

STORAGE NAME: h0445s1.brc

DATE: March 11, 2000

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

BILL #: CS/HB 445

RELATING TO: Real Estate Brokers & Salespersons

SPONSOR(S): Committee on Real Property and Probate and Representative Goodlette

TIED BILL(S): None

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

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

I. SUMMARY:

This bill allows a real estate licensee to return escrowed property to the buyer of a residential condominium unit without notifying the Florida Real Estate Commission and without initiating certain procedures, if such buyer delivers written notice to the real estate licensee of the buyer's intent to cancel the contract for purchase and sale. The provisions of this bill 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.

Currently, the Florida Real Estate Commission construes Florida law as requiring a real estate licensee to obtain a release signature from the seller before returning any escrowed property to the buyer when the buyer of a residential condominium has provided written notice of the buyer's intent to cancel the contract and if the seller refuses to sign the release the broker must initiate specific procedures.

To date, the Department of Business and Professional Regulation has not provided a final version of its fiscal analysis of this bill. Nevertheless, this bill does not appear to have any 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. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

B. PRESENT SITUATION:

Real Estate Contracts and Condominiums

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.¹ In general, the escrowed property is forfeited by the buyer if the buyer does not complete the purchase, unless the seller breaches the contract or the contract requires refund of the escrow deposit to the buyer.²

Section 718.503, F.S., requires a contract for purchase and sale of a residential condominium to contain the following language, if the seller is the developer:

THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER, AND RECEIPT BY BUYER OF ALL OF THE ITEMS REQUIRED TO BE DELIVERED TO HIM OR HER BY THE DEVELOPER UNDER SECTION 718.503, FLORIDA STATUTES. THIS AGREEMENT IS ALSO VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM THE DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

According to the Second District Court of Appeals, in Asbury Arms Development Corp. v. Florida Department of Business Regulations, Division of Florida Land Sales and Condominiums, 456 So.2d 1291, 1293 (Fla. 2nd DCA 1984), "the fifteen-day right to void is

¹Although 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".

²For 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.

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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, and the buyer, prior to signing the contract, has been provided the documents described below, s. 718.503, F.S., requires the following contract language:

THE BUYER HEREBY ACKNOWLEDGES THAT BUYER HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS, RULES OF THE ASSOCIATION, A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND THE QUESTION AND ANSWER SHEET MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO EXECUTION OF THIS CONTRACT.

If the seller is not the developer, and the buyer, prior to signing the contract, has not been provided the required documents, s. 718.503, F.S., requires the following contract language:

THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION, BYLAWS, AND RULES OF THE ASSOCIATION, A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND QUESTION AND ANSWER SHEET IF SO REQUESTED IN WRITING. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS, RULES, AND QUESTION AND ANSWER SHEET IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

These 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.

Real Estate Licensees and Escrow Accounts

Typically, when a buyer exercises the right of rescission, the buyer also makes a simultaneous demand for return of any property the buyer may have placed in escrow with a real estate licensee.³ The real estate 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 release form releasing the deposit to the buyer. If the seller refuses to sign the release of

³A “licensee” is “[a]nyone who holds any of the various licenses issued by the Department of [Business and] Professional Regulation.” Florida Real Estate Commission Handbook, 1993 Edition, at H-18. A real estate licensee holds one of three forms of license: broker, broker-salesperson, or salesperson.

deposit form,⁴ it is considered a disputed claim,⁵ 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”,⁶ and must then promptly⁷ institute one of the procedures listed in ss. 475.25(1)(d)1.a.-d., F.S.:

- 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 dispute resolution 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”⁸ 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 real estate 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

⁴“When confronted with the need for their ‘approval’ to release deposits, Sellers often figure they have some claim on it and are reluctant to [sign the form].” Memorandum from John Steinwand, licensed real estate broker, February 22, 1999.

⁵“Based upon prior decisions of the Commission, good faith doubt shall be deemed to exist in the following situations: . . . 2. the closing or consummation date of the sale, lease, or other transaction has not passed, but one or more of the parties has expressed its intention not to close or consummate the transaction and the broker has not received conflicting **or identical** instructions from all of the parties concerning disbursement of the escrowed funds.” F.A.C. 61J2-10.032(1)(b) (emphasis added).

⁶Section 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).

⁷A real estate licensee must initiate one of these procedures within 30 business days. *Id.*

⁸The guideline penalty for violation of this section ranges from a \$1,000 fine to a 5 year license suspension. F.A.C. 61J2-24.001(3).

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.⁹

Real estate licensees comment that “sellers will unreasonably refuse to approve an escrow disbursement when asked, simply to attempt to obtain some leverage or advantage with no legal justification for so doing.”¹⁰ The real estate licensees believe that the right of rescission set forth in s. 718.503, F.S., is absolute, and that they have sufficient knowledge and expertise to understand the rescission right and to properly understand when to return escrowed property to a buyer.¹¹

When a real estate licensee requests an Escrow Disbursement Order in compliance with s. 475.25(1)(d)1.a., F.S., they typically wait for four to six months for a reply from the Florida Real Estate Commission.¹² During that time period, the buyer who deposited the property with the real estate licensee has lost the beneficial use of the property.

C. EFFECT OF PROPOSED CHANGES:

This bill allows a real estate licensee to return escrowed property to the buyer of a residential condominium unit without notifying the Florida Real Estate Commission and without initiating the procedures listed in s. 475.25(1)(d)1.a.-d., F.S., provided such buyer delivers 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.

The provisions of this bill 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.

There is no specified form for use by a buyer who wishes to cancel a contract for sale and purchase of a residential condominium as authorized by the provisions of s. 718.503, F.S. The development of a form for that written notice requiring, for example, proper signatures, date and time of delivery, and which buyer is entitled to return of the escrowed property where there are multiple buyers, may serve to facilitate such transactions and to limit disagreement over whether real estate licensees have complied with their duties required by law and by contract.

⁹Telephone conference with James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission, on September 14, 1999.

¹⁰Letter from June M. Mueller, President of the Naples Area Board of Realtors, May 18, 1999.

¹¹*Id.*

¹²Telephone conference with James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission, on September 14, 1999.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

Because real estate licensees are not charged a fee for requesting an Escrow Disbursement Order (EDO), the administrative 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.¹³ The department states that "disputed escrow actions . . . involving residential condominium units number less than 30% of the Division's caseload."¹⁴ 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, and may thus slightly increase investigatory costs incurred by the department.¹⁵ No specific figures have been provided by the department.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

¹³Telephone conference with James R. Mitchell, Assistant Attorney General and counsel to the Florida Real Estate Commission, on September 14, 1999.

¹⁴Department of Business and Professional Regulation, Legislative Affairs Office, Bill Analysis Form for HB 445, undated but received December 29, 1999, at 2.

¹⁵*Id.*

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 small 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. This bill also lessens the administrative burdens on real estate licensees of filing the notice or 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."¹⁶

D. FISCAL COMMENTS:

Committee on Real Property & Probate

To date, the Department of Business and Professional Regulation has not provided this committee with a final version of its fiscal impact statement.¹⁷

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.

¹⁶*Id.* at 4.

¹⁷A fiscal impact statement was first requested on December 10, 1999.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

The time periods set forth in s. 718.503, F.S., for canceling a contract for sale and purchase do not start to run until the buyer receives all of the required documents. Accordingly, 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.¹⁸ 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.¹⁹ 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:

The real estate licensee could still 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;²⁰ and

¹⁸See, 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).

¹⁹Rule 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.2d 97 (Fla. 1971) (emphasis added).

²⁰A 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.2d 689, 690 (Fla. 3rd DCA 1988).

If the real estate licensee refused or was unable to pay a civil judgment, the Real Estate Recovery Fund²¹ may pay the monies owed to the aggrieved person.²²

The Florida Association of Realtors supports this legislation.²³

Assistant Attorney General Jim Mitchell, counsel to the Florida Real Estate Commission, states that it "would appear reasonable to allow the [real estate licensee] to disburse the funds to the buyer" when "a buyer exercises the right to void the contract within the . . . statutory three-day rescission period" ²⁴

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

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.

VII. SIGNATURES:

COMMITTEE ON REAL PROPERTY & PROBATE:

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

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

AS REVISED BY THE COMMITTEE ON BUSINESS REGULATION & CONSUMER AFFAIRS:

Prepared by:

Staff Director:

Alan W. Livingston

Rebecca R. Everhart

²¹Section 475.482, F.S.

²²The 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 on September 14, 1999. Mr. Mitchell also suggested the alternative remedies.

²³Telephone conference with Kelly Horton of the Florida Association of Realtors, on December 10, 1999.

²⁴Real Estate Law, February, 1999, at 1211.