

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 861 Residential Loan Alternative Agreements
SPONSOR(S): Commerce Committee, Judiciary Committee, Regulatory Reform & Economic Development Subcommittee, Robinson, W.
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 770

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Regulatory Reform & Economic Development Subcommittee	13 Y, 0 N, As CS	Larkin	Anstead
2) Judiciary Committee	22 Y, 0 N, As CS	Mawn	Kramer
3) Commerce Committee	17 Y, 0 N, As CS	Larkin	Hamon

SUMMARY ANALYSIS

A listing agreement is a contract in which a property owner gives a real estate broker or sales associate the authority to find a buyer for his or her property; the terms of such an agreement can generally be negotiated, but the duration of the agreement, the property's price and sales terms, and the amount of any fee or commission must be defined in the contract. Recently, some Florida real estate brokerage firms have been offering homeowners monetary payments, advertised as an "alternative loan," in exchange for the exclusive right to list a homeowner's property whenever the homeowner decides to put it up for sale; such right comes with the right to collect a commission on the property's eventual sale. Where the property owner goes on to try to sell his or her home with a different listing agent, even where the agreement was entered into years before, the brokerage firm may file a lien on the homeowner's property, which lien generally must be paid before the sale can proceed.

The bill:

- Defines "residential real property" as improved residential property of four residential dwelling units or fewer or unimproved residential property on which four residential dwelling units or fewer may be built.
- Defines "residential loan alternative agreement" as a signed writing, legal instrument, or contract between a person and a seller or owner of residential real property that:
 - Grants an exclusive right to a person to act as a broker for the property's disposition;
 - Has an effective duration, inclusive of renewals, of more than two years; and
 - Requires the person to pay monetary compensation to the seller or owner.
- Defines "disposition" as a transfer or voluntary conveyance of the title or other ownership interest in residential real estate.
- Prohibits a residential loan alternative agreement from authorizing a person to place a lien on or otherwise encumber any residential real property.
- Prohibits a residential loan alternative agreement from constituting a lien, encumbrance, or security interest in the residential real property.
- Prohibits a court from enforcing a residential alternative loan alternative agreement by a lien or constructive trust in the residential real property or upon the proceeds of the property's disposition.
- Prohibits assignment of a residential loan alternative agreement.
- Provides that a residential loan alternative agreement is void if listing services do not begin within 90 days after the agreement's execution by both parties, and unenforceable if it does not meet the requirements established by the bill.
- Prohibits the clerk of the court from recording a residential loan alternative agreement.
- Makes a residential loan alternative agreement violation an unfair or deceptive trade practice.

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

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

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

STORAGE NAME: h0861e.COM

DATE: 4/11/2023

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Real Estate Agents and 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 applicable to real estate brokers¹ and sales associates² (colloquially known as “real estate agents”).³ The FREC is also empowered to adopt rules that enable it to implement its statutorily authorized duties and responsibilities.⁴

A person who operates as a broker or sales associate in Florida without having a valid, current, and active license commits a felony of the third degree.⁵ FREC may also discipline licensed real estate brokers and sales associates if FREC finds that the broker or sales associate violated the practice act, which violations may include:⁶

- 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.

Further, a real estate broker or sales associate may be convicted of 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.⁷ This does not prohibit a broker or sales associate from recording a judgment rendered by a court or placing a lien on a property where expressly permitted by contractual agreement or otherwise allowed by law.⁸

Real Estate Listing Agreements

A listing agreement is a contract in which a property owner gives a real estate broker or sales associate the authority to find a buyer for his or her property; the terms of such an agreement can generally be negotiated, but the duration of the agreement, the property’s price and sales terms, and the amount of any fee or commission must be defined in the contract.⁹

¹ “Broker” means, in pertinent part, a person who, for another, and for compensation or valuable consideration directly or indirectly paid or promised, expressly or implied, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents any real property or an interest in or concerning the same; or who advertises or holds out to the public by any oral or printed solicitation or representation that she or he is engaged in such business. S. 475.01(1)(a), F.S.

² “Sales associate” means a person who performs any act specified in the definition of “broker,” but who performs such act under the direction, control, or management of another person. S. 475.01(1)(j), F.S.

³ Ch. 475, Part I, F.S.

⁴ These rules are contained in ch. 61J2, F.A.C.

⁵ S. 475.42(1)(a), F.S.

⁶ Ss. 475.25 and s. 455.227, F.S.

⁷ S. 475.42(1)(i) and (2), F.S.

⁸ S. 475.42(1)(i), F.S.

⁹ S. 475.25(1)(r), F.S.; Jean Folger, *What is a Listing Agreement? Definition, Types, and How they Work*,

<https://www.investopedia.com/terms/l/listing-agreement.asp> (last visited March 23, 2023).

There are three types of listing agreements, as shown in the following chart:¹⁰

Types of Listing Agreements	Description
Exclusive Right-to-Sell Agreement	<ul style="list-style-type: none"> • Broker acts as agent. • Broker receives commission when the property is sold, regardless of who finds the buyer.
Exclusive Agency Listing Agreement	<ul style="list-style-type: none"> • Broker acts as agent. • Broker receives commission if the property is sold through the broker's efforts but not if the property is sold through the seller's efforts.
Open Listing Agreement	<ul style="list-style-type: none"> • Broker acts as agent. • Seller reserves the right to employ any number of brokers as agents. • Broker whose effort results in the property's sale receives commission.

However, Florida courts have held that, even where there is no listing agreement or other special contract, a broker is entitled to a commission when that person is the procuring cause of a sale.¹¹ Thus, where a broker engaged to find a buyer for property brings a prospective buyer and the property owner together, and where sale negotiations between the buyer and property owner begin but only conclude after the listing agreement expires, the broker is still entitled to a commission.

Liens on Real Property

A lien is a claim against property which evidences a debt, obligation, or duty.¹² Under Florida law, a real estate broker or sales associate may place a lien on real property where expressly authorized to do so by contractual agreement or by law.¹³ This is accomplished by recording the lien in the official records of the county in which the property lies, thereby putting all persons on notice of the lien's existence and the lienholder's rights to make a claim against the property to satisfy the lien. As county recorder, each of Florida's 67 clerks of the circuit court must record certain legal instruments presented to them, including liens, upon payment of applicable fees or charges.¹⁴

Recent Events

Recently, some Florida real estate brokerage firms have been offering homeowners monetary payments, advertised as an "alternative loan," in exchange for the exclusive right to list a homeowner's property whenever the homeowner decides to put it up for sale; such right comes with the right to collect a commission on the property's eventual sale. Some homeowners enter into these "alternative loan" agreements without realizing that they can last upwards of 40 years; in other words, should the homeowner decide to sell his or her home at any time within the time period specified in the agreement, even where that time period extends 40 years into the future, the homeowner must use as his or her listing agent a broker or sales associate from the brokerage firm with which the homeowner had the agreement.

However, some homeowners who entered into such agreements have gone on to try to sell their homes years later, and not realizing their agreements are still in effect, have listed the property with a different brokerage firm. The original brokerage firm may then, under the terms of the agreement, file a lien against the property for the value of the commission and any other fees specified in the agreement,

¹⁰ National Association of Realtors, *Handbook on Multiple Listing Policy Section 3: Definitions of Various Types of Listing Agreements*, <https://www.nar.realtor/handbook-on-multiple-listing-policy/section-3-definitions-of-various-types-of-listing-agreements> (last visited March 23, 2023)

¹¹ *Esslinger-Wooten-Maxwell, Inc. v. Lones Family Ltd. P'ship*, 298 So. 3d 1176, 1180 (Fla. 3d DCA 2020).

¹² Fla. Jur. 2d Liens s. 37:1.

¹³ S. 475.42(1)(i), F.S.

¹⁴ S. 28.222(3), F.S.

even though the brokerage firm never performed the listing services.¹⁵ The property owner would then have to either pay the lien to clear the cloud on his or title so that the property could be sold, or else find a buyer willing to take title subject to the lien, which may be impossible.

One brokerage firm currently utilizing this strategy is MV Realty, which operates in 33 states, including Florida; according to MV Realty, more than 30,000 people have signed such “alternative loan” agreements with the firm.¹⁶ Recently, the Florida¹⁷, Massachusetts¹⁸, Pennsylvania¹⁹, and Ohio, Attorneys General²⁰ sued MV Realty for using misleading contractual terms in these types of 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.²¹ 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 harmful business practices, including unfair methods of competition and unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

Effect of the Bill

The bill:

- Defines:
 - “Residential real property” as improved residential property of four residential dwelling units or fewer or unimproved residential real property on which four residential dwelling units or fewer may be built.
 - “Residential loan alternative agreement” as a signed writing or a signed and written legal instrument or contract between a person and a seller or owner of residential real property that:
 - Grants an exclusive right to a person to act as a broker for the property’s disposition;
 - Has an effective duration, inclusive of renewals, of more than two years; and
 - Requires the person to pay compensation to the seller or owner.
 - “Disposition” as a transfer or voluntary conveyance of the title or other ownership interest in residential real estate.
- Prohibits a residential loan alternative agreement from authorizing a person to place a lien on or otherwise encumber any residential real property.

¹⁵ 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/> (last visited March 23, 2023).

¹⁶ Angie Moreschi, *MV Realty Facing Congressional Scrutiny Following Channel 11 Investigation* (Dec. 21, 2022), <https://www.wpxi.com/news/local/mv-realty-facing-congressional-scrutiny-following-channel-11-investigation/Y4HNN2X24NEQRFMTNVLB2QNHNQ/> (last visited March 23, 2023).

¹⁷ Office of the Attorney General, *Attorney General Moody Takes Legal Action against MV Realty for Swindling Florida Homeowners*, (Nov. 29, 2022), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/E9E4A2F7281415CE85258909007259EC>. (last visited March 23, 2023).

¹⁸ Cheryl Fiandaca, *Massachusetts Attorney General Sues MV Realty Company after I-Team Investigation* (December 14, 2022), <https://www.cbsnews.com/boston/news/mv-realty-attorney-general-lawsuit-massachusetts-iteam-investigation/> (last visited March 23, 2023).

¹⁹ Pennsylvania Office of Attorney General, *AG Shapiro Sues Real Estate Brokerage Firm MV Realty over Misleading Homeowner Benefit Program* (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%E2%80%94%20Attorney%20General%20Josh%20Shapiro,and%20its%20founder%2C%20Amanda%20Zachman> (last visited March 23, 2023).

²⁰ Ohio Attorney General, *AG Yost Sues MV Realty, Founder and Broker for Illegal Practices* (Feb. 15, 2023),

<https://www.ohioattorneygeneral.gov/Media/News-Releases/February-2023/AG-Yost-Sues-MV-Realty-Founder-and-Broker-for-Ille> (last visited March 23, 2023).

²¹ ss. 501.201-213, F.S.

- Prohibits a residential loan alternative agreement from constituting a lien, encumbrance, or security interest in the residential real property.
- Prohibits courts from enforcing a residential alternative loan alternative agreement by a lien or constructive trust in the residential real property or upon the proceeds of the residential real property's disposition.
- Prohibits the assignment of a residential loan alternative agreement.
- Provides that a residential loan alternative agreement is void if listing services do not begin within 90 days after the agreement's execution by both parties.
- Specifies that a residential loan alternative agreement that does not meet the requirements established by the bill is unenforceable in law or equity.
- Prohibits the clerk of the court from recording a residential loan alternative agreement.
- Makes a violation an unfair or deceptive trade practice within the meaning of FDUTPA.

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

B. SECTION DIRECTORY:

Section 1: Creates s. 475.279, F.S.; relating to residential loan alternative agreements for the disposition of residential real property.

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 property owners in the state to the extent that it eliminates the use of long-term loan alterative agreements and the practice of filing liens to enforce such agreements. However, the bill may have a negative economic impact on brokerage firms that rely on such a business model.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 16, 2023, the Regulatory Reform & Economic Development Subcommittee adopted a proposed committee substitute (“PCS”) and reported the bill favorably as a committee substitute. The PCS:

- Defined “residential loan alternative agreement” and replaced the phrase “option to enter into a listing agreement” with “residential loan alternative agreement” throughout the bill.
- Replaced the phrase “broker” with “person” throughout most of the bill.
- Prohibited the renewal of a residential loan alternative agreement.
- Prohibited a residential loan alternative agreement from authorizing a broker to place a lien on or otherwise encumber any residential real property.
- Provided that a residential loan alternative agreement that does not meet certain requirements is unenforceable.

On March 23, 2023, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Modified the definition of “residential loan alternative agreement” to specify that the effective duration is inclusive of renewals.
- Deleted a provision requiring that a residential loan agreement require notice to and written consent of the seller or owner before the person may assign the agreement to another person.
- Prohibited the assignment of a residential loan alternative agreement.
- Deleted a provision capping the term of a residential loan alternative agreement at six months and prohibiting renewals.
- Specified that a residential loan alternative agreement is void if listing services do not begin within 90 days after the agreement’s execution by both parties.

On April 10, 2023, the Commerce Committee adopted one amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Clarified that FDUTPA actions may be brought against a licensed real estate professional.
- Made clarifying and technical changes.

The analysis is drafted to the committee substitute as passed by the Commerce Committee.