

**STORAGE NAME:** h0445s2.brc

**DATE:** March 14, 2000

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
BUSINESS REGULATION & CONSUMER AFFAIRS  
ANALYSIS**

**BILL #:** CS/CS/HB 445

**RELATING TO:** Real Estate Brokers & Salespersons

**SPONSOR(S):** Committee on Business Regulation & Consumer Affairs and Committee on Real Property and Probate and Representative Goodlette and others

**TIED BILL(S):** None

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) REAL PROPERTY & PROBATE YEAS 6 NAYS 0
  - (2) BUSINESS REGULATION & CONSUMER AFFAIRS YEAS 6 NAYS 0
  - (3)
  - (4)
  - (5)
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**I. SUMMARY:**

This bill allows a real estate licensee to return escrowed property to the buyer of a residential condominium who validly rescinds the purchase contract without the licensee obtaining a signed release from the seller and without following the statutory dispute resolution procedures. These provisions of the bill relating to escrow disbursement are permissive rather than mandatory.

The bill requires a disclosure notice, referred to as a No Brokerage Relationship Notice, when a licensee has contact with a buyer or seller but does not officially represent that person. The notice must include a statement cautioning the purchaser or buyer against disclosing confidential information regarding the sale without first agreeing on representation by a real estate licensee. It also must specify the licensee's duties, such as dealing honestly with a potential client and properly handling funds which may be placed in the licensee's care. Exceptions are created for circumstances, such as for open houses and model home showings.

The bill also clarifies that the appraisal statutes do not apply to a broker or salesperson who gives an opinion on the value of real estate.

This bill does not appear to have a fiscal impact on local governments and an insignificant fiscal impact on the Florida Real Estate Commission and the Department of Business and Professional Regulation.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes  No  N/A

Does the bill create, increase or reduce, either directly or indirectly:

Any new responsibilities, obligations or work for other government or private organizations or individuals?

2. Lower Taxes Yes  No  N/A

3. Individual Freedom Yes  No  N/A

Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Does the bill prohibit, or create new government interference with any presently lawful activity?

4. Personal Responsibility Yes  No  N/A

5. Family Empowerment Yes  No  N/A

For any principle that received a "no" above, please explain.

Less Government - The bill allows the option of by-passing several requirements for processing escrowed funds. It lessens the administrative burdens relating to obtaining a seller signature on release forms prior to returning escrowed property when the buyer exercises a right of rescission relating to a condominium unit. The bill also lessens the administrative burdens on real estate licensees of filing the notices with the Florida Real Estate Commission that may otherwise be required pursuant to s. 475.25, F.S.

The bill imposes additional disclosure requirements for real estate licensees when they communicate with a potential client but are not engaged by the client for representation in the purchase or sale transaction. A licensee would be subject to penalties of chapter 475, F.S., for a violation of the new disclosure requirement. The department estimates that this bill may increase the number of disciplinary cases heard by the Florida Real Estate Commission.

Individual Freedom - See comments in Less Government above. The intent behind requiring a Notice of Nonrepresentation (formerly required by law) or No Brokerage Relationship Notice at first contact with a consumer is to clarify, before the consumer conveys confidential information, that the licensee does not represent the consumer. The disclosure notices are intended to prevent any conflicts should the consumer and licensee fail to establish a representation agreement.

**B. PRESENT SITUATION:**

Real Estate/Condominiums Escrow Disbursements

In a typical contract for purchase and sale of real property, the seller of the property expects the buyer to place property in escrow as one of the conditions of the contract.<sup>1</sup> In general, the escrowed property is forfeited by the buyer if the purchase is not completed, unless the seller breaches the contract or the contract requires refund of the escrow deposit to the buyer.<sup>2</sup>

Section 718.503, F.S., requires a contract for purchase and sale of a residential condominium to contain language which discloses several options available to a purchaser to void the contract, if the seller is the developer.

According to the Second District Court of Appeals, in Asbury Arms Development Corp. v. Florida Department of Business Regulation, Division of Florida Land Sales and Condominiums, 456 So.2d. 1291, 1293 (Fla. 2nd DCA 1984), "the fifteen-day right to void is designed as a cooling off period to protect the public in general from high pressure condominium sales situations. It allows the purchaser to review or check out the contents of the prospectus or offering statement required by section 718.504, to seek the advice of an attorney, or simply to reconsider the decision."

If the seller is not the developer, the seller is required to provide disclosures to the buyer which specify the buyers right to cancel a contract within three days after the execution of the contract. The disclosure must be a part of the contract for sale.

The disclosure clauses create what is commonly referred to as a "right of rescission," which allows a buyer to unilaterally rescind or cancel the offer to purchase the condominium unit. Typically, when the right of rescission is exercised, the buyer also makes a simultaneous demand for return of any property the buyer may have placed in escrow with a real estate licensee. The licensee must then inform the seller of the buyer's election to rescind the contract, and will typically ask at the same time for the seller to sign a form releasing the deposit to the buyer. If the seller refuses to sign the release of deposit form, it is considered a disputed claim, and the real estate licensee must follow specific procedures set forth in s. 475.25(1)(d)1., F.S. The real estate licensee must first "promptly notify the [Florida Real Estate Commission] of such doubts or conflicting demands",<sup>3</sup> and must promptly<sup>4</sup> institute one of the procedures listed in ss. 475.25(1)(d)1.a.-d., F.S.:

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<sup>1</sup>Although any form of property may be placed in escrow, in practice the property is nearly always cash. The property placed in escrow is commonly referred to as a "good faith deposit" or a "good faith binder".

<sup>2</sup>For instance, the standard contract promulgated by the Florida Association of Realtors and used throughout much of the state requires the escrowed property to be returned to the buyer if the buyer is unable to secure financing. Form FAR-5 Rev. 10/98, page 1, line 38.

<sup>3</sup>Section 475.25(1)(d)1., F.S. The initial notice to the commission must be within 15 business days. F.A.C. 61J-10.032(1).

<sup>4</sup>A real estate licensee must initiate one of these procedures within 30 business days. *Id.*

- a. Request that the Commission issue an escrow disbursement order determining who is entitled to the escrowed property;
- b. With the consent of all parties, submit the matter to arbitration;
- c. By interpleader or otherwise, seek adjudication of the matter by a court; or
- d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties.

Section 475.25(1)(d)1., F.S., authorizes discipline of a licensee for failure to account for or deliver a deposit to the party entitled to it "at the time which has been agreed upon or is required by law . . . ." Section 475.25(1)(k), F.S., requires a licensee to hold monies in trust "until disbursement thereof is properly authorized . . . ." The Florida Real Estate Commission interprets these provisions to require a licensee to obtain a release signature from both buyer and seller before releasing any deposit held in an escrow account, even though the Florida Statutes do not require release signatures. Because the required condominium purchase contract clauses found in s. 718.503, F.S., do not specifically address the return of escrowed property, the Florida Real Estate Commission does not construe s. 718.503, F.S., as creating an exception to its interpretation of s. 475.25(1)(d)1., F.S. and s. 475.25(1)(k), F.S., when a condominium buyer exercises the right of rescission.<sup>5</sup>

#### Real Estate/Relationship Disclosure

In 1994, the Legislature amended chapter 475, F.S., to authorize transaction broker and disclosed dual agent forms of representation for real estate professionals, in addition to the traditional single agent relationship. Despite disclosure requirements, considerable confusion existed on the part of licensees and consumers as to the scope and nature of the various types of representation.

During the 1996 interim, representatives of the Florida Association of Realtors, Florida Real Estate Commission, and the Department of Business & Professional Regulation met in the form of the Real Estate Agency Work Group to attempt to develop a solution to the problem of appropriate relationships between real estate professionals and their customers. Revisions to several statutory provisions resulted as a part of CS/CS/HB 339, which became chapter 97-42, Laws of Florida.

This legislation created the "Brokerage Relationship Disclosure Act" in the stated attempt to eliminate confusion and provide for a better understanding on the part of customers in real estate transactions. The act expressly revoked disclosed dual agency in Florida; required certain disclosures, including "Notice of Nonrepresentation" upon "first contact", as newly defined; and allowed single agency transactional brokerage, as defined in the act.

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<sup>5</sup>Telephone conference with James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission by the staff of the Committee on Real Property & Probate, on September 14, 1999.

Real estate licensees were required to provide a Notice of Nonrepresentation (“Notice”) upon “first contact” with a potential buyer or seller. The Notice was required to be printed on a separate and distinct form in the required format with no additional information other than the brokerage’s name, address and telephone number. The notice was designed to caution the consumer not to disclose confidential information until a real estate licensee had been hired.

In 1999, CS/HB 417 was passed into law as chapter 99-384, Laws of Florida, repealing provisions and references requiring real estate licensees to provide a Notice of Nonrepresentation to a potential seller or buyer. Real estate licensees are no longer required to provide notice upon “first contact” informing the potential client that the licensee’s brokerage firm or the licensee do not represent the potential client unless they had specifically agreed to appropriate representation.

A portion of the repealed notice language was transferred to the current disclosure notice which is required for brokers and agents. These provisions continue to apply to authorized brokerage relationships. The statute restricts the disclosure requirements to residential sales, as defined, and specifically cites certain activities, such as auctions or appraisals, to which the disclosures do not apply.

**C. EFFECT OF PROPOSED CHANGES:**

Real Estate/ Condominium Escrow Disbursement

The bill allows a real estate licensee to return escrowed property to the buyer of a residential condominium unit. The buyer is required to deliver written notice to the real estate licensee of the buyer’s intent to cancel the contract for purchase and sale as authorized by the provisions of s. 718.503, F.S. Upon receipt of the notice, the licensee is no longer required to notify the Florida Real Estate Commission. The licensee also is no longer required to initiate the procedures listed in s. 475.25(1)(d)1.a.-d., F.S., for disbursement of the escrowed funds.

The escrow disbursement provisions are permissive rather than mandatory. Thus, a real estate licensee is not required to return escrowed property upon receipt of a notice canceling a contract for purchase and sale of a condominium unit, but merely permitted to do so.

Real Estate/Relationship Disclosure

The bill creates a disclosure requirement for a real estate licensee who has no brokerage relationship with a seller or buyer similar to the former Notice of Nonrepresentation. The disclosure notice must be provided to the buyer or seller prior to showing the property.

The notice must contain language cautioning a buyer or seller not to divulge confidential information until agreement on representation has been reached. A statement is also required indicating the duties of the licensee to the buyer or seller. These duties include: dealing honestly and fairly; disclosing all known material facts relating to the property which may not be evident to the buyer; and the responsibility for properly handling funds which are entrusted to the licensee.

The bill creates exceptions from the new disclosure requirement, as well as, from the various other disclosures which are currently required by law. Exceptions are similar to those allowed under the former Notice of Nonrepresentation. They include: circumstances

where a licensee knows the customer is represented by another licensee; circumstances where it is evident a licensee is representing an owner who has built new units which are for sale; statements which are made by a licensee in response to general factual questions; and circumstances where a licensee is present at an open house or model home showing.

The bill specifies that a real estate broker or salesperson may give a price opinion or opinion of the value of real estate without these statements being considered an appraisal of the property.

**D. SECTION-BY-SECTION ANALYSIS:**

Section 1. Amends s. 475.25, F.S., to allow a real estate licensee to return escrowed property upon receiving a notice of a buyer's intent to cancel the purchase contract and return the escrowed property to the buyer without notifying the Real Estate Commission.

Section 2. Amends s. 475.278, F.S., to require a disclosure notice, referred to as a No Brokerage Relationship Notice, when a licensee has contact with a buyer or seller but does not officially represent the potential client.

Section 3. Amends s. 475.612, F.S., to clarify that a licensee' opinion on the value of real estate is not considered an appraisal.

Section 4. Provides that the act shall take effect July 1, 2000.

**III. 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:**

This bill is not expected to have any direct economic impact on the private sector.

This bill may have a slight indirect economic benefit in the form of lower overhead to Florida real estate licensees. This bill lessens the administrative burdens related to obtaining a seller signature on release forms prior to returning escrowed property when the buyer exercises a right of rescission relating to a condominium unit. It also lessens administrative burdens on real estate licensees as it relates to filing notices with the Florida Real Estate Commission that may otherwise be required pursuant to s. 475.25(1)(d)1.a.-d., F.S.

The Department of Business and Professional Regulation states: "HB 445 will provide buyers a quicker turnaround time for receiving accessibility to their funds that have been placed in escrow. Litigation costs may increase between buyers and sellers."<sup>6</sup>

**D. FISCAL COMMENTS:**

Because real estate licensees are not charged a fee for requesting an Escrow Disbursement Order (EDO), the cost of administering the program comes solely from the budget of the Department of Business and Professional Regulation, Division of Real Estate. The Florida Real Estate Commission tracks the number of EDO requests received, but does not further classify them by subject matter. A source estimates that approximately 5 percent of the approximately 1,500 EDO requests received annually involve disputes regarding condominiums and the right of rescission.<sup>7</sup> The department states that "disputed escrow actions . . . involving residential condominium units number less than 30% of the Division's caseload."<sup>8</sup> To the extent that this bill may lessen the number of requests for escrow disbursement orders, it may slightly lower the administrative costs of the Florida Real Estate Commission that are chargeable to the Division of Real Estate.

The department estimates that this bill may increase the number of disciplinary cases heard by the Florida Real Estate Commission; thus, slightly increasing investigatory costs incurred by the department.<sup>9</sup>

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<sup>6</sup>*Id.* at 4.

<sup>7</sup>Telephone conference with James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission by staff of the Committee on Real Property & Probate, on September 14, 1999.

<sup>8</sup>Department of Business and Professional Regulation, Legislative Affairs Office, Bill Analysis Form for HB 445, undated but received by the Committee on Real Property and Probate on December 29, 1999, at 2.

<sup>9</sup>*Id.*

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

Time periods set forth in s. 718.503, F.S., for canceling a contract for sale and purchase do not begin until the buyer receives all required documents. A buyer and a seller may disagree about when that time period begins, if they disagree about the date of receipt of documents or the completeness of the documents delivered.<sup>10</sup> The buyer and seller may also disagree as to when the time period ends because they may not understand whether intervening weekends and holidays are included in computing the time periods.<sup>11</sup> If a real estate licensee were to wrongfully return a deposit to a buyer upon the buyer invoking the right to void the contract, an aggrieved seller would still have the following protections:

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<sup>10</sup>See, e.g., Chalfonte Development Corporation, v. Rosewin Coats, Inc., 374 So.2d. 618 (Fla. 4th DCA 1979) (involving a dispute over the completeness of documents provided to the buyer by the seller).

<sup>11</sup>Rule 1.090 of the Florida Rules of Civil Procedure provides: "In computing any period of time prescribed or allowed by these rules, by order of court, *or by any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." This court rule is applicable to time periods set by statute. Stockslager v. Daly Aluminum Products, Inc., 246 So.d. 97 (Fla. 1971) (emphasis added).

The real estate licensee could be prosecuted under s. 475.25(1)(b), F.S., for “culpable negligence, or breach of trust in any business transaction . . . .”;

The real estate licensee would be subject to civil suit by the seller;<sup>12</sup> and

If the real estate licensee refused or was unable to pay a civil judgment, the Real Estate Recovery Fund<sup>13</sup> may pay the monies owed to the aggrieved person.<sup>14</sup>

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

**Committee on Real Property & Probate**

On January 18, 2000, the Committee on Real Property and Probate passed HB 445, as amended, and reported it out favorably as a committee substitute. One amendment was offered by the bill sponsor that made grammatical changes without changing the substance of the bill. The amendment was adopted.

**Committee on Business Regulation & Consumer Affairs**

On March 14, 2000, the Committee on Business Regulation and Consumer Affairs passed CS/HB 445, as amended, and reported it out as a committee substitute for committee substitute. The CS for CS includes the original committee substitute language for disbursing funds in escrow to a purchaser of a condominium. The CS for CS is also designed to re-establish the requirement and form similar to the former Notice of Nonrepresentation which was repealed in 1999 and creates the disclosure to be referred to as a “No Brokerage Relationship Notice.” This disclosure notice would have to be given to the buyer or seller before showing of the property. Exceptions are created which are similar to the former Notice of Nonrepresentation, such as for open houses and model home showings.

The CS for CS also clarifies that the appraisal statutes do not apply to a broker or salesperson who gives an opinion of the value of real estate.

**VII. SIGNATURES:**

**COMMITTEE ON REAL PROPERTY & PROBATE:**

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

J. Marleen Ahearn, Ph.D., J.D.

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<sup>12</sup>A real estate broker may be civilly liable for transferring escrow property to a party not entitled to them. Accurate Financial Corporation v. Burman, 519 So.2nd. 689, 690 (Fla. 3rd DCA 1988).

<sup>13</sup>Section 475.482, F.S.

<sup>14</sup>The concerns raised in this paragraph are from James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission, as discussed in a telephone conference with the staff of the Committee on Real Property and Probate on September 14, 1999. Mr. Mitchell also suggested the alternative remedies.

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**PAGE 10**

AS REVISED BY THE COMMITTEE ON BUSINESS REGULATION & CONSUMER  
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