

AMBIGUITY OF FLORIDA STATUTE § 718.116 AND ITS IMPACT ON COMMUNITY ASSOCIATIONS' ABILITY TO COLLECT UNPAID ASSESSMENTS

By Ashley Poulter



Recently, there has been an increase in litigation surrounding the interpretation of Florida Statute § 718.116 (2010)¹, which may have a serious impact on a community association's ability to collect unpaid assessments. Florida Statute § 718.116(1)(a) provides:

The principal controversy surrounding

A unit owner, regardless of how his or her title has been acquired, including by purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. that came due up to the time of transfer of title. This liability is

without prejudice to any right the owner may have to recover from the previous owner the amounts paid by the owner.²

this statute is whether the Florida legislature intended to make a purchaser who acquired the property via foreclosure (*i.e.*, not subject to the first mortgage) jointly and severally liable with the previous owner for all unpaid assessments. Purchasers who acquire their property through a foreclosure sale assert that the foreclosure judgment forecloses, and thus bars any claim for unpaid assessments against them. In addition, foreclosure purchasers take the position that had the legislature intended for owners who acquire title through foreclosure sale to be liable for a previous owner's assessments, the legislature would have included the italicized language of the first sentence of the statute in the second sentence.³

It is questionable whether courts will follow the reasoning and statutory interpretation of the foreclosure purchasers. The more compelling position taken by community associations, and reflected in the legislative amendments to section 718.116, is that the second sentence of section 718.116(1)(a) unequivocally states that all unit owners, without exception, are jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.⁴ Nevertheless, even if the second sentence of section 718.116(1)(a) does not unequivocally state the obligations of unit owners for past due assessments, reading the first and second sentence of section 718.116(1)(a) as a congruous paragraph demonstrates the legislature's intent that the italicized portion of the first sentence be incorporated by reference into the second sentence because the two sentences are grouped together in a single-section paragraph.⁵ Community associations

take the position that had the legislature intended for a unit owner who purchased property from a foreclosure sale be exempted from liability for past due assessments, then the legislature would have so stated or included the second sentence in its own section.

Legislative changes made to section 718.116(1)(a) support the community associations' position that all purchasers, including purchasers who acquired their property via foreclosure sale, are jointly and severally liable with the previous owner for unpaid assessments. In 1991, the legislature amended section 718.116 to provide that "a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title."

Furthermore, the July 1, 2010 amendments made to section 718.116 evince the legislature's desire to protect a community association's ability to collect past due assessments from foreclosure sale purchasers. The amendment to section 718.116(b)(1) allows an association to collect assessments from a first mortgagee, its successor, or an assignee from the twelve months immediately preceding that person's acquisition of title.⁶ Before the amendment, a community association could only collect past due assessments from a first mortgagee, its successor or assignee from the six months immediately preceding that person's acquisition of title.⁷ This change demonstrates the intention of the legislature to increase the liability of foreclosure purchasers for past due assessments, not release them from liability.

Finally, foreclosure purchasers are also taking the position that they are not successors or assignees to the property's first mortgage. Thus, they assert that they are not liable for the prior owner's assessments pursuant to section 718.116(1)(g) which states, "[f]or purposes of this subsection, the term 'successor or assignee' as used with respect to a first mortgagee includes only a subsequent holder of the first mortgage."⁸ In contrast, community associations maintain that whether the foreclosure purchasers are successors or assignees to the first mortgage is irrelevant for the purpose of interpreting section 718.116(1)(a) because the language "successor or assignee" is not used in section (1)(a) of the statute.⁹ Therefore, section 718.116(1)(g) does not absolve foreclosure sale purchasers of joint and several liability for the unpaid assessments pursuant to section 718.116(1)(a).¹⁰

As the number of purchasers who acquire their property through foreclosure sales increases, we anticipate that litigation will continue to arise under this statute. Should the courts find that section 718.116 absolves foreclosure sale purchasers from liability for unpaid assessments, this may have a serious

impact on community associations' ability to obtain a significant amount of unpaid assessments due from previous owners of the property. Ultimately, however, we are hopeful that the courts will find the community associations' position compelling, and, in time, the legislature will clarify any ambiguity.

(Endnotes)

1 § 718.116, Fla. Stat. (2010).

2 § 718.116(1)(a), Fla. Stat. (2010) Emphasis added).

3 *Id.*

4 *Id.*

5 *Id.*

6 § 718.116(1)(b)(1), Fla. Stat. (2010).

7 § 718.116(1)(b)(1.), Fla. Stat. (2009).

8 § 718.116(1)(g), Fla. Stat. (2010).

9 § 718.116(1)(a), Fla. Stat. (2010).

10 *Id.*