

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 643 Foreclosure Fraud
SPONSOR(S): Ford and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 992

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Financial Institutions</u>	<u>6 Y, 0 N</u>	<u>Holt/Bradford</u>	<u>Haug</u>
2) <u>Jobs & Entrepreneurship Council</u>	<u></u>	<u></u>	<u></u>
3) <u></u>	<u></u>	<u></u>	<u></u>
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SUMMARY ANALYSIS

HB 643 addresses two types of practices that comprise the foundation for foreclosure rescue schemes, foreclosure-rescue consultants and equity purchasers. The bill:

- Defines the following seven terms: Equity purchaser, Foreclosure-rescue consultant, Foreclosure-related rescue services, Foreclosure-rescue transaction, Homeowner, Residential real property, and Residential real property in foreclosure.
- Requires a foreclosure-rescue consultant, or its agents, to have a written agreement before initiating or engaging in any services. Certain disclosures are required to be in the agreement, such as the exact details of the service to be provided, terms of payment, total charges, and a notice of right to cancel. Further, a consultant is prohibited from charging or collecting a fee prior to completing or performing the agreed upon services.
- Requires an equity purchaser to have a written agreement signed by the homeowner prior to any instrument transferring the title can be given to the homeowner for signature. The Act creates a rebuttable presumption that the transaction between the homeowner and the foreclosure purchaser is a loan with a mortgage rather than a sale with a lease. The agreement must disclose all the material terms and conditions of the transaction, including cancellation rights. Also, the homeowner has a 30-day right to cure any default of the contract, and this right may be exercised on at least three separate occasions during the life of the agreement.
- Provides that a repurchase price offered within 2 years after the sale of the residential real property must not be unconscionable. In any foreclosure-rescue transaction, before or at the time of conveyance, the equity purchaser must fully assume or discharge any and all liens.
- Establishes a rebuttable presumption that the homeowner has a reasonable ability to make payments and to repurchase the property if the homeowner's payments for primary housing expenses and regular principal and interest payments on other personal debt do not exceed 60 percent of the homeowner's monthly gross income.
- Penalizes violators of any provision for unfair and deceptive trade practice. Violators are subject to the penalties and remedies provided in part II of chapter 501, F.S., including a monetary penalty not to exceed \$15,000 per violation.
- There is no fiscal impact relating to this bill. The amount of potential revenues received by the state for penalties and remedies as provided in part II of chapter 501, F.S. is indeterminate at this time.

This act shall take effect July 1, 2008.

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

STORAGE NAME: h0643b.FI.doc
DATE: 3/10/2008

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families: The bill provides educational insight that may enable homeowners who are faced with foreclosure the ability to make informed decisions regarding foreclosure rescue transactions.

Maintain public security: The bill has the potential to provide the Office of the Attorney General enforcement tools that may save expenses by a reduction in litigation costs.

B. EFFECT OF PROPOSED CHANGES:

Background:

It is estimated that over 150,000 mortgage foreclosures have occurred in Florida during 2007. National ranking of foreclosures place Florida second on the list. As the foreclosure numbers ascend, there is a correlated rise in mortgage related crimes. According to Florida Attorney General data, criminals and scam artists have found a new market of consumers to defraud by making false promises to rescue homeowners from foreclosures. Homeowners victimized by these crimes have unknowingly signed over their deeds or even their accumulated equity has been stolen.

Generally, homeowners who are in serious default of mortgage payments are targeted by foreclosure consultants. Concisely, the scheme is initiated by a telephone call from the consultant to the homeowner in which a repayment resolution ensues. Absent the homeowner submitting documentation for the consultant to conduct a complete financial analysis, the homeowner is "qualified" over the phone for services, provided a fee "generally in the range of \$1200 to \$2000" is paid up-front. Moreover, during the telephone call, the fee is collected via credit card, electronic debit, or check, but the contractual terms and conditions are not discussed in detail. However, there are embedded in the contract that the homeowner receives from the consultant numerous limitations to the services and to the homeowner's refund and cancellation rights.

In exchange for the fee, the consultant, for example, makes inquiries to the lender regarding a plan for repayment that the lender will accept. These negotiations are done by the consultant without knowledge of the homeowner's financial condition or ability to meet any repayment plan. The resulting repayment plan represents the consultant fulfilling his service obligations. Consequently, the homeowner could be further burdened with a predatory or unachievable repayment plan. The consultant has collected his fee, with no contractual obligation to return any portion of it, despite the homeowner's inability to adhere to the new repayment plan.

An unscrupulous equity purchaser is usually involved in a lease/buy back scheme. A lease/buy back is a foreclosure rescue scam in which the homeowner (usually unknowingly) deeds the house to the rescuer and leases it back with an option to repurchase, normally after a year. The rescuer pays arrearages (usually nothing more) in exchange for the deed. The buyback price is normally at fair market value, which usually nets the rescuer many times his initial investment. More often than not, the homeowner is unable to afford the rent, which exceeds the mortgage payment he initially could not afford, and is evicted, forfeiting the right to repurchase. The rescuer then simply sells the house on the open market and keeps the equity.

Effect of Proposed Changes:

Section 1: The bill provides legislative findings and intent.

Section 2: HB 643 defines the term "foreclosure-rescue consultant" as "a person who directly or indirectly makes a solicitation, representation, or offer to a homeowner to provide or perform, in return

for payment of money or other valuable consideration, consideration, foreclosure related rescue services.” The term "Equity purchaser" as used in the bill “means any person who acquires title to any residential real property as a result of a foreclosure rescue transaction.” Exceptions are provided in the bill for both definitions. The bill includes additional definitions for the terms: 1) foreclosure-rescue transaction, 2) homeowner, 3) residential real property, and 4) residential real property in foreclosure.

Section 3: Prohibited acts: In the course of offering or providing foreclosure-related rescue services, a foreclosure rescue consultant, including the consultant's salespersons, agents, representatives, or independent contractors, may not:

1. Engage in or initiate foreclosure-related rescue services without first executing a written agreement for foreclosure-related rescue services; or
2. Solicit, charge, receive, or attempt to collect or secure payment, directly or indirectly, for foreclosure-related rescue services before successfully completing or performing all services contained in the agreement for foreclosure-related rescue services.

Section 4: Foreclosure-related rescue services; written agreement.

This section addresses foreclosure-rescue consultant agreements. The bill requires several disclosures be incorporated into an agreement as a means to enhance vulnerable homeowner protection. The agreement must be printed in a minimum 12-point type, and the homeowner has at least a 24-hour review period prior to signing. Among the many disclosures is a recommendation disclosure. A recommendation disclosure must direct the homeowner to contact his lending provider prior to signing the agreement; because, an opportunity may exist to negotiate a payment plan free of charge through the lender.

Cancellation disclosures must be printed in bold 14-point type, and the agreement must describe in detail the procedure for notifying the consultant of cancellation. Also, the agreement must be signed by both parties, but the bill provides that the homeowner receives a copy immediately upon his signing the agreement. Additionally, the agreement must allow a homeowner at least 5 business days from the signing date to cancel without penalty. If an agreement is cancelled, any payments are to be returned within 10 days. Moreover, the right to cancel may not be waived by the homeowner or limited in any manner by the foreclosure-rescue consultant.

Section 5: Foreclosure-rescue transactions; written agreement.

This section addresses equity purchasers' agreements. Several disclosures are also required to be included in these agreements. The bill requires at least a 12-point bold type written agreement signed by the homeowner prior to executing any instrument quitclaiming, assigning, transferring, conveying, or encumbering an interest in the foreclosure property. Specific disclosures must be in the agreement that describe all the material terms of the transaction. The bill requires that among those disclosures there be an option or right to repurchase the property that list such things as the purchase price, down payment amount, closing costs, and fees.

If the homeowner has the right to repurchase the property, the equity purchaser has the burden of verifying and demonstrating the homeowner has a reasonable ability to exercise the repurchase option. The price the homeowner pays may not be unfair or commercially unreasonable. A repurchase price offered within 2 years after the sale of the property that exceeds 25 percent of the price at which the equity purchaser acquired the property creates a rebuttable presumption that the foreclosure-rescue transaction was unconscionable. The acquisition price paid by the equity purchaser may include any actual costs incurred by the purchaser in acquiring the property. The homeowner shall also have a

right in the agreement to cure any default in terms on at least three separate occasions during the life of the transaction.

An equity purchaser must give the homeowner, at the time the written agreement is signed, a notice stating that the homeowner may cancel the transaction without penalty within 5 business days. Notice of the right to cancel must serve as a separate cover sheet to the written agreement with no other written or pictorial material in at a least a 12-point bold.

The right to cancel does not limit or otherwise affect the homeowner's right to cancel the transaction under any other law. The right to cancel is not conditioned upon the homeowner's repayment of money paid to the homeowner under the foreclosure-rescue transaction. The right to cancel may not be waived by the homeowner or limited in any way by the equity purchaser. Any money paid by the homeowner is to be returned within 30 days after a cancellation notification.

In any foreclosure-rescue transaction, before or at the time of conveyance, the equity purchaser must fully assume or discharge any and all liens.

For purposes of this section, there is a rebuttable presumption that the homeowner has a reasonable ability to make payments and to repurchase the property if the homeowner's payments for primary housing expenses and regular principal and interest payments on other personal debt do not exceed 60 percent of the homeowner's monthly gross income.

Section 6: Rebuttable presumption.

Any foreclosure-rescue transaction involving a lease option or other repurchase agreement creates a rebuttable presumption that the transaction is a loan transaction and the conveyance from the homeowner to the equity purchaser is a mortgage.

Section 7: Violations.

A person who violates any provision of this act commits an unfair and deceptive trade practice as defined in part II of chapter 501, Florida Statutes. Violators are subject to the penalties and remedies provided in part II of chapter 501, Florida Statutes, including a monetary penalty not to exceed \$15,000 per violation.

Section 8:

This act shall take effect July 1, 2008.

C. SECTION DIRECTORY:

- Section 1: Legislative findings and intent
- Section 2: Definitions
- Section 3: Prohibited acts
- Section 4: Foreclosure-related rescue services; written agreement (foreclosure-rescue consultants)
- Section 5: Foreclosure-rescue transactions; written agreement (equity purchaser)
- Section 6: Rebuttable presumption
- Section 7: Violations
- Section 8: Effective date

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The amount of potential revenues received by the state for penalties and remedies as provided in part II of chapter 501, F.S. is indeterminate at this time.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

There is no fiscal impact relating to this bill. The amount of potential revenues received by the state for penalties and remedies as provided in part II of chapter 501, F.S. is indeterminate at this time.

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:

Research from office of the Attorney General indicates that legislation similar to HB 643 exists in 13 other states and 6 states have similar legislation pending. Currently, there are approximately 20 active investigations, and litigation is underway involving foreclosure-rescue consultants and equity purchasers, according to Attorney General's staff.

D. STATEMENT OF THE SPONSOR

None

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 6, 2007, the Committee on Financial Institutions voted to recommend a strike-all amendment. The amendment:

1. Expands the definition of "equity purchaser" to include persons who acquire a legal, equitable, or beneficial ownership interest in any real estate property, as a result of a foreclosure through other means, i.e. trust purchases. The exclusions applicable to acquiring title are expanded by the amendment to include legal, equitable, or beneficial interest by methods listed in the amendment.
2. Removes from the definition of "residential real property in foreclosure" the service of process requirement and the 90-day delinquency on a property loan requirement.
3. Narrows the exemptions for entities that are considered a "foreclosure-rescue consultant" by removing lawyers, real estate brokers, and mortgage brokers.
4. Clarifies the term "foreclosure-rescue transaction" to include a "lease option interest" as a form of conveyance.
5. Replaces "24 hour" references with "1 business day."
6. Adds "restructuring" to the Homeowner's Right of Cancellation notice as a recommendation that a homeowner pursues with his/her lender as a possible free of charge service.
7. Adds a 5:00 p.m. deadline for notice to an equity purchaser of cancellation.
8. Considers unconscionable a repurchase price that is greater than 17% per annum more than the total amount paid by the purchaser to acquire, improve, maintain, and hold the property.
9. Changes effective date to October 1, 2008.