

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 Rules

BILL: CS/SB 770

INTRODUCER: Commerce and Tourism Committee and Senator Bradley

SUBJECT: Residential Loan Alternative Agreements

DATE: April 10, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	Favorable
2.	<u>Renner</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
3.	<u>Oxamendi</u>	<u>Twogood</u>	<u>RC</u>	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 770 regulates residential loan alternative agreements for the disposition of residential real property. Under the bill, a “residential loan alternative agreement” means “a signed writing between a person and a seller or owner of residential real property that grants an exclusive right to a person to act as a broker; has an effective duration, inclusive of renewals, of more than 2 years; and requires the person to pay monetary compensation to the seller or owner.”

The bill prohibits a residential loan alternative agreement from authorizing a person to place a lien or otherwise encumber any residential real property. Nor can a residential loan alternative agreement constitute a lien, an encumbrance, or a security interest in the residential real property.

Under the bill, a residential loan alternative agreement may not be enforced by a lien or constructive trust in the residential real property or upon the proceeds of the disposition (sale) of the residential real property.

The bill provides that a residential loan alternative agreement may not be assigned and becomes void if the listing services do not begin within 90 days after the execution of the agreement by both parties. The bill provides that, as a matter of public policy, a residential loan alternative agreement that does not meet these requirements is unenforceable in law or equity and may not be recorded by the clerk of the circuit court.

Additionally, the bill provides that a violation of the requirements in the bill is an unfair or deceptive trade practice within the meaning of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and the violator is subject to the penalties and remedies provided by FDUTPA.

The bill takes effect July 1, 2023.

II. Present Situation:

Regulation of Real Estate Professionals

Real estate brokers¹ and broker associates² (real estate professionals) are regulated by the Florida Real Estate Commission (commission) within the Department of Business and Professional Regulation (DBPR) under part I of ch. 475, F.S. The Division of Real Estate within the DBPR performs the administrative services for the commission, including recordkeeping services, examination services, legal services, and investigative services.³

Fiduciary Relationship

Real estate brokers are in a relationship with the buyer or seller for whom they act as an agent. The duties of a broker as a fiduciary are loyalty, confidentiality, obedience, full disclosure and accounting, and the duty to use skill, care, and diligence.⁴

The listing agreement between the buyer or seller of real estate and a broker must be disclosed in writing in the listing agreement or other documents.⁵

Listing Agreements

In an exclusive listing agreement such as the standard agreement offer by Florida Realtors, the seller authorizes the listing broker to sell the property and to offer cooperation to other agents, but the seller reserves the right to sell the property herself or himself.⁶

Disciplinary Provisions

If the commission finds that a licensee, registrant, permittee, or applicant, has violated any of the disciplinary grounds in ss. 455.227, 475.25, and 475.42, F.S., the commission may:

- Deny an application for licensure, registration, or permit, or renewal thereof;
- Place a licensee, registrant, or permittee on probation;
- Suspend a license, registration, or permit for a period not exceeding 10 years;
- Revoke a license, registration, or permit;
- Impose an administrative fine not to exceed \$5,000 for each count or separate offense;

¹ See s. 475.01(1)(a), F.S., defining the term “broker.”

² See s. 475.01(1)(b), F.S., defining the term “broker associate.”

³ Section 475.021, F.S.

⁴ See s. 475.278, F.S., providing the requirements for an authorized brokerage relationship in residential sales, and s. 475.01(1)(f), F.S., defining the term “fiduciary.”

⁵ Section 475.278, F.S.

⁶ Florida Realtors is a trade association for Florida’s real estate brokers. Members of the trade association have access to a variety of forms for use in the real estate brokerage practice. See Florida Realtors, *Form Descriptions*, available at <https://www.floridarealtors.org/tools-research/form-descriptions> (last visited Mar. 24, 2023).

- Issue a reprimand; and
- Do any or all of the foregoing actions.⁷

In relevant part, grounds for discipline of a real estate professional may include:

- Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession;⁸
- Advertising property or services in a manner that is fraudulent, false, deceptive, or misleading in form or content;⁹ and
- Disseminating or causing to be disseminated by any means any false or misleading information for the purpose of offering for sale, or for the purpose of causing or inducing any other person to purchase, lease, or rent, real estate located in Florida or for the purpose of causing or inducing any other person to acquire an interest in the title to real estate located in Florida.¹⁰

Florida Deceptive and Unfair Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA or act)¹¹ addresses issues of consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.¹² Violations of the act are enforced by the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction. The Department of Legal Affairs is the enforcement authority if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.¹³

The enforcing authority may seek a declaratory judgment to determine whether an act or practice violates FDUTPA, file an action to enjoin any person who has violated, is violating, or is otherwise likely to violate the act, or take legal action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of the act.¹⁴

The FDUTPA provides for a civil penalty of no more than \$10,000 for willful violations. The enforcing authority is also entitled to reasonable attorney's fees and costs if civil penalties are assessed in any litigation.¹⁵

MV Realty Case

The Florida Attorney General has filed a complaint for injunctive and monetary relief against Florida-based real estate brokerage firm (MV Realty) and its principals for deceptive, unfair and

⁷ Section 475.25(1), F.S.

⁸ Section 455.227(1)(m), F.S.

⁹ Section 475.25(1)(c), F.S.

¹⁰ Section 475.42(1)(n), F.S.

¹¹ Part II of ch. 501, F.S.

¹² See s. 501.202, F.S.

¹³ Section 501.203(2), F.S.

¹⁴ Section 501.207(1), F.S.

¹⁵ Section 501.2075, F.S.

unconscionable business practices under the FDUTPA.¹⁶ The Attorney General alleges that the practices of MV Realty “result in homeowners signing away home equity for a paltry upfront payment.”¹⁷ The defendants allegedly offer homeowners \$300 to \$5,000 as a cash loan alternative in exchange for an agreement to use the MV Realty as an exclusive listing broker. After accepting the payment, MV Realty files a 40-year lien on the property that requires homeowners to pay 3 percent of the value of the home to MV Realty, regardless of whether the company provides any real estate listing services.

The Attorney General also alleges that MV Realty and the other defendants have violated the Telemarketing Sales Rule¹⁸ by bombarding prospective consumers, including consumers who have registered under the national Do-Not-Call registry, with unwanted telemarketing calls and by using phone numbers that deceptively simulate local calls.¹⁹

III. Effect of Proposed Changes:

The bill creates s. 475.279, F.S., to regulate residential loan alternative agreements.

The bill defines the term “residential loan alternative agreement” as a signed writing between a person and a seller or owner of residential real property that:

- Grants an exclusive right to a person to act as a broker;
- Has an effective duration, inclusive of renewals, of more than 2 years; and
- Requires the person to pay monetary compensation to the seller or owner.

The bill defines the term “disposition” to mean “a transfer or voluntary conveyance of the title or other ownership interest in residential real estate.” It also defines the term “residential real property” to mean “improved residential property of four units or fewer or unimproved residential real property intended for four units or fewer.”

The bill prohibits a residential loan alternative agreement from authorizing a person to place a lien or otherwise encumber any residential real property. Nor can a residential loan alternative agreement constitute a lien, an encumbrance, or a security interest in the residential real property.

Under the bill, a residential loan alternative agreement may not be enforced by a lien or constructive trust in the residential real property or upon the proceeds of the disposition (sale) of the residential real property.

¹⁶ *Office of Attorney General v. MV Realty, et al*, case no. 22-CA-009958 (Fla. 13th Jud. Cir. 2022). A copy of the civil complaint for injunctive and other relief is available at [http://myfloridalegal.com/webfiles.nsf/WF/CPAL-CLMSK3/\\$file/Web+Link.pdf](http://myfloridalegal.com/webfiles.nsf/WF/CPAL-CLMSK3/$file/Web+Link.pdf) (last visited Mar. 24, 2023).

¹⁷ Office of Attorney General Ashley Moody, *Attorney General Moody Takes Legal Action Against MV Realty for Swindling Florida Homeowners* (Nov. 29, 2022), available at <https://www.myfloridalegal.com/newsrel.nsf/newsreleases/E9E4A2F7281415CE85258909007259EC?Open&> (last visited Mar. 24, 2023).

¹⁸ The Telemarketing Sales Rule, 16 C.F.R s. 310, *et seq.*, is a rule of the Federal Trade Commission (FTC) which requires telemarketers to make specific disclosures of material information; prohibits misrepresentations; sets limits on the times telemarketers may call consumers; prohibits calls to a consumer who has asked not to be called again; and sets payment restrictions for the sale of certain goods and services. See FTC, *Telemarketing Sales Rule*, available at <https://www.ftc.gov/legal-library/browse/rules/telemarketing-sales-rule> (last visited Mar. 24, 2023).

¹⁹ *Supra* note 17.

The bill provides that a residential loan alternative agreement may not be assigned and becomes void if the listing services do not begin within 90 days after the execution of the agreement by both parties. The bill provides that, as a matter of public policy, a listing agreement or an option to enter into a listing agreement that does not meet these requirements is unenforceable in law or equity and may not be recorded by the clerk of the circuit court.

Additionally, the bill deems a violation of s. 475.279, F.S., to be an unfair or deceptive trade practice within the meaning of FDUTPA, and provides that a person who violates this section is subject to the penalties and remedies provided FDUTPA.

The bill takes effect July 1, 2023.

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:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 475.279 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 27, 2023:

The amendment regulates residential loan alternative agreements, rather than the option to enter into a listing agreement as provided in the current bill.

The amendment defines a residential loan alternative agreement as a signed writing between a person and a seller or owner of a residential property that.

- Grants an exclusive right to a person to act as a broker;
- Has an effective duration, inclusive of renewals, of more than 2 years; and
- Requires the person to pay monetary compensation to the seller or owner.

The amendment provides that a residential loan alternative agreement may not be assigned and becomes void if the listing services do not begin within 90 days after the execution of the agreement by both parties.

- B. **Amendments:**

None.