

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2196

SPONSOR: Banking and Insurance Committee and Senator Geller

SUBJECT: Insurance Payments from Escrow Accounts

DATE: March 19, 2004 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Deffenbaugh	Deffenbaugh	BI	Fav./CS
2.		JU	
3.			
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5.			
6.			

I. Summary:

Committee Substitute for Senate Bill 2196 (“bill”) adds requirements to the current law that makes a lender of money secured by a mortgage liable to the property owner for a loss that results from the failure of the lender to timely pay any insurance premium from escrowed funds. The bill provides that if the premium payment is not more than 90 days overdue, the insurer must reinstate the insurance policy, retroactive to the date of cancellation, and the lender must reimburse the property owner for any penalty or fees imposed by the insurer and paid by the property owner for reinstating the policy. If the premium payment is more than 90 days overdue or if the insurer refuses to reinstate the insurance policy, the lender must pay the difference between the cost of the previous policy and a new, comparable policy, for a period of two years.

This bill substantially amends sections 501.137 and 627.4133 of the Florida Statutes.

II. Present Situation:

Florida Law (s. 501.137, F.S.) Making Mortgage Lenders Liable for Late Payment of Taxes or Premiums

Section 501.137, F.S., provides that every lender of money whose loans are secured by a mortgage on real estate located in Florida and who receives funds held in escrow for the payment of property taxes or hazard insurance premiums, must promptly pay the taxes or insurance premiums when due, so that the maximum tax discount is obtained and the insurance coverage does not lapse. If the lender, as a result of neglect, fails to pay any tax or insurance premium when due, when sufficient escrow funds are on deposit, the lender is liable *if the property owner suffers a loss as a result of such failure*. The statute does not define or otherwise describe the type of loss for which a lender would be liable and staff research finds no case law interpreting its meaning.

The cited statute is in ch. 501, F.S., Consumer Protection, but there is no specific state agency responsible for its enforcement. State chartered financial institutions, including banks and credit unions, as well as mortgage lenders, are licensed and regulated by the Office of Financial Regulation (OFR or Office).¹ Representatives of OFR state that such state regulated financial institutions and mortgage lenders would be expected to abide by the requirements of this section, and would typically do so if a complaint is received by OFR or by the Division of Consumer Services of the Department of Financial Services, (though the meaning of “loss” may be vague). But, ultimate enforcement of the statute’s requirements is a matter for the courts. However, for mortgage lenders licensed under ch. 494, F.S., the Office may levy administrative penalties and fines for the mortgage lender’s failure to disburse funds in accordance with agreements,² although OFR representatives state that such penalties are unlikely unless there was a repeated practice of violations. Also, there is no comparable provision for imposing administrative penalties on state licensed banks, savings and loan associations, savings banks, and credit unions, which are exempt from ch. 494, F.S.

Florida Law Requiring Property Insurers to Provide Notice of Cancellation

Florida law requires Insurers must give the named insured at least 10 days’ written notice of cancellation of a property insurance policy when cancellation is for nonpayment of premium.³ However, there is no statutory requirement for an insurance company to reinstate an insurance policy that has been canceled for nonpayment of premium, whether due to the mortgage lender’s failure to pay the premium when due or any other reason.

Federal RESPA Requirements

The federal Real Estate Settlement Procedures Act⁴ (RESPA) imposes requirements that apply to any mortgage loan on residential property designed for one to four families and which is insured by any agency of the federal government or is made by any lender which is regulated by any agency of the federal government.⁵

The act includes a provision that if the loan requires the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.⁶

If a borrower sends a “qualified written request” to the loan servicer concerning the servicing of the loan, the servicer must provide a written acknowledgement within 20 business days of receipt of the request. Not later than 60 business days after receiving the request, the servicer must make

¹ The Office of Financial Regulation regulates mortgage brokers, lenders and mortgage companies, including enforcement of the Florida Fair Lending Act (ch. 494, F.S.), as well as financial institutions, generally (ch. 655, F.S.), credit unions (ch. 657, F.S.), bank and trust companies (ch. 658, F.S.), international banking (ch. 663, F.S.), associations (ch. 665, F.S.), and savings banks (ch. 667, F.S.)

² S. 494.0072(2)(g), F.S. (2003)

³ S. 627.4133(2), F.S. (2003)

⁴ 12 U.S.C. s. 2601 , et seq.

⁵ 12 U.S.C. s. 2602

⁶ 12 U.S.C. s. 2605(g)

any appropriate corrections to the borrower's account, and must provide a written clarification regarding any dispute. A servicer that fails to comply with any provision of this section shall be liable to the borrower for any actual damages to the borrower as a result of the failure, plus reasonable costs and attorneys fees. The act authorizes any additional damages as the court may allow in the case of a pattern or practice of noncompliance in an amount not to exceed \$1,000. The act further provides that any action for a violation of provision may be brought in the U.S. District Court or in any other court of competent jurisdiction within 3 years of the violation.⁷

The following questions and answers relative to RESPA provisions related to escrow accounts are quoted from the website for the U.S. Department of Housing and Urban Development (HUD):⁸

What steps should I take if the lender does not pay my hazard insurance on time or at all and my insurance is canceled?

Lenders are required by Section 6 to make escrow account disbursements on time. If a lender fails to do so, a borrower may bring a private law suit under this Section. Therefore, if you incur any damages due to the lender's negligence, you may wish to consult an attorney.

You should also contact your lender immediately and send a copy of the bill. Some lenders list a special address and/or FAX number for insurance and tax bills. Keep checking with the insurance company to make certain the bill is paid. You may wish to pay the insurance company directly to avoid cancellation of your policy and then seek a refund from your lender. Keep copies of all your correspondence and payments. If you incur any damages due to the lender's negligence, you may wish to consult an attorney.

I got a notice that my hazard insurance has been canceled. My lender force-placed hazard insurance with a different company and it costs a lot more. Can a lender do this?

As long as your mortgage payment is not more than 30 days late, Section 6 of RESPA requires the lender to make escrow payments, for taxes, insurance, etc., in a timely manner. You should write to your lender and complain. If your lender does not refund the difference or otherwise resolve your complaint satisfactorily, you may wish to file a complaint with HUD or the Consumer Protection Office of your State Attorney General's Office. You may also wish to consult an attorney.

RESPA further provides that its provisions do not alter, affect, or exempt any person from complying with state laws with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of RESPA. The Secretary of HUD is authorized to determine whether such inconsistencies exist, but the Secretary may not determine that any state

⁷ 12 U.S.C. s. 2614

⁸ FAQs About Escrow Accounts for Consumers (<http://www.hud.gov/offices/hsg/sfh/res/respafaq.cfm>)

law is inconsistent with any provision if the Secretary determines that such law gives greater protection to the consumer.⁹

Even though RESPA does not preempt a state law that give greater protection to the consumer, there still may be a question of federal preemption if the lender that services the loan is a federal bank charted under the National Bank Act, or a subsidiary of a federal bank, regulated by the Office of the Comptroller of Currency (OCC) National banks are permitted to engage in activities “incidental to the business of banking,” which OCC regulations interpret as including servicing loans by the national bank or by a service company owned by the bank.¹⁰ The National Bank Act and OCC regulations are interpreted as preempting additional state requirements on such institutions.

III. Effect of Proposed Changes:

Section 1 amends s. 501.137, F.S., to add requirements to the current law that makes a lender of money liable to the property owner for a loss that results from the failure of the lender to timely pay any insurance premium from escrowed funds. The bill provides that if the premium payment is not more than 90 days overdue, the insurer must reinstate the insurance policy, retroactive to the date of cancellation, and the lender must reimburse the property owner for any penalty or fees imposed by the insurer and paid by the property owner for reinstating the policy. If the premium payment is more than 90 days overdue or if the insurer refuses to reinstate the insurance policy, the lender must pay the difference between the cost of the previous policy and a new, comparable policy, for a period of two years.

Section 2 amends s. 627.4133, F.S., related to cancellation or non-renewal of property insurance policies, to require a property insurer that cancels a policy on property secured by a mortgage due to the failure of the lender to timely pay the premium must reinstate the policy as required by s. 501.137, F.S. (above). By having this provision in the Florida Insurance Code, the Office of Insurance Regulation will have the full authority to enforce the provisions of s. 501.137, F.S., as it applies to insurers.

Section 3 provides that the act shall take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁹ 12 U.S.C. s. 2616

¹⁰ 12 U.S.C. s. 94; 12 C.F.R. Part 5

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill takes effect July 1, 2004, and if interpreted to apply to policies in effect on that date, it may be deemed to impair the obligations of such policies and as such, violate Art. 1, Sec. 10, Florida Constitution, which prohibits any law impairing the obligation of contracts. This could be cured by applying the bill to policies issued or renewed on or after the effective date.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Property owners would be afforded greater protections to either reinstate a property insurance policy that has been canceled due to nonpayment of premium by the mortgage lender or to be reimbursed for the additional cost of obtaining replacement coverage.

State regulated financial institutions and mortgage lenders would be subject to any policy reinstatement fees or additional costs for replacement coverage for two years.

The bill may expose insurers to loss for risks covered under a policy for up to 90 days for which the premium has not yet been paid, but the past due premium would be required to be paid before the coverage is reinstated, retroactive to the date of cancellation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Federal law may preempt application of the bill to national banks, as explained in Present Situation, above.

VIII. Amendments:

None.