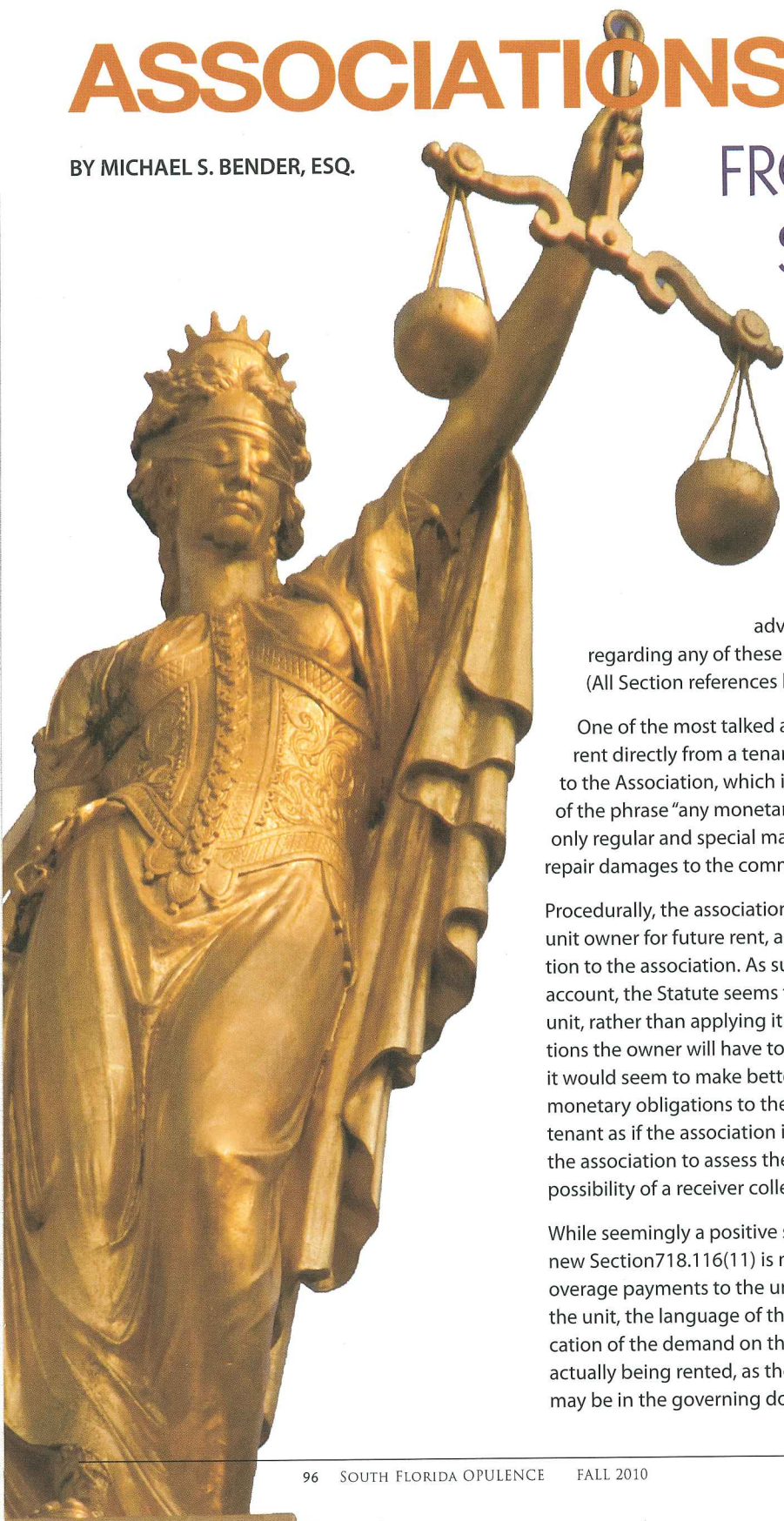


ASSOCIATIONS TO BENEFIT

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FROM NEW STATE STATUTE CHANGES



The Legislative Session for 2010 produced a number of significant changes to the Condominium Act (Chapter 718 F.S.), as well as other Chapters of Florida Statutes that affect condominiums, which are contained in Senate Bill (SB) 1196, all of which became effective on July 1, 2010. The following is a summary of a few of the changes most relevant to the operation of the association and an identification of the particular affected sections of the Florida Statutes. Please note that this summary is not intended to be an exhaustive explanation of the intricate detail of all of the changes nor is it to be considered complete legal advice on the subject. It is recommended that if there are any questions regarding any of these changes, you contact your Association attorney for further discussion. (All Section references below are to Florida Statutes.)

One of the most talked about changes to Chapter 718 is the ability of the Association to collect rent directly from a tenant when a unit owner is delinquent in paying any monetary obligation to the Association, which is set forth in the new subsection (11) added to Section 718.116. The use of the phrase "any monetary obligation" is considered expansive as it necessarily encompasses not only regular and special maintenance assessments, but also properly levied fines, or even costs to repair damages to the common element caused by an owner or their occupant.

Procedurally, the association is required to make a written demand on the tenant, with a copy to the unit owner for future rent, and may only collect rent to the extent of the unpaid monetary obligation to the association. As such, if the association collects more rent than is owed on the unit owner account, the Statute seems to contemplate the association sending any overage to the owner of the unit, rather than applying it to the account of the unit owner as a credit for future monetary obligations the owner will have to the association. However, until there is a court decision to the contrary, it would seem to make better business sense to credit the account of the unit owner against future monetary obligations to the association. If the tenant does not pay, the association may evict the tenant as if the association is the landlord. However, the statute does not provide for the ability of the association to assess the costs incurred in the eviction against the unit. It also contemplates the possibility of a receiver collecting the rent.

While seemingly a positive step for associations in their efforts to address delinquent accounts, the new Section 718.116(11) is not without issue. In addition to the apparent requirement to forward overage payments to the unit owner and inability to assess the costs of eviction of a tenant against the unit, the language of the Statute does not address some potential practical pitfalls in the application of the demand on the tenant. By way of example, many communities are unaware if a unit is actually being rented, as the delinquent unit owner has also circumvented the requirement (which may be in the governing documents of the association) of having a prospective tenant approved

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prior to the tenant taking up residence in the community. Even when the Board might be aware of a tenant residing within the unit, without a copy of a lease for that tenant, there is the question of how much rent the tenant is to be paying to the association, and when such payments are due. Finally, the language of the Statute has raised concern amongst some practitioners with regard to whether the association may apply the rental payments it receives to the entire past due balance of a delinquent owner, which might include interest, administrative late fees, as well as attorney's fees and costs of collection, or only apply it to monetary obligations which come due following the receipt of the demand letter. The more logical reading of the Statute, in order to actually serve its purpose of assisting associations in their efforts to collect past due accounts, is to allow the receipt of a rental payment to be applied against the entire outstanding balance of that unit owner. Hopefully, the Legislature will address and clarify this in its next Legislative Session.

Section 718.303 has been revised to allow for the suspension of use rights to common elements, common facilities or any other association property if a unit owner is delinquent for more than 90 days in pay a monetary obligation to the association. The suspension would not apply to limited common elements for that unit, common elements that must be used to access the unit, utility services provided to the unit, parking spaces or elevators. Again, while a positive step for Boards of Directors in the ongoing battle to collect outstanding monetary obligations to the association, it remains unclear how an association can best enforce and/or police any properly passed suspension of use rights.

With regard to the language of 718.303 which was approved by the Legislature, there is also a conflict in the way the Statute has been adopted in that new language in subsection (3) requires notice and a hearing for the suspension, like with fines (i.e. before an independent Fining Committee), but the new subsection (4) states that the notice and hearing requirement of (3) do not apply to suspensions because of failing to pay monetary obligation. Rather, subsection (4) indicates that notice must be provided of only the board meeting at which the suspension will be approved by the board of directors, and then written notice mailed or hand delivered to the unit owner as well as any unit occupants whose use rights have been suspended. The Legislature should resolve this conflict at the next Session.

Additionally, a new subsection (5) has been added to allow the association to suspend the voting rights of a member that is more than 90 days delinquent in any monetary obligation until the full payment of all such obligations. This suspension must also be approved at a properly noticed meeting of the board of directors, followed by written notice then being mailed or hand delivered to the unit owner whose voting rights have been suspended.

Another provision of SB1196 that was most talked about following the Legislative Session was the amending of Section 718.112(2)(l) to delete language which prohibited owners from voting to forego retrofitting of a fire sprinkler system for common areas in a high rise building, meaning one greater than 75 feet in height. The new language now permits, upon a vote of a majority of the voting interest, to forego retrofitting in the common

elements, association property and units of residential condominiums of any size. It further prohibits local authorities from compelling retrofitting until 2019 for those communities that did not vote to forego it. Additionally, if retrofitting is to be required, an application for a building permit must be filed by December 31, 2016, demonstrating the intent to become compliant by 2019.

Section 718.112(2)(l) was also amended to add a new subsection 2, to provide that if there had been a prior vote to forego retrofitting, a vote to require retrofitting will have to be called upon a petition of at least 10% of the voting interests. However, such a vote may only be called once every 3 years. A new subsection 4 has also been added to allow associations to vote to forego retrofitting elevators for generators pursuant to Section 553.509(2), with a vote of a majority of the voting interest in the affected condominium.

In order to attempt to encourage buyers for the many vacant and unsold units in the large condominium projects which were built during the "bubble years" of 2003-2008, a new Part VII to Chapter 718 has been added which includes Sections 718.701 - 708, entitled the "Distressed Condominium Relief Act." These Sections acknowledge the massive downturn in the condominium market in the state and the impact that it has had on all facets of condominiums. Special status is being afforded to two different classifications, "bulk assignees" and "bulk buyers" of units. Both types are purchasers of multiple units (more than seven) and the classification of which will depend upon whether or not the purchase is with or without an assignment of developer rights other than to conduct sales, leasing and marketing activity and a few other entitlements.

Unlike a "bulk assignee", the bulk buyer will not be considered a successor developer for the purpose of taking on the liabilities of the original developer for warranties for construction defects, funding, financial reporting issues and other such claims. The bulk buyer will be exempt from paying working capital contributions in connection with the bulk purchase and be exempt from the right of first refusal in the documents. This special status will apply to qualified purchasers through July 1, 2012 (unless extended by the Legislature in a later session). Specific filing requirements with the Division are also included for such a purchaser.

SB1196 contained many other significant changes to Chapter 718 of the Florida Statutes, including to insurance requirements, Official Records and the time within which a Director must file his or her Candidate Certification form. Please look for Part Two of this article on those legislative changes in the next issue of *Opulence Magazine*. 



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