

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Maintain public security: Restricts the use of the term “escrow” as a measure for consumer fraud protection.

Ensure lower taxes: The estimated biennial revenue generated is \$34,604 in the Insurance Regulatory Trust Fund. The estimated biennial revenue generated for local governments is \$4,326.

B. EFFECT OF PROPOSED CHANGES:

Background

Escrow Funds

In the routine practice of purchasing and selling real estate, the seller expects the buyer to place property in escrow as consideration of the contract. Various forms of property may be placed in escrow; however, 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.”

Pursuant section 475.25(1)(d)1., F.S., the Florida Real Estate Commission is authorized to discipline 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...” Further, “A broker may place and maintain up to \$5,000 of personal or brokerage funds in the broker's property management escrow account and up to \$1,000 of personal or brokerage funds in the broker's sales escrow account.” Moreover:

It is the intent of the Legislature that, in the event of legal proceedings concerning a broker's escrow account, the disbursement of escrowed funds not be delayed due to any dispute over the personal or brokerage funds that may be present in the escrow account.

In general, when a transaction is normally cancelled or withdrawn, a buyer also makes a simultaneous demand for the return of any property escrowed with a real estate licensee. Unless a dispute arises or contractual exception exists, the seller is informed of the buyer's contract rescission and typically asked to sign a form releasing the deposit to the buyer.

Other professional groups similarly act as escrow agents, such as attorneys. For attorneys, The Rules Regulating the Florida Bar and Florida Supreme Court orders regulate their practices and procedures, including accounting of escrow accounts.

Earlier this year, attorney Ira C. Hatch, the president of Coastal Escrow Services, Inc. and Coastal Title Services, Inc. abruptly closed their doors. As of March 17, 2008, both companies are under civil and criminal investigation. Mr. Hatch has been disbarred and faces criminal prosecution for racketeering, money laundering, grand theft, and operating as a money transmitter without proper registration in connection to the disappearance of an estimated \$4 million from escrow accounts at Coastal Escrow Services, Inc.

Effect of Proposed Changes

Section 1: Creates s. 501.165 in chapter 501, F.S., Consumer Protection. The bill provides in subsection (1):

A person, other than a person who is specifically authorized under the laws of this state to act as an escrow agent in this state and is acting within the scope of that authority, may not:

- (a) Transact business under any name or title that contains the word "escrow" or words of similar import; or
- (b)1. Use any name, word, sign, symbol, or device in any context or in any manner; or
- 2. Circulate or use any letterhead, billhead, circular, paper, or writing of any kind or otherwise advertise or represent in any manner, that indicates or reasonably implies that the business being conducted or advertised is the kind or character of business transacted that is regulated by this state as an escrow agent.

In subsection (2) the term "escrow agent" is defined to exclusively mean:

- (a) A savings and loan association, bank, trust company, or other financial institution, any of which must be located in this state and any of which must have a net worth in excess of \$5 million;
- (b) An attorney who is a member of The Florida Bar or his or her law firm;
- (c) A real estate broker who is licensed pursuant to chapter 475 or his or her brokerage firm; or
- (d) A title insurance agent who is licensed pursuant to s. 626.8417, a title insurance agency that is licensed pursuant to s. 626.8418, or a title insurer who is authorized to transact business in this state pursuant to s. 624.401.

Subsection (3) provides that any person aggrieved by a violation of this section may bring an action in a court of competent jurisdiction to:

- (a) Obtain a declaratory judgment that an act or practice violates this section; or
- (b) Enjoin any person who has violated, is violating, or is otherwise likely to violate this section.

In subsection (4), any action brought by a person who has suffered a loss as a result of a violation of this section, such person may recover actual damages, plus attorney's fees and court costs.

Any person who willfully violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2: This act shall take effect July 1, 2008.

C. SECTION DIRECTORY:

None

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The division estimates approximately 721 individuals will initially apply for the title insurance agents' licenses.

The estimated biennial revenue generated is \$34,604 in the Insurance Regulatory Trust Fund.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

County governments will receive taxes in the amount of \$4,326 for FY 08-09, \$432 for FY 09-10 and \$4,326 for ongoing biennial renewals.

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires individuals who act as escrow agents to be licensed as attorneys, real estate brokers, and title agents or be employed by a law firm, real estate brokerage, title insurance agency or a financial institution. The division predicts individuals acting as escrow agents, who are not one of the above or work for one of the above, will apply for title insurance agents' licenses. Therefore, the individuals must pay the application filing fee of \$10 and the examination fee of \$56. The appointing entities must pay the total appointment fee of \$60 (\$42+\$12+\$6).

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comment 1: Subsection (2) is apparently designed to exempt certain professional groups (lenders, attorneys, brokers and title agents) who routinely and regularly act as escrow agents. But, it is unclear whether an attorney is "specifically authorized under the laws of this state to act as an escrow agent in this state" as contemplated by subsection (1). Attorneys are bound by strict ethical rules that regulate their handling of trust accounts, but when they act as an escrow agent there is no any specific grant of authority from the government.

It is questionable whether financial institutions are required to have a specific grant of authority to handle an escrow account, with the exception, for example, of licensing to engage in trust business.

One suggested change to the approach taken by the bill would be to exclude rather than include groups authorized to handle escrows. This could be accomplished by beginning subsection (2) with the introductory phrase: "This section does not apply to: [list of exclusions, a, b, c etc.]." Then set up subsection (1) with: "Except as provided in subsection (2), a person may not: [a, b, c etc.]" OR "Except as provided in subsection (2), no person shall: [a, b, c etc.]"

Consideration should also be given to other legitimate professionals who handle escrow funds and might want to use the word "escrow" in their business name or advertising. The list might include, for example, mortgage brokers, rental management companies, insurance companies, and bonding companies.

Comment 2: Paragraphs (a) and (b) of subsection (3) should be re-written to allow either or both actions to be brought by an aggrieved person. The way the bill is currently written it appears the person aggrieved has to choose only one option. Also, subsection (3)(b) where it states: "or is otherwise likely to violate this section" may be unenforceable both civilly and criminally. Subsection (1) describes specific acts that are violations. How would one prove someone is likely to violate the act? For example, someone has business cards printed using the term "escrow," but has not yet used them? In such a case, there is no aggrieved person until Section (1) is violated.

D. STATEMENT OF THE SPONSOR

None

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES