

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 861 Residential Loan Alternative Agreements
SPONSOR(S): Regulatory Reform & Economic Development Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Regulatory Reform & Economic Development Subcommittee		Larkin	Anstead

SUMMARY ANALYSIS

A listing agreement forms a legally binding agreement with a real estate agent to sell property on behalf of the owner. All listing agreements in Florida are required to have a definitive termination date and a real estate agent may be disciplined by the Florida Real Estate Commission (FREC) for failing to include such. Generally, an agent and the seller choose a mutually agreeable termination date, which they can modify or extend by mutual assent.

Generally, a real estate agent is entitled to a commission when that person is the procuring cause of a sale. Recently, some real estate brokers have offered homeowners cash in exchange for the exclusive right to list an owners' property in the future. Some of the owners who entered into these agreements did not realize the listing contract lasted up to 40 years and were later sued by the real estate broker for commission even though the broker was not involved in the sale of the property.

The bill:

- Limits the term of a residential loan alternative agreement for the disposition of residential real property to no more than six months and may not be renewed.
- Prohibits a residential loan alternative agreement from authorizing a person to place a lien or otherwise to encumber any residential real property.
- Prohibits residential loan alternative agreements from constituting a lien, encumbrance, or security interest on the property.
- Prohibits courts from enforcing a residential loan alternative agreement by a lien or by constructive trust in the residential real property or upon the proceeds of the disposition of the residential real property.
- Requires specific notice and the written consent of the homeowner or seller before a residential loan alternative agreement may be assigned to another person.
- Defines "disposition" as a transfer or voluntary conveyance of the title or other ownership interest in residential real property.
- Defines "residential alternative loan alternative agreement" as a signed writing between a person and seller or homeowner that:
 - grants the exclusive right to a person to act as a broker for the disposition of the property,
 - provides an effective duration of more than two years, and
 - provides the person pay compensation to the seller or owner.
- Defines "residential real property" as an improved residential property of four units or fewer or unimproved residential real property intended for four units or fewer.
- Provides that a residential loan alternative agreement is unenforceable in law or equity and may not be recorded by the clerk of the circuit court.
- Makes violations of certain provisions an unfair or deceptive trade practice within the meaning of Florida Deceptive and Unfair Trade Practices Act.

The bill provides an effective date of July 1, 2023.

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

FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: pcs0861.RRS

DATE: 3/14/2023

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Background on Real Estate Brokers

The Florida Real Estate Commission (FREC), within the Division of Real Estate (Division), at the Department of Business and Professional Regulation (Department), administers and enforces real estate licensing laws.¹ The FREC is also empowered to adopt rules that enable it to implement its statutorily authorized duties and responsibilities.²

FREC may discipline real estate brokers by denying, refusing to renew, suspending, or revoking their permit or imposing administrative fines if FREC has found that the broker has violated the practice act, including:³

- engaging in dishonest, fraudulent transactions;
- advertising property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;
- making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession;
- failing to include in any written listing agreement a definite expiration date, description of the property, price and terms, fee or commission, and a proper signature of the principal, or
- failing to perform any statutory or legal obligation placed upon a licensee.

A real estate broker or sales associate may be convicted for a second degree misdemeanor for recording a contract, or other writing which purports to affect the title of, or encumber, any real property if the same is known to her or him to be false, void, or not authorized to be placed of record, for the purpose of collecting a commission, or to coerce the payment of money to the broker or sales associate or other person.⁴ This does not prohibit a broker or a sales associate from recording a judgment rendered by the court, placing a lien on a property where expressly permitted by contractual agreement, or otherwise allowed by law.⁵

A person who operates as a broker or sales associate without being the holder of a valid and current active license commits a felony of the third degree.⁶

Broker-Property Owner Relationship

A broker is a person or agency who arranges transactions between a buyer and a seller for a commission.⁷ "In the absence of a special contract, a broker is entitled to a commission when that person is the procuring cause of a sale."⁸

Real Estate Listing Agreements⁹

¹ Ch. 475, Part I, F.S.

² These rules are contained in ch. 61J2, F.A.C.

³ Ss. 475.25 and s. 455.227, F.S.

⁴ S. 475.42(1)(i) and (2), F.S.

⁵ S. 475.42(1)(i), F.S.

⁶ S. 475.42(1)(a), F.S.

⁷ S. 475.01(1)(a), F.S.

⁸ *Esslinger-Wooten-Maxwell, Inc. v. Lones Family Ltd. P'ship*, 298 So. 3d 1176, 1180 (Fla. 3d DCA 2020).

⁹ Jessica Cody. *Understanding the Listing Agreement When Selling Your Home*, Home Light (Feb. 10, 2023),

<https://www.homelight.com/blog/listing-agreement/>.

A listing agreement is a legally binding contract that establishes the duties of the seller and the real estate agent. The time period for these agreements must be defined in the contract.¹⁰ Typically, the contract terms may be negotiated. For example, the expiration date, commission, and duties.¹¹ There are three types of listing agreements:

Types of Listing Agreements	Description
Exclusive Right-to-Sell Agreement	<ul style="list-style-type: none"> • Gives only one agent the right to find a buyer. • Real estate broker receives commission when the property is sold regardless of who finds the buyer.
Exclusive Agency Listing Agreement	<ul style="list-style-type: none"> • Any agent that is part of the real estate agency may sell the property and collect commission. • Seller is allowed to sell property without assistance from the agent. • If the seller sells the property without assistance of the agent, the agent is not entitled to commission.
Open Listing Agreement	<ul style="list-style-type: none"> • The seller pays commission to the agent only if the house sells through the efforts of that agent.

Recording Documents Related to Real Estate Agreements With the Clerk of the Court

The Clerk of the Court is required to record certain instruments presented to them, upon payment of service charges. A document submitted to the clerk of court is deemed validly recorded and acts as notice to other persons for certain purposes. Clerks record documents such as agreements, notices or claims of lien, and other instruments relating to the ownership, transfer, or encumbrance¹² of or claims against real or personal property or any interest in it.¹³

An encumbrance, such as a recorded lien, creates a cloud on the property’s title.¹⁴ This affects the marketability of the property and the ability for a homeowner to sell or refinance their home. Currently, a broker may place a lien on a property where expressly permitted by contractual agreement or authorized by law.¹⁵

Recent Events

Certain Florida licensed real estate brokerage firms have been offering homeowners cash, advertised as an alternative loan, in exchange for exclusive rights to list a homeowners’ property when they decide to sell.

Some homeowners enter into these residential loan alternative agreements without recognizing that they may last up to 40 years. Years later when a homeowner sells their property, without the brokerage firm, the brokerage firm files a lien against the property for 3% of its value even though the brokerage firm never performed the listing services.¹⁶

¹⁰ S. 475.25(1)(r), F.S.
¹¹ Jamie Johnson, *What Is a Listing Agreement?*, Rocket Mortgage (Feb. 19, 2023), <https://www.rocketmortgage.com/learn/listing-agreement> (visited March 2, 2023).
¹² “An encumbrance is a claim against an asset by an entity that is not the owner. Common types of encumbrances against real property include liens, easements, leases, mortgages, or restrictive covenants. Encumbrances impact the transferability and/or use of subjected properties.” *Encumbrance*, Legal Information Institute (last visited Feb. 28, 2023),
¹³ S. 28.222(3)(a), F.S.
¹⁴ A cloud on title means a claim that affects the ownership of a property. *Cloud on Title*, Legal Information Institute, https://www.law.cornell.edu/wex/cloud_on_title (visited March 2, 2023).
¹⁵ S. 475.42(1)(i), F.S.; see also, S. 702.01, F.S. If the debt is not paid to the creditor, the creditor can file a foreclosure action to have the court enforce the lien
¹⁶ Rebecca Liebson, *Florida Company Pays Quick Cash to List Your Home. the Catch? A 40-Year Contract*, Tampa Bay Times (Sept. 6, 2022), <https://www.tampabay.com/news/real-estate/2022/09/06/florida-company-pays-quick-cash-to-list-your-home-the-catch-a-40-year-contract/>.

One of these companies is MV Realty, which operates in 33 states. It has acknowledged that more than 30,000 people have signed similar types of contracts.¹⁷

Recently, the Florida¹⁸, Massachusetts¹⁹, Pennsylvania²⁰, and Ohio, Attorney Generals²¹ have filed lawsuits against MV Realty for its misleading contractual terms related to these types of “listing agreements”.

Florida Deceptive and Unfair Trade Practices Act (FDUTPA or Act)

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA or Act) declares unlawful any unfair or deceptive acts or practices committed in the conduct of any trade or commerce.²² The Act is a separate cause of action intended to be an additional remedy to other civil remedies at law, and it is aimed toward making consumers whole for losses caused by fraudulent consumer practices. The Act protects consumers from deceptive acts, and protects the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. It applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract.

Effect of the Bill

The bill:

- Limits the term of a residential loan alternative agreement for the disposition of residential real property to no more than six months and may not be renewed.
- Prohibits a residential loan alternative agreement from authorizing a person to place a lien or otherwise to encumber any residential real property.
- Prohibits residential loan alternative agreements from constituting a lien, encumbrance, or security interest in the residential real property.
- Prohibits courts from enforcing a residential alternative loan alternative agreement by lien or constructive trust in the residential real property or upon the proceeds of the disposition of the residential real property.
- Requires specific notice and the written consent of the homeowner or seller before a residential loan alternative agreement may be assigned to another person.
- Defines “disposition” as a transfer or voluntary conveyance of the title or other ownership interest in residential real property.
 - Defines “residential alternative loan alternative agreement” as a signed writing between a person and seller or owner of residential real property that:
 - Grants an exclusive right to a person to act as a broker for the disposition of the property;
 - Has an effective duration of more than two years; and
 - Provides the person pay compensation to the seller or owner.

¹⁷ Angie Moreschi, *MV Realty Facing Congressional Scrutiny Following Channel 11 Investigation*, WPXI, (Dec. 21, 2022), <https://www.wpxi.com/news/local/mv-realty-facing-congressional-scrutiny-following-channel-11-investigation/Y4HNN2X24NEQRFMTNVLB2QNHNQ/>.

¹⁸ *Attorney General Moody Takes Legal Action against MV Realty for Swindling Florida Homeowners*, Office of the Attorney General (Nov. 29, 2022), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/E9E4A2F7281415CE85258909007259EC>.

¹⁹ Cheryl Fiandaca, *Massachusetts Attorney General Sues MV Realty Company after I-Team Investigation*, CBS News. (December 14, 2022), <https://www.cbsnews.com/boston/news/mv-realty-attorney-general-lawsuit-massachusetts-iteam-investigation/>.

²⁰ *AG Shapiro Sues Real Estate Brokerage Firm MV Realty over Misleading Homeowner Benefit Program*, Pennsylvania Office of Attorney General (Dec. 14, 2022), https://www.attorneygeneral.gov/taking-action/ag-shapiro-sues-real-estate-brokerage-firm-mv-realty-over-misleading-homeowner-benefit-program/#:~:text=Homeowner%20Benefit%20Program,_AG%20Shapiro%20Sues%20Real%20Estate%20Brokerage%20Firm,Over%20Misleading%20Homeowner%20Benefit%20Program∓text=HARRISBURG%20%20E%20%80%94%20Attorney%20General%20Josh%20Shapiro,and%20its%20founder%2C%20Amanda%20Zachman.

²¹ “*AG Yost Sues MV Realty, Founder and Broker for Illegal Practices*,” Ohio Attorney General Dave Yost (Feb. 15, 2023), <https://www.ohioattorneygeneral.gov/Media/News-Releases/February-2023/AG-Yost-Sues-MV-Realty-Founder-and-Broker-for-Ille>.

²² ss. 501.201-213, F.S.

- Defines “residential real property” as an improved residential property of four units or fewer or unimproved residential real property intended for four units or fewer.
- Provides that a residential loan alternative agreement is unenforceable in law or equity.
- Provides that a residential loan alternative agreement may not be recorded by the clerk of the circuit court.
- Makes a violation of this section an unfair or deceptive trade practice within the meaning of Florida Deceptive and Unfair Trade Practices Act.

B. SECTION DIRECTORY:

Section 1: Creates s. 475.279, F.S.; defines terms; specifies limitations on residential loan alternative agreements; requires notice and written consent in certain circumstances; provides penalties for violations.

Section 2: Provides an effective date of July 1, 2023.

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:

The bill may have a positive economic impact on homeowners selling their property.

As for real estate brokerage firms, the bill may have a negative economic impact if they use the residential loan alternative agreement practice.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Language in the bill may need to be clarified to distinguish between “having an effective duration of more than 2 years” and “may not exceed a term of 6 months.”

Clerks of court will have to train their employees to recognize residential loan alternative agreements related to the provisions in the bill that prohibit recording such agreements.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES