, the term "paper document" means a
58 document that is received by the county recorder in a form that
59 is not electronic.
60 (b) A county recorder:

61 1. Who implements any of the functions listed in this
62 section shall do so in compliance with standards established by
63 rule by the Department of State.
64 2. May receive, index, store, archive, and transmit
65 electronic documents.
66 3. May provide for access to, and for search and retrieval
67 of, documents and information by electronic means.
68 4. Who accepts electronic documents for recording shall
69 continue to accept paper documents as authorized by state law and
70 shall place entries for both types of documents in the same
71 index.
72 5. May convert paper documents accepted for recording into
73 electronic form.
74 6. May convert into electronic form information recorded
75 before the county recorder began to record electronic documents.
76 7. May accept electronically any fee that the county
77 recorder is authorized to collect.
78 8. May agree with other officials of a state or a political
79 subdivision thereof, or of the United States, on procedures or
80 processes to facilitate the electronic satisfaction of prior
81 approvals and conditions precedent to recording and the
82 electronic payment of fees.
83 (5) Administration and standards.--
84 (a) The Department of State shall prescribe by rule
85 pursuant to ss. 120.536(1) and 120.54 standards to implement this
86 section in consultation with the Electronic Recording Advisory
87 Council. The Electronic Recording Advisory Council shall consist
88 of nine members. The Secretary of State shall provide
89 administrative support to the Electronic Recording Advisory
90 Council. The members of the Electronic Recording Advisory

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

V

91 Council shall be appointed by the Secretary of State. The
92 council shall consist of:
93 1. Five clerks of circuit court or county recorders who are
94 members of the Florida Association of Court Clerks &
95 Comptrollers.
96 2. Two persons working in the title insurance industry who
97 are members of the Florida Land Title Association.
98 3. One banker who is a member of the Florida Bankers
99 Association.
100 4. One mortgage broker who is a member of the Florida
101 Association of Mortgage Brokers.
102 (b) The first meeting of the Electronic Recording Advisory
103 Council shall be held on or before July 30, 2006. Thereafter,
104 the council shall meet at the call of the chair.
105 (c) The members of the Electronic Recording Advisory
106 Council shall serve without compensation, and shall not claim per
107 diem and travel expenses from the Secretary of State.
108 (d) To keep the standards and practices of county recorders
109 in this state in harmony with the standards and practices of
110 recording offices in other jurisdictions that enact substantially
111 this act and to keep the technology used by county recorders in
112 this state compatible with technology used by recording offices
113 in other jurisdictions that enact substantially this act, the
114 Department of State in consultation with the Electronic Recording
115 Advisory Council, so far as is consistent with the purposes,
116 policies, and provisions of this act, in adopting, amending, and
117 repealing standards shall consider:
118 1. Standards and practices of other jurisdictions.
119 2. The most recent standards adopted by national standard-
120 setting bodies, such as the Property Records Industry

121 Association.
122 3. The views of interested persons and governmental
123 officials and entities.
124 4. The needs of counties of varying size, population, and
125 resources.
126 5. Standards requiring adequate information security
127 protection to ensure that electronic documents are accurate,
128 authentic, adequately preserved, and resistant to tampering.
129 (6) Uniformity of application and construction.--In
130 applying and construing this section, consideration must be given
131 to the need to promote uniformity of the law with respect to its
132 subject matter among states that enact it.
133 (7) Relation to Electronic Signatures in Global and
134 National Commerce Act.--This section modifies, limits, and
135 supersedes the federal Electronic Signatures in Global and
136 National Commerce Act, 15 U.S.C. ss. 7001 et seq., but this
137 section does not modify, limit, or supersede s. 101(c) of that
138 act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of
139 any of the notices described in s. 103(b) of that act, 15 U.S.C.
140 s. 7003(b).
141 Section 2. This act shall take effect upon becoming a law.

Civil Justice Committee Meeting

March 8, 2006
10:00 AM - 12:00 PM
24 House Office Building

Amendment (s)

Allan G. Bense
Speaker

Mark Mahon
Chair

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 841**

COUNCIL/COMMITTEE ACTION

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

1

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Attkisson offered the following:
3
4 **Amendment**
5 Remove line(s) 23-25 and insert:
6 (2) If an appellant is an individual or is an
7 independently owned and operated business with 400 or fewer
8 full-time employees, the supersedeas bond, at the election of
9 the

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **PCB CJ 06-04**

COUNCIL/COMMITTEE ACTION

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

1

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1 Council/Committee hearing bill: Civil Justice Committee
2 Representative(s) Cannon offered the following:
3
4 **Amendment**
5 Remove line(s) 84-88 and insert:
6 (a) The Department of State shall prescribe by rule
7 standards to implement this section in consultation with the
8 Electronic Recording Advisory Council, which is hereby created.
9 The Electronic Recording Advisory Council shall consist of nine
10 members. The Secretary of State shall appoint the chair of the
11 Electronic Recording Advisory Council. The Secretary of State
12 shall provide
13