The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1706

INTRODUCER: Senator Garcia

SUBJECT: Servicers and Lenders of Residential Mortgage Loans

DATE: February 7, 2022 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Arnold	Knudson	BI	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 1706 amends several provisions related to the regulation of Florida's residential mortgage industry, mortgage foreclosures, and the Florida Insurance. Specifically, the bill:

- Requires mortgage lenders and mortgage servicers regulated under ch. 494, F.S., to comply with federal law requirements for force-placed insurance and providing periodic statements at each billing cycle;
- Requires subsequent mortgage servicers subject to ch. 494, F.S., to honor previously executed loan modification agreements and foreclosure prevention alternatives;
- Requires mortgage servicers and mortgage lenders subject to ch. 494, F.S., to meet certain criteria before initiating foreclosure proceedings;
- Establishes requirements when a borrower requests a foreclosure prevention alternative;
- Prohibits insurers and insurance agents from force-placing insurance with an affiliate or making payments to a mortgage lender or servicer;
- Amends ch. 702, F.S., to require certain acts before commencing a foreclosure action.

II. Present Situation:

Federal Regulation of the Residential Mortgage Industry

Most mortgage loans are a federally related mortgage loan[1] and thus subject to the provisions of the federal Real Estate Settlement Procedures Act (RESPA) and Truth in Lending Act (TILA)[2] Any mortgage lender making a mortgage loan subject to RESPA and TILA must comply with RESPA and TILA provisions related to mortgage lenders, accordingly. Similarly, any mortgage servicer servicing a mortgage loan subject to RESPA and TILA must comply with RESPA and TILA provisions related to mortgage servicing, with few exceptions.[3]

RESPA

Enacted by Congress in 1974 in response to abuses in the real estate settlement process, RESPA requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures about the nature and costs of the real estate settlement process. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB) and, with respect to entities under its jurisdiction, generally granted authority to CFPB to supervise for and enforce compliance with RESPA and its implementing regulations.[4]

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[1] "Federally related mortgage loan" means any loan (other than temporary financing, such as a construction loan): (i) that is secured by a first or subordinate lien on residential real property, including a refinancing of any secured loan on residential real property, upon which there is either (A) located or, following settlement, will be constructed using proceeds of the loan, a structure or structures designed principally for occupancy of from one to four families (including individual units of condominiums and cooperatives and including any related interests, such as a share in the cooperative or right to occupancy of the unit); or located or, following settlement, will be placed using proceeds of the loan, a manufactured home; and; (ii) for which one of the following paragraphs applies. The loan: (A) is made in whole or in part by any lender that is either regulated by or whose deposits or accounts are insured by any agency of the Federal Government; (b) Is made in whole or in part, or is insured, guaranteed, supplemented, or assisted in any way: (1) By the Secretary of the Department of Housing and Urban Development (HUD) or any other officer or agency of the Federal Government; or (2) Under or in connection with a housing or urban development program administered by the Secretary of HUD or a housing or related program administered by any other officer or agency of the Federal Government; (C) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or a financial institution from which the loan is to be purchased by the Federal Home Loan Mortgage Corporation (or its successors); (D) Is made in whole or in part by a "creditor," as defined in section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)), that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. For purposes of this definition, the term "creditor" does not include any agency or instrumentality of any State, and the term "residential real estate loan" means any loan secured by residential real property, including single-family and multifamily residential property; (E) Is originated either by a dealer or, if the obligation is to be assigned to any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition, by a mortgage broker; or (F) Is the subject of a home equity conversion mortgage, also frequently called a "reverse mortgage," issued by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition. *See* 12 CFR 1042.2(b)(9). Non-depository mortgage lenders originating at least 100 closed-end mortgage loans for the preceding two calendar years are subject to the federal Home Mortgage Disclosure Act (Regulation C) under the authority of the Consumer Finance Protection Bureau, and thus fall under RESPA's definition of "federally related mortgage loan." *See* 12 CFR 1003.2(g)(2).

[2] RESPA exempts business purpose loans, temporary financing, vacant land, assumption without lender approval, loan conversions, and secondary market transactions. *See* 12 CFR 1024.5(b)(3).

[3] *See* Consumer Financial Protection Bureau, *Mortgage Servicing Rules: Coverage*, https://files.consumerfinance.gov/f/201407_cfpb_servicing-applicability-comparison-chart-reg-x-and-z.pdf (last visited February 5, 2022)

[4] Federal Reserve, *Regulation X, Real Estate Settlement Procedures Act*, https://www.federalreserve.gov/supervisionreg/caletters/ca_15-6_attach_reg_x.pdf (last visited February 5, 2022)

RESPA regulations related to the mortgage loan process include:

- Acknowledgements of applications;
- Affiliated business arrangements;
- Applications for mortgage loans;
- Continuity of contact;[5]
- Escrow accounts;
- Force-placed insurance;[6]
- Mortgage loan servicing error resolution and borrower information requests;
- Mortgage loan servicing requirements;
- Mortgage origination and servicing disclosures;
- Loss mitigation and foreclosure prevention alternatives;[7]
- Prohibition on dual tracking;[8]
- Prohibitions on kickbacks and unearned fees;[9]
- Title insurance; and
- Transfer rights[10]

TILA

Enacted by Congress in 1968, TILA is intended to protect consumers and ensure competition among financial institutions through the meaningful disclosure of credit terms, allowing consumers to compare standardized credit terms more readily and knowledgeably. The Dodd-Frank Act granted rule-making authority under TILA to the CFPB and, with respect to entities under its jurisdiction, generally granted authority to CFPB to supervise for and enforce compliance with TILA and its implementing regulations.[11]

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[5] *See* 12 CFR 1024.40, providing functions of servicer personnel; information about loss mitigation options, procedures, and deadlines; status of any loss mitigation application; complete record of the borrower's payment history; and communication response times.

[6] *See* 12 CFR 1024.37, providing bases for changer borrower for force-placed insurance; requirements before charging borrower force-placed insurance; notice requirements; renewing or replacing force-placed insurance; cancellation of force-placed insurance; and limitations on force-placed insurance charges.

[7] See 12 CFR 1024.41, providing loss mitigation applications; processes and deadlines for reviewing complete and incomplete applications; COVID-19 related loss mitigation options; short-term loss mitigation options; acknowledgment notices; denial of loan modification options; prohibitions on dual tracking; appeal process and timelines; and servicing transfers.

[8] 12 CFR 1024.41(f)-(h), prohibiting foreclosure referral until more than 120 day delinquent, while a loss mitigation application form is under submission, review, or appeal; and providing timelines.

[9] *See* 12 CFR 1024.14, prohibiting in return for referrals any fees, kickbacks, split charging, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation.

[10] *See* 12 CFR 1024.33, providing, in part, that the transfer of servicing does not affect any term or condition of the mortgage loan other than terms directly related to the servicing of the loan.

[11] Consumer Finance Protection Bureau, *Truth in Lending Act*, https://files.consumerfinance.gov/f/201503_cfpb_truth-in-lending-act.pdf (last visited February 5, 2022).

TILA regulations related to the consumer credit include:
- Annual percentage rates;
- Credit card disclosures;
- Limitations on home equity lines of credit and certain closed-end home mortgages;
- Mortgage loan appraisal requirements;
- Mortgage loan disclosures;
- Mortgage loan servicing requirements; and
- Periodic statements.[12]

Preemption of State Laws

State laws that are inconsistent with RESPA regulations may be preempted by RESPA. State laws that give greater protection to consumers are not inconsistent with, and are not preempted by, RESPA. In addition, nothing in RESPA should be construed to preempt the entire field of regulation covered by RESPA.[13]

State laws that are inconsistent with TILA regulations are preempted to the extent of the inconsistency.[14]

Exemption of Reverse Mortgages

A reverse mortgage is nonrecourse consumer credit obligation in which a mortgage, deed of trust, or equivalent consensual security interest securing one or more advances is created in the consumer's principal dwelling; and any principal, interest, or shared appreciation or equity is due and payable, other than in the case of default, only after the consumer dies, the dwelling is transferred, or the consumer ceases to occupy the dwelling as a principal dwelling.[15]

RESPA expressly exempts reverse mortgages from certain mortgage servicing regulations, including force-placed insurance.[16]

TILA expressly exempts reverse mortgages from its regulations related to periodic statements for residential mortgage loans.[17]

Exemption of Small Servicers

A small servicer is a mortgage servicer that servicers, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer or affiliate is the creditor or assignee; is a Housing Finance Agency; or is nonprofit entity that services 5,000 of fewer mortgage loans, including any

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[12] *See* 12 CFR 1026.41, providing timing of the statement; form of the statement; amount due with explanation; past payment breakdown; transaction activity; partial payment information; contact information; account information; and delinquency information.
[13] 12 CFR 1024.5(c)(1)
[14] *See* 12 CFR 1026.28
[15] 12 CFR 1026.33(a)
[16] *See* 12 CFR 1024.30; Reverse mortgages remain subject to RESPA regulations related to continuity of contact, early intervention for certain borrowers, and dual tracking prohibited by loss mitigation procedures.
[17] 12 CFR 1026.41(e)(1)

mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor.[18]

RESPA expressly exempts small servicers from certain mortgage servicing regulations, including forced-placed insurance.[19]

TILA expressly exempts small servicers from its regulations related to periodic statements for residential mortgage loans.[20]

State Regulation of Loan Originators, Mortgage Brokers, Mortgage Lenders, and Mortgage Servicers

The Office of Financial Regulation (OFR) licenses and regulates non-depository financial service industries and individuals through its administration and enforcement of ch. 494, F.S.[21] The OFR has the express authority to deny, suspend, or revoke the license of, and impose administrative fines on, an individual licensed under ch. 494, F.S., found to be in violation of its provisions, including any violation of RESPA and TILA.[22]

Notwithstanding agency enforcement authority, failure to comply with ch. 494, F.S., does not affect the validity or enforceability of any mortgage loan, and no person acquiring a mortgage loan, as mortgagee or assignee, is required to ascertain whether or not the provisions of ch. 494, F.S., have been complied with.[23]

Further, ch. 494, F.S., does not limit any statutory or common law right of any person to bring any action in any court for any act involved in the mortgage loan business or the right of the state to punish any person for any violation of any law.[24]

Regulation of Insurance Agents

In general, insurance agents transact insurance on behalf of an insurer or insurers. The Department of Financial Services (DFS) regulates the education, licensing, and compliance of insurance agents and agencies under ch. 626, F.S., and has statutory authority to refuse, suspend, or revoke the license of an insurance agent or agency in violation of the provisions of ch. 626, F.S.

Under Florida law, insurance agents are prohibited from the following non-exhaustive list of acts:

[18] 12 CFR 1026.41(e)(4)
[19] *See* 12 CFR 1024.30; Small servicers remain subject to RESPA regulations related to continuity of contact, early intervention for certain borrowers, and dual tracking prohibited by loss mitigation procedures.
[20] 12 CFR 1026.41(e)(4)
[21] Florida Office of Financial Regulation, *Division of Consumer Finance*, https://www.flofr.gov/sitePages/DivisionOfConsumerFinance.htm (last visited February 5, 2022).
[22] Section 494.00255(m), F.S.
[23] Section 494.0022, F.S.
[24] Section 494.002, F.S.

- Entering into agreements whereby commissions are contingent upon savings effected in the adjustment, settlement, and payment of losses covered under an insurance policy;[25]
- Except as provided for under s. 626.572, F.S., unlawfully rebating, attempting to unlawfully rebate, or unlawfully dividing or offering to divide his or her commissioner with another; [26] and
- Sharing commissions with individuals other than similarly appointed and licensed agents, customer representatives, or insurance agencies.[27]

Conditions Precedent to Bringing a Foreclosure Action

In general, mortgage foreclosure is based on the provisions of the mortgage contract. In many standard form mortgage contracts, a "right to cure" or "default" notice paragraph, contains several specific requirements giving the mortgagor notice of the default and, sometimes, an opportunity to cure it, as a condition precedent to the mortgagee or assignee bringing a foreclosure action against the mortgagor.

For example, Fannie Mae's Standard Mortgage Form for Florida provides, in part:

> *Notice of Default.* Lender will give a notice of Default to Borrower prior to acceleration following Borrower's Default, except that such notice of Default will not be sent when Lender exercises its right under Section 19 unless Applicable Law provides otherwise. The notice will specify, in addition to any other information required by Applicable Law: (i) the Default; (ii) the action required to cure the Default; (iii) a date, not less than 30 days (or as otherwise specified by Applicable Law) from the date the notice is given to Borrower, by which the Default must be cured; (iv) that failure to cure the Default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property; (v) Borrower's right to reinstate after acceleration; and (vi) Borrower's right to deny in the foreclosure proceeding the existence of a Default or to assert any other defense of Borrower to acceleration and foreclosure.
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> *Acceleration; Foreclosure; Expenses.* If the Default is not cured on or before the date specified in the notice, Lender may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender will be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 26, including, but not limited to: (i) reasonable attorneys' fees and costs; (ii) property inspection and valuation fees; and (iii) other fees incurred to protect Lender's interest in the Property and/or rights under this Security Instrument.[28]

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[25] Section 626.581(1), F.S.
[26] Section 626.611(1)(k), F.S.
[27] Section 626.753(2), F.S.
[28] Fannie Mae. *Security Instruments, Florida Form 3010* (July 2021) https://singlefamily.fanniemae.com/media/document/doc/florida-security-instrument-form-3010-word (last visited February 6, 2022).

Where there are conditions precedent to filing the foreclosure suit, the mortgagee must prove that it has complied with them.[29] Many Florida courts apply a *substantial compliance standard* when determining whether conditions precedent have been met prior to initiating a foreclosure suit. Substantial compliance is "that performance of a contract which, while not full performance, is so nearly equivalent that what was bargained for that it would be unreasonable to deny the [party] the [benefit].[30] In Florida, opinions of the First, Second, Third, Fourth,[31] and Fifth District Courts of Appeal have determined that "the lender's default notice to borrower must only substantially comply with the conditions precedent set forth in the mortgage."[32]

Regulation of Lender Placed Insurance

Lender-placed insurance, sometimes referred to as force-placed insurance, is insurance obtained by a lender or servicer when a mortgagor does not maintain valid or sufficient insurance upon mortgage real property as required by the terms of the mortgage agreement. It may be purchased unilaterally by the lender or servicer, who is the named insured, subsequent to the date of the credit transaction, providing coverage against loss, expense or damage to collateralized property as a result of fire, theft, collision, or other risks of loss that would either impair a lender, servicer, or investor's interest, or adversely affect the value of collateral covered by limited dual interest insurance. It is purchased according to the terms of the mortgage agreement as a result of the mortgagor's failure to provide evidence of required insurance.[33]

In addition to compliance with RESPA provisions, lender-placed insurance is subject to several state and federal regulations.

Fannie Mae and Freddie Mac Servicing Guidelines for Lender-Placed Insurance Requirements

The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) provide liquidity, stability, and affordability to the mortgage market by buying mortgages from lenders and either holding the mortgages in their own portfolios or packaging the mortgages into mortgage-based securities for purposes of selling in the secondary mortgage market.[34] Fannie Mae and Freddie Mac, in turn, protect their interest in each mortgage by requiring minimum insurance coverages,[35] or lender-placed insurance coverage meeting the

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[29] *Torres v. Deutsche Bank National Trust Company*, 256 So.3d 903, 905 (Fla. 4th DCA 2018).
[30] *Ortiz v. PNC Bank, Nat. Ass'n*, 188 So.3d 923, 925 (Fla. 4th DCA 2016)
[31] *See* id.
[32] *Bank of N.Y. Mellon v. Nunez,* 190 So.3d 160, 162-63(Fla. 3rd DCA 2015).
[33] National Association of Insurance Commissioners, *Real Property Lender-Placed Insurance Model Act – 631, 1* (Spring 2021), https://content.naic.org/sites/default/files/MO631.pdf (last visited February 4, 2022).
[34] Federal House Finance Agency, *About Fannie Mae and Freddie Mac*, https://www.fhfa.gov/about-fannie-mae-freddie-mac (last visited January 28, 2022).
[35] For first-lien residential mortgages, Fannie Mae requires coverage equal to the lesser of the following:

- 100 percent of the insurable value of the improvements, as established by the property insurer; or
- The unpaid principal balance of the mortgage, as long as it at least equals the minimum amount (80 percent of the insurable value of the improvements) required to compensate for damage or loss on a replacement cost basis.

For one-to-four unit residential properties, Freddie Mac requires coverage at least equal to the higher of the following, not to exceed the replacement cost of the insurable improvements:

- The unpaid principal balance of the mortgage; or required minimum insurance coverages when the mortgage servicer cannot obtain evidence of acceptable insurance for the property securing the mortgage loan.[36]

The mortgage servicer has the following responsibilities for obtaining lender-placed insurance meeting the required minimum insurance coverages for the property securing the mortgage loan:

- Only issue lender-placed insurance coverage after it makes unsuccessful attempts to obtain evidence of insurance in accordance with applicable law;
- Not use a lender-placed insurance carrier that is an affiliated entity, as defined below, for a lender-placed insurance policy, including any captive insurance or reinsurance arrangements with an affiliated entity;
- Exclude any lender-placed insurance commissions or payments (including any incentive based compensation regardless of its designation as commission, bonus, fees, or other types of payments from the servicer's lender-placed insurance carrier; for example, underwriting bonuses or other payments based on insurance loss ratios) earned on a lender-placed insurance policy by the servicer, broker, or any affiliated entity from the lender-placed insurance premiums charged to the borrower or submitted for reimbursement from Fannie Mae;
- Provide copies of its lender-placed insurance policy, including any other contractual arrangements between the servicer and a lender-placed insurance carrier, upon Fannie Mae's request;
- Provide any documentation or data relating to its lender-placed insurance activities and lender-placed insurance coverage requested by Fannie Mae within 30 days of Fannie Mae's request;
- Terminate any lender-placed insurance, in compliance with law;
- Refund all lender-placed insurance premiums and fees charged during any period of coverage overlap, in compliance with applicable law.[37]

State Regulation of Lender-Placed Insurance

The Office of Insurance Regulation (OIR) regulates the business of lender-placed insurance by approving the forms and rates of lender-placed insurers.[38]

Part I of ch. 627, F.S., is the Rating Law[39] governing property, casualty, and surety insurance which covers subjects of insurance resident, located, or to be performed in this state.[40] The Rating Law provides that the rates for all classes of insurance it governs may not be excessive, inadequate, or unfairly discriminatory.[41] Though the terms "rate" and "premium" are often used

- 80 percent of the full replacement cost of the insurable improvements.

[36] Fannie Mae, *Servicing Guide: Fannie Mae Single Family* (December 8, 2021), https://servicing-guide.fanniemae.com/#Servicer.20Responsibilities.20Related.20to.20Lender-Placed.20Insurance (last visited February 4, 2022); *Freddie Mac, Seller/Servicer Guides: Lender-Placed Insurance* (July 1, 2016), https://guide.freddiemac.com/app/guide/section/8202.12 (last visited February 4, 2022).
[37] Fannie Mae, *Servicing Guide: Fannie Mae Single Family* (December 8, 2021), https://servicing-guide.fanniemae.com/#Servicer.20Responsibilities.20Related.20to.20Lender-Placed.20Insurance (last visited February 4, 2022).
[38] Section 627.021, F.S.
[39] Section 627.011, F.S.
[40] Section 627.021, F.S.
[41] Section 627.062(1), F.S.

interchangeably, the rating law specifies that "rate" is the unit charge that is multiplied by the measure of exposure or amount of insurance specified in the policy to determine the premium, which is the consideration paid by the consumer.[42]

All insurers or rating organizations must file rates with the Office of Insurance Regulation (OIR) either 90 days before the proposed effective date of a new rate, which is considered a "file and use" rate filing, or 30 days after the effective date of a new rate, which is considered a "use and file" rate filing.

Upon receiving a rate filing, the OIR reviews the filing to determine if the rate is excessive, inadequate, or unfairly discriminatory. The office makes that determination in accordance with generally acceptable actuarial techniques and, in a property insurance rate filing, considers the following:

- Past and prospective loss experience.
- Past and prospective expenses.
- The degree of competition among insurers for the risk insured.
- Investment income reasonably expected by the insurer.
- The reasonableness of the judgment reflected in the rate filing.
- Dividends, savings, or unabsorbed premium deposits returned to policyholders.
- The adequacy of loss reserves.
- The cost of reinsurance.
- Trend factors, including trends in actual losses per insured unit for the insurer.
- Conflagration and catastrophe hazards.
- Projected hurricane losses.
- Projected flood losses, if the policy covers the risk of flood.
- A reasonable margin for underwriting profit and contingencies.
- Other relevant factors that affect the frequency or severity of claims or expenses.

OIR Consent Orders against Lender-Placed Insurers

Between 2013 and 2014, following its review of Florida's lender-placed insurance market and findings of insurer practices that potentially and practically hurt policyholders, the Office of Insurance Regulation (OIR), issued consent order to lender-placed insurers American Security Insurance Company[43] and Praetorian Insurance Company,[44] requiring the modification of their business practices related to lender-placed insurance. These two consent order had the effect of instituting new requirements on more than 90 percent of Florida's lender-placed insurance market.[45]

Lender-placed insurance business reforms required under the consent orders included:

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[42] Section 627.041, F.S.

[43] Florida Office of Insurance Regulation, *Consent Order No. 141841-13* (October 7, 2013), https://www.floir.com/siteDocuments/AmericanSecurity141841-13-CO.pdf (last visited February 5, 2022).

[44] Florida Office of Insurance Regulation, *Consent Order No. 141851-13* (April 10, 2014), https://www.floir.com/siteDocuments/Praetorian141851-13-CO.pdf (last visited February 5, 2022).

[45] Florida Office of Insurance Regulation, *Press Release: Office Order Praetorian Insurance Company to Modify its Business Practices for Lender-Placed Insurance in Florida* (April 11, 2014), https://www.floir.com/PressReleases/viewmediarelease.aspx?id=2054 (last visited February 5, 2022).

- Notifying all current borrowers by mail and within 120 days of the execution of the Consent Order to inform them about alternative options available for lender-placed insurance coverage;
- Prohibiting the payment of commissions to a mortgage servicer on lender-placed insurance policies obtained by that servicer;
- Prohibiting the payment of contingent commissions based on underwriting profitability or loss ratios to any servicer or entity affiliated with a servicer;
- Prohibiting the issuance of lender-placed policies on mortgaged property serviced by an affiliate;
- Prohibiting the issuance of reinsurance on lender-placed insurance policies with a captive insurer of any mortgage servicer;
- Prohibiting the provision of free or below-cost outsourced services to a mortgage servicer; and
- Prohibiting the payment of any incentive to a mortgage servicer as an inducement to secure lender-placed insurance business.[46]

Adoption of NAIC Model Act 631

The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from 50 states, the District of Columbia, and five U.S. territories.[47]

In Spring 2021, the NAIC adopted the Real Property Lender-Placed Insurance Model Act # 631 (Model Act), governing insurers and insurance producers engaged in any transaction involving lender-placed insurance, for the purpose of promoting the public welfare by regulating lender-placed insurance on real property; creating a legal framework within which lender-placed insurance on real property may be written within a state; help maintain the separation between lenders and servicers from insurers and insurance producers; and minimize the possibilities of unfair competitive practices in the sale, placement, solicitation, and negotiation of lender-placed insurance.[48]

The Model Act provides several reforms related to lender-placed insurance, including:

- Term of insurance policy;
- Calculation of coverage and payment of premiums;
- Prohibited practices;
- Non-circumvention;
- Evidence of coverage;
- Filing, approval, and withdrawal of forms and rates;
- Enforcement;
- Regulatory authority;
- Judicial review; and

[46] *Id*.
[47] National Association of Insurance Commissioners, *Our Story*, https://content.naic.org/about (last visited February 5, 2022).
[48] National Association of Insurance Commissioners, *Real Property Lender-Placed Insurance Model Act-631* (Spring 2021), https://content.naic.org/sites/default/files/MO631.pdf (last visited February 5, 2022).

- Penalties[49]

Specific to prohibited practices, the Model Act prohibits an insurer or insurance producer from:

- Issuing lender-placed insurance on mortgaged property that the insurer or insurance producer or an affiliate of the insurer or insurance producer owns, performs the servicing for, or owns the servicing rights to the mortgage property;
- Compensating a lender, insurer, investor, or servicer (including through the payment of commissions) on lender-placed insurance policies issued by the insurer;
- Sharing lender-placed insurance premium or risk with the lender, investor, or servicer that obtained the lender-placed insurance;
- Offering contingent commissions, profit sharing, or other payments dependent on profitability or loss ratios to any person affiliated with a servicer or the insurer in connection with lender-placed insurance;
- Making any payments, including, but not limited to, the payment of expenses to a lender, insurer, investor, or servicer for the purpose of securing lender-placed insurance business or related outsourced services.[50]

The insurer is further prohibited from providing free or below-cost outsourced services to lender, investors, or servicers, and outsourcing its own functions to lenders, insurance producers, investors, or servicers on an above-cost basis.[51]

III. Effect of Proposed Changes:

Section 1 amends s. 494.001, F.S., related to definitions under ch. 494, F.S., to define "borrower" may also mean a natural person who is a mortgagor under a residential mortgage loan.

The bill defines "foreclosure prevention alternative" to mean a modification of a residential mortgage loan term.

The bill also defines "mortgage servicer" to mean a person or entity that directly services, or is contracted as a subservicing agent to a master servicer to service, a residential mortgage loan or manages a residential mortgage loan, which services or management may include, but are not limited to, the following responsibilities:

- Interacting with the borrower; managing the borrower's loan account daily, including, but not limited to, collecting and crediting loan payments that include principals and interests pad, and generating periodic billing and account statements; and managing the borrower's escrow account, if applicable; or
- Enforcing the note and security instrument as the current owner of the promissory note or as the authorized agent of the current owner of the promissory note.

Section 2 creates s. 494.00163, F.S., which requires mortgage lenders and mortgage servicers to comply with certain federal regulations.

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[49] *Id.*
[50] *Id.*
[51] *Id.*

Under the bill, a mortgage lender or mortgage servicer must comply with 12 CFR s. 1024.37, governing forced-placed insurance. The federal regulation provides that a mortgage servicer may not assess a borrower a premium charge or fee related to force-placed insurance unless the servicer has a reasonable basis to believe the borrower failed to comply with the mortgage loan contract's requirements to maintain hazard insurance. The federal regulation also requires the mortgage servicer provide written notices to the borrower 45 and 15 days before force-placing hazard insurance. Notice requirements also apply to the renewal of force-placed insurance. The federal regulation requires the mortgage servicer to cancel force-placed insurance within 15 days of receiving evidence the borrower has had in place hazard insurance coverage that complies with the mortgage loan's requirements to maintain insurance.

The bill specifies a periodic statement for a residential mortgage loan must comply with 12 CFR s. 1026.41, governing periodic statements for residential mortgage loans. The federal regulation requires that periodic statements specify the amount due, payment due date, any late payment fees, an explanation of the amount due, a breakdown of past payments, transaction activity since the last statement, applicable partial payment information, contact information including at least a telephone number for the consumer to obtain information about the consumer's account, account information including the outstanding principal balance and information regarding interest rates and any prepayment penalties, and, if applicable, information regarding delinquent payments.

The bill specifies a reverse mortgage servicer or a small mortgage servicer is not exempt from 12 CFR s. 1024.37 or 12 CFR s. 1026.41, governing forced-placed insurance and periodic statement for residential mortgage loans, respectively. Under the bill, a "small mortgage servicer" means a mortgage servicer that, together with any affiliates, services up to 5,000 residential mortgage loans, all of which have the mortgage servicer or its affiliate as the creditor or assignee.

Section 3 creates s. 494.00225, F.S., which provides for transfer rights for loan modifications and foreclosure prevention alternatives.

Following the written approval of a first lien loan modification, foreclosure prevention alternative, or other loan modification to avoid foreclosure, the assuming mortgage servicer or mortgage lender of bought or transferred mortgage servicing rights must assume all duties and obligations subject to the first lien loan modification, foreclosure prevention alternative or other loan modification.

Section 4 creates s. 494.0027, F.S., which provides a framework governing residential mortgage foreclosure prevention alternatives.

Definitions – Subsection (1) defines "complete application" to mean an application for a foreclosure prevention alternative for which the borrower has provided all documents required by the mortgage servicer or mortgage lender within the reasonable timeframe specified by the mortgage servicer or mortgage lender.

The bill defines "single point of contact" to mean a person who has, or a team of personnel of which each member has, the ability, authority, and responsibility to:

- Communicate the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submission to be considered for the foreclosure prevention alternative.
- Coordinate receipt of all documents associated with the available foreclosure prevention alternatives and notify the borrower of any missing document necessary to complete an application for a foreclosure prevention alternative.
- Have access to current information and sufficient personnel to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.
- Ensure that the borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer or mortgage lender and for which the borrower is or may be eligible.
- Have access to the person who has the ability and authority to stop the foreclosure process when necessary.

Dual Tracking – Subsection (2) paragraph (a) prohibits the mortgage servicer or mortgage lender from commencing a civil action for the recovery of any debt, or for the enforcement of any right, under a residential mortgage loan which is not barred under ch. 494, F.S., or ch. 702, F.S.; record a notice of default or a notice of sale, or conduct a foreclosure sale; after a borrower submits a foreclosure prevention alternative application offered by or through the mortgage servicer or mortgage lender unless one of the following has occurred:

- The borrower fails to submit all document or information required to complete the application within the allotted timeframe authorized by the mortgage servicer or mortgage lender, which must be at least 30 calendar days after the date of the initial acknowledgement of receipt of the application sent to the borrower.
- The mortgage servicer or mortgage lender makes written determination that the borrower is not eligible for foreclosure prevention alternative, and any appeal period under subsection 5 has expired.
- The borrower does not accept a written offer for a foreclosure prevention alternative within 30 days after the date of the offer.
- The borrower accepts a written offer for a foreclosure prevention alternative, but defaults on otherwise breaches the obligations under the foreclosure prevention alternative.

Single Point of Contact – Subsection (2) paragraph (b) requires the mortgage servicer or mortgage lender to promptly establish a single point of contact after the borrowers request a foreclosure prevention alternative and provide the borrower with at least one direct means of communication. The single point of contact must remain assigned to the borrower's account until the mortgage servicer or mortgage lender determines all foreclosure prevention alternative have been exhausted or the borrower's account becomes current. The single point of contact must refer and transfer the borrower to an appropriate supervisor if requested. The mortgage servicer or mortgage lender is responsible for all single point of contact personnel are knowledgeable about the borrower's foreclosure prevention alternative status.

Acknowledgement of Application – Subsection (3) requires a mortgage servicer or mortgage lender to provide the borrower written acknowledgement of receipt of a foreclosure prevention application or related document within 7 business days of receipt. The acknowledgment must include:

- A description of the process for considering the application, including, without limitation, an estimate of when a decision on the application will be made and the length of time the borrower will have to consider an offer for a foreclosure prevention alternative.
- A statement of any deadlines that affect the processing of an application for a foreclosure prevention alternative, including, without limitation, the deadline for submitting any missing document.
- A statement of the expiration dates for any document submitted by the borrower.

If the submitted application is incomplete, the acknowledgment must include:
- A statement of any deficiency in the borrower's application and allow the borrower at least 30 calendar days to submit any missing document or information required to complete the application.
- A description of the process for considering the application, including, without limitation, an estimate of when a decision on the application will be made and the length of time the borrower will have to consider an offer for a foreclosure prevention alternative.
- A statement of any deadlines that affect the processing of an application for a foreclosure prevention alternative, including, without limitation, the deadline for submitting any missing document.
- A statement of the expiration dates for any document submitted by the borrower.

Copies of Documents – Subsection (4) requires the mortgage servicer or mortgage lender to provide the borrower with a copy of complete foreclosure prevention alternative signed by the mortgage lender or its agent or authorized representative.

Notice of Denial – Subsection (5) requires the mortgage servicer or mortgage lender to send the borrower written statement of containing the following items after a completed application is submitted and denied:
- The reason for the denial.
- The length of time the borrower has to request an appeal of the denial.
- Instructions regarding how to appeal the denial, including, without limitation, how to provide evidence that the denial was in error.

The mortgage servicer or mortgage lender must allow the borrower at least 30 calendar days to appeal a denial.

Dual Tracking, Post-Application Denial – Subsection (6) prohibits the mortgage servicer or mortgage lender from commencing a civil action for the recovery of any debt, or for the enforcement of any right, under a residential mortgage loan which is not barred under ch. 494, F.S., or ch. 702, F.S., record a notice of default or a notice of sale, or conduct a foreclosure sale, after a completed application is denied until the later of:
- 60 calendar days after the borrower is sent the written statement under subsection 5; or
- If the borrower appeals the denial, the later of:
  - 15 calendar days after the denial of the appeal;
  - If the appeal is successful, 14 calendar days after a foreclosure prevention alternative offered after the appeal is declined by the borrower; or

- If a foreclosure prevention alternative offered after the appeal is accepted, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

Resubmitted Applications – Subsection (7) specifies a mortgage servicer or mortgage lender is not required to evaluate an application from a previous applicant, provided the borrower was evaluated or afforded a fair opportunity to be evaluated, unless there has been a material change in the borrower's financial circumstance since the date of the borrower's previous application, which has been documented by the borrower and submitted to the mortgage servicer or mortgage lender.

Restriction on Fees – Section (8) prohibits a mortgage servicer or mortgage lender from charger or collecting an application fee, processing fee, or other fee for a foreclosure prevention alternative, or late fee for periods during which:

- A foreclosure prevention alternative is under consideration or a denial is being appealed;
- The borrower is making timely payment under a foreclosure prevention alternative; or
- A foreclosure prevention alternative is being evaluated or exercised.

Section 5 creates s. 627.4055, F.S., "Lender-placed insurance for residential mortgage loan guaranty", which prohibits certain acts by an insurer or insurance agents related to lender-placed insurance.

This section defines:

- "Affiliate" to have the same meaning as defined in s. 624.10, F.S.
- "Lender-placed insurance" to mean insurance obtained by a mortgage servicer or mortgage lender when a borrower of a residential mortgage loan does not maintain valid or sufficient insurance upon the mortgaged real property as required by the terms of the mortgage agreement.
- "Mortgage servicer" to have the same meaning as defined in s. 494.001, F.S.
- "Person affiliated" to mean an affiliate or affiliated person as defined in s. 624.10, F.S.

The bill prohibits an insurer or insurance agent from issuing lender-placed insurance on a mortgage property if:

- The insurer or insurance agent or an affiliate of the insurer or insurance agents owns, performs the servicing for, or owns the servicing right to, the mortgage property; or
- The mortgage servicer or mortgage lender has not complied with 12 CFR s. 1024. 37, governing forced-placed insurance.

The bill prohibits an insurer or insurance agent from:

- Compensating a mortgage lender, insurer, investor, or mortgage servicer, including, but not limited to, through payment of commissions, on a lender-placed insurance policy issued by the insurer or insurance agent.
- Making any payment, including, but not limited to, payment of expenses, to any mortgage lender, insurer, investor, or mortgage servicer for the purpose of securing lender-placed insurance business or related outsourced services.

- Share lender-placed insurance premium or risk with the mortgage lender, investor, or mortgage servicer that obtained the lender-placed insurance.
- Offering contingent commissions, profit sharing, or other payments depending on profitability or loss ratios to any person affiliated with lender-placed insurance.

The bill prohibits an insurer or insurance agent from providing free or below-cost outsourced services to mortgage lender, insurance producer, investor, or mortgage servicer or outsource its own functions to a mortgage lender, insurance producer, investor, or mortgage servicer on an above-cost basis.

Section 6 creates s. 635.0215, F.S., which prohibits certain acts by an insurer or insurance agents related to lender-placed insurance.

This section defines:
- "Affiliate" to have the same meaning as defined in s. 624.10, F.S.
- "Lender-placed insurance" to have the same meaning as defined in s. 627.4055(1), F.S.
- "Mortgage servicer" to have the same meaning as defined in s. 494.001, F.S.
- "Person affiliated" to mean an affiliate or affiliated person as defined in s. 624.10, F.S.

The bill prohibits an insurer or insurance agent from issuing lender-placed insurance on a mortgage property if:
- The insurer or insurance agent or an affiliate of the insurer or insurance agents owns, performs the servicing for, or owns the servicing right to, the mortgage property; or
- The mortgage servicer or mortgage lender has not complied with 12 CFR s. 1024. 37, governing forced-placed insurance.

The bill prohibits an insurer or insurance agent from:
- Compensating a mortgage lender, insurer, investor, or mortgage servicer, including, but not limited to, through payment of commissions, on a lender-placed insurance policy issued by the insurer or insurance agent.
- Making any payment, including, but not limited to, payment of expenses, to any mortgage lender, insurer, investor, or mortgage servicer for the purpose of securing lender-placed insurance business or related outsourced services.
- Share lender-placed insurance premium or risk with the mortgage lender, investor, or mortgage servicer that obtained the lender-placed insurance.
- Offering contingent commissions, profit sharing, or other payments depending on profitability or loss ratios to any person affiliated with lender-placed insurance.

The bill prohibits an insurer or insurance agent from providing free or below-cost outsourced services to mortgage lender, insurance producer, investor, or mortgage servicer or outsource its own functions to a mortgage lender, insurance producer, investor, or mortgage servicer on an above-cost basis.

Section 7 creates s. 702.013, F.S., which provides a framework governing residential mortgage foreclosure prevention alternatives.

Definitions – Subsection (1) defines:

- "Complete application" to have the same meaning as defined in s. 494.001, F.S.
- "Foreclosure prevention alternative" to have the same meaning as defined in s. 494.001, F.S.
- "Mortgage servicer" to have the same meaning as defined in s. 494.001, F.S.
- "Single point of contact" to have the same meaning as defined in s. 494.0027(1), F.S.
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Dual Tracking – Subsection (2) paragraph (a) prohibits the mortgage servicer or mortgage lender from commencing a civil action for the recovery of any debt, or for the enforcement of any right, under a residential mortgage loan which is not barred under ch. 494, F.S., or ch. 702, F.S., recording a notice of default or a notice of sale, or conducting a foreclosure sale, after a borrower submits a foreclosure prevention alternative application offered by or through the mortgage servicer or mortgage lender unless:

- The borrower fails to submit all document or information required to complete the application within the allotted timeframe authorized by the mortgage servicer or mortgage lender, which must be at least 30 calendar days after the date of the initial acknowledgement of receipt of the application sent to the borrower.
- The mortgage servicer or mortgage lender makes written determination that the borrower is not eligible for foreclosure prevention alternative, and any appeal period under subsection 5 has expired.
- The borrower does not accept a written offer for a foreclosure prevention alternative within 30 days after the date of the offer.
- The borrower accepts a written offer for a foreclosure prevention alternative, but defaults on otherwise breaches the obligations under the foreclosure prevention alternative.

Single Point of Contact – Subsection (2) paragraph (b) requires the mortgage servicer or mortgage lender to promptly establish a single point of contact after the borrowers request a foreclosure prevention alternative and provide the borrower with at least one direct means of communication. The single point of contact must remain assigned to the borrower's account until the mortgage servicer or mortgage lender determines all foreclosure prevention alternative have been exhausted or the borrower's account becomes current. The single point of contact must refer and transfer the borrower to an appropriate supervisor if requested. The mortgage servicer or mortgage lender is responsible for all single point of contact personnel are knowledgeable about the borrower's foreclosure prevention alternative status.

Acknowledgement of Application – Subsection (3) requires a mortgage servicer or mortgage lender to provide the borrower written acknowledgement of receipt of a foreclosure prevention application or related document within 7 business days of receipt. The acknowledgment must include:

- A description of the process for considering the application, including, without limitation, an estimate of when a decision on the application will be made and the length of time the borrower will have to consider an offer for a foreclosure prevention alternative.

- A statement of any deadlines that affect the processing of an application for a foreclosure prevention alternative, including, without limitation, the deadline for submitting any missing document.
- A statement of the expiration dates for any document submitted by the borrower.

If the submitted application is incomplete, the acknowledgment must include:
- A statement of any deficiency in the borrower's application and allow the borrower at least 30 calendar days to submit any missing document or information required to complete the application.
- A description of the process for considering the application, including, without limitation, an estimate of when a decision on the application will be made and the length of time the borrower will have to consider an offer for a foreclosure prevention alternative.
- A statement of any deadlines that affect the processing of an application for a foreclosure prevention alternative, including, without limitation, the deadline for submitting any missing document.
- A statement of the expiration dates for any document submitted by the borrower.

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- The reason for the denial.
- The length of time the borrower has to request an appeal of the denial.
- Instructions regarding how to appeal the denial, including, without limitation, how to provide evidence that the denial was in error.

The mortgage servicer or mortgage lender must allow the borrower at least 30 calendars day to appeal a denial.

Dual Tracking, Post-Application Denial – Subsection (6) prohibits the mortgage servicer or mortgage lender from commencing a civil action for the recovery of any debt, or for the enforcement of any right, under a residential mortgage loan which is not barred under ch. 494, F.S., or ch. 702, F.S., record a notice of default or a notice of sale, or conduct a foreclosure sale, after a completed application is denied until the later of:
- 60 calendar days after the borrower is sent the written statement under subsection 5; or
- If the borrower appeals the denial, the later of:
  - 15 calendar days after the denial of the appeal;
  - If the appeal is successful, 14 calendar days after a foreclosure prevention alternative offered after the appeal is declined by the borrower; or
  - If a foreclosure prevention alternative offered after the appeal is accepted, the date on which the borrower fails to timely submit the first payment or otherwise breaches the terms of the offer.

Resubmitted Applications – Subsection (7) specifies a mortgage servicer or mortgage lender is not required to evaluate an application from a previous applicant, provided the borrower was evaluated or afforded a fair opportunity to be evaluated, unless there has been a material change in the borrower's financial circumstance since the date of the borrower's previous application, which has been documented by the borrower and submitted to the mortgage servicer or mortgage lender.

Restriction on Fees – Section (8) prohibits a mortgage servicer or mortgage lender from charger or collecting an application fee, processing fee, or other fee for a foreclosure prevention alternative, or late fee for periods during which:

- A foreclosure prevention alternative is under consideration or a denial is being appealed;
- The borrower is making timely payment under a foreclosure prevention alternative; or
- A foreclosure prevention alternative is being evaluated or exercised.

Section 8 amends s. 494.00115, F.S., related to exemptions under ch. 494, F.S., to update cross references to the definition of "mortgage lender" in s. 494.001, F.S., to reflect renumbering as necessitated by Section 1 of the bill.

Section 9 amends s. 494.0025, F.S., related to prohibited loan originator, mortgage broker, and mortgage lender practices, to update a cross reference to the definition of "residential mortgage loan" in s. 494.001, F.S., to reflect renumbering as necessitated by Section 1 of the bill.

Section 10 provides an effective date of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Impairment of Contracts and Due Process

Both the Florida and the United States Constitutions prohibit the state from passing a law impairing contractual obligations.[52] However, the Legislature may provide that a non-criminal law, including one that affects existing contractual obligations, applies retroactively in certain situations.[53] In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature.[54] A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary.[55] However, even where the Legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.[56] Further, where a law is designed to serve a remedial purpose, a court may decide not to apply the law retroactively where doing so "would attach new legal consequences to events completed before its enactment."[57]

Moreover, both the Florida and United States Constitutions prohibit the taking of life, liberty, or property without due process of law.[58] The right to contract, as long as no fraud or deception is involved and the contract is otherwise legal, is both a liberty and a property right subject to due process protections, and the impairment of contracts may, in certain instances, be viewed as the taking of property without due process.[59]

For mortgage loans, the bill creates a foreclosure prevention alternative framework which may impair the default notice provisions of current mortgage contracts and the right of the mortgagee to initiate foreclosure preceding under the contract terms. Whether this framework implicates the constitutional right to contract or the constitutional right to due process, is for the courts to decide.

Access to Courts

In *Kluger v. White*,[60] the Florida Supreme Court evaluated to what extent the Legislature may alter a civil cause of action. The Court stated that it would not completely prohibit the Legislature from altering a cause of action, but neither would it allow the Legislature

[52] U.S. Const. art. I, s. 10; Art. I, s. 10, Fla. Const.
[53] U.S. Const. art. I, ss. 9 and 10; Art. 1, s. 10, Fla. Const.
[54] A procedural law merely establishes the means and methods for applying or enforcing existing duties or rights. A remedial law confers or changes a remedy, i.e., the means employed in enforcing an existing right or in redressing an injury. A substantive law creates, alters, or impairs existing substantive rights. *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *St. John's Village I, Ltd. v. Dept. of State*, 497 So. 2d 990 (Fla. 5th DCA 1986); *McMillen v. State Dept. of Revenue*, 74 So. 2d 1234 (Fla. 1st DCA 1999).
[55] *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).
[56] *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).
[57] *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986).
[58] U.S. Const. amends. V and XIV; Art. I, s. 21, Fla. Const.
[59] *Miles v. City of Edgewater Police Dept.*, 190 So. 3d 171 (Fla. 1st DCA 2016); s*ee, e.g., Griffin v. Sharpe*, 65 So. 2d 751 (Fla. 1953) (finding that a statute removing a specific deed restriction's expiration date both impaired contracts and constituted a taking of private property without due process).
[60] *Kluger*, 281 So. 2d 1 (Fla. 1973).

"to destroy a traditional and long-standing cause of action upon mere legislative whim . . . ."

The takeaway from *Kluger* and other relevant case law is that the Legislature may:

- Reduce the right to bring a cause of action as long as the right is not entirely abolished.[61]
- Abolish a cause of action that is not "traditional and long-standing" – that is, a cause of action that did not exist at common law, and that did not exist in statute before the adoption of the Florida Constitution's Declaration of Rights.[62]
- Abolish a cause of action if the Legislature either:
  - Provides a reasonable commensurate benefit in exchange;[63] or
  - Shows an "overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."[64]

For mortgage loans, the bill creates a foreclosure prevention alternative framework which may impair the default notice provisions of current mortgage contracts and the right of the mortgagee to initiate foreclosure preceding under the contract terms. Whether this framework implicates the mortgagee’s access to courts, is for the courts to decide.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Currently, mortgage lenders, mortgage servicers, insurers, and insurance agents must comply with federal regulations related to the residential mortgage industry and lender-placed insurance. To the extent the provisions of the bill lack specificity in contrast to current federal rules, the provisions of the bill may cause confusion for individuals already in compliance.

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[61] *See Achord v. Osceola Farms Co.*, 52 So. 3d 699 (Fla. 2010).

[62] *See Anderson v. Gannett Comp.*, 994 So. 2d 1048 (Fla. 2008) (false light was not actionable under the common law); *McPhail v. Jenkins*, 382 So. 2d 1329 (Fla. 1980) (wrongful death was not actionable under the common law); *see also Kluger*, 281 So. 2d at 4 ("We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity . . .").

[63] *Kluger*, 281 So. 2d at 4; *see Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (upholding statutory cap on medical malpractice damages because the Legislature provided arbitration, which is a "commensurate benefit" for a claimant); *accord Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); *but see Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1992) (striking down noneconomic cap on damages, which, although not wholly abolishing a cause of action, did not provide a commensurate benefit).

[64] *Kluger*, 281 So. 2d at 4-5 (noting that in 1945, the Legislature abolished the right to sue for several causes of action, but successfully demonstrated "the public necessity required for the total abolition of a right to sue") (citing *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948); *see Echarte*, 618 So. 2d at 195 ("Even if the medical malpractice arbitration statutes at issue did not provide a commensurate benefit, we would find that the statutes satisfy the second prong of *Kluger* which requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown'").

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 1 of the bill provides a definition of “foreclosure prevention alternative” which is functionally identical to the definition of “loan modification” under s. 494.001(16), F.S., possibly subjecting foreclosure prevention alternatives to the loan modification and fee provisions of s. 494.00296, F.S. The definition of “mortgage servicer” created by the bill conflicts with the current definitions of “mortgage lender” under s. 494.001(24), F.S., which includes servicing a mortgage loan, and “servicing a mortgage loan” under s. 494.001(36), F.S. This could lead to confusion about the applicability of subsequent provisions of the bill to mortgage servicers.

Section 2 of the bill subjects reverse mortgage servicers to the lender-placed insurance requirements of 12 CFR 1024.37 and the periodic statement requirements of 12 CFR 1026.41. However, current Florida statutes do not provide a definition of a “reverse mortgage” or “servicer of a reverse mortgage”. In the alternative, ch. 494, F.S., does not provide a definition of the technical term “home equity conversion mortgage.” This could lead to compliance and enforceability issues.

The OFR would enforce Section 4 of the bill amending ch. 494, F.S. OFR, as the agency does not have statutory authority to prevent mortgage foreclosures and ch. 494, F.S., does not limit any statutory or common law right of any person to bring any action in any court for any active involved in the mortgage loan business or right of the state to punish any person for any violation of any law;[65] and failure to comply with ch. 494, F.S., does not affect the validity or enforceability of any mortgage loan, and no person acquiring a mortgage loan, as mortgagee or assignee or assignee, is required to ascertain whether or not the provisions of this ch. 494, F.S., have been complied with.[66]

Sections 5 and 6 of the bill amending ch. 627, F.S., and ch. 635, F.S., apply to both insurers and insurance agents. Insurance agents are regulated by DFS under ch. 626, F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 494.001, 494.00115, and 494.0025.

This bill creates the following sections of the Florida Statutes: 494.00163, 494.00225, 494.0027, 627.4055, 635.0215, and 702.013.

[65] Section 494.002, F.S.
[66] Section 494.0022, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.