

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1037 Escrow Agents
SPONSOR(S): Jobs & Entrepreneurship Council/Poppell
TIED BILLS: **IDEN./SIM. BILLS:** SB 2272

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Financial Institutions</u>	<u>5 Y, 0 N</u>	<u>Holt/Bradford</u>	<u>Haug</u>
2) <u>Jobs & Entrepreneurship Council</u>	<u>14 Y, 0 N, As CS</u>	<u>Holt/Topp</u>	<u>Thorn</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

CS/HB 1037 creates a section in chapter 877, Miscellaneous Crimes. The bill provides in general that an unauthorized person may not, in connection with the purchase and sale of real property:

1. Transact business using the term "escrow" or words of similar import, or
2. Circulate, simulate, or advertise that the business is regulated as an escrow agent.

These restrictions in the bill do not apply to:

1. Certain financial institutions
2. Attorneys
3. A person who is licensed pursuant to chapter 475, Real Estate Brokers, Sales Associates, Schools, and Appraisers
4. 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.

Any person aggrieved by a violation of the bill provisions may bring an action in a court of competent jurisdiction to obtain a declaratory judgment. In any such action brought, a person may recover actual damages, plus attorney's fees, and court costs. Further, a willful violation by any person is a misdemeanor of the first degree.

The Department of Financial Services 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. The estimated biennial revenue generated for local governments is \$4,326.

There is a potential impact to the public sector as individuals acting as escrow agents that are not currently licensed as attorneys, real estate brokers, and title agents or employed by a law firm, real estate brokerage, title insurance agency or a financial institution will apply for title insurance agents' licenses. The amount from potential increase in license fees is indeterminate.

This act takes effect July 1, 2008.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Maintain public security: Restricts operations as escrow agents to authorized persons another measure of 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 with the disappearance of an estimated \$4 million from escrow accounts at Coastal Escrow Services, Inc.

Florida's Sunrise Act

Section 11.62, F.S., provides guiding principles for the establishment of new regulatory programs for professions and occupations. Subsection (2) reads:

It is the intent of the Legislature:

(a) That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and

(b) That no profession or occupation be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupational services to the public.

Subsection (3) provides that in determining whether to regulate a profession or occupation, the Legislature shall consider certain factors, including: whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare; whether the practice of the profession or occupation requires specialized skill or training; whether the regulation will have an unreasonable effect on job creation or job retention in the state; and whether the overall cost effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

Subsection (4) of s. 11.62, F.S., provides that the proponents of legislation that provides for the regulation of a profession or occupation not already subject to state regulation shall provide, upon request, certain information in writing to the state agency that is proposed to have jurisdiction over the regulation and to the legislative committees to which the legislation is referred. Similarly, subsection (5) provides that the agency shall provide the Legislature with information concerning the effect of proposed legislation that provides for new regulation of a profession or occupation, including the resources necessary to implement and enforce the proposed regulation.

Effect of Proposed Changes

Section 1: Creates s. 877.101, Chapter 877, F.S., Miscellaneous Crimes.

The bill provides in s. 877.101(1), F.S., Escrow business by unauthorized persons; use of name.

(1) Except as provided in subsection 877.101(2), in connection with the purchase and sale of real property a person 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.

(2) This section, does not apply to:

(a) A financial institution as defined in s. 655.005;

(b) An attorney who is a member of The Florida Bar or his or her law firm;

(c) A person 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..

Section 877.101(3), F.S., 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

On March 20, 2008, the Committee on Financial Institutions voted to recommend a strike-all amendment to the Jobs & Entrepreneurship Council. The amendment:

- Revises the bill structure to clarify exclusions.

- Removes injunctive language.

On April 15, 2008, the Jobs & Entrepreneurship Council adopted a substitute amendment. The amendment changed the bill by:

- Removing the proposed bill provisions from Chapter 501, Consumer Protection, and placing them in a section created in Chapter 877, Miscellaneous Crimes.
- Revising the bill structure to clarify exclusions.
- Removing injunctive language.
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