

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 643 Foreclosure Fraud
SPONSOR(S): Jobs & Entrepreneurship Council, 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>17 Y, 0 N, As CS</u>	<u>Holt/Topp</u>	<u>Thorn</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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 (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. The date of the agreement may not be earlier than the date the homeowner signed the agreement. A homeowner is allowed 1 business day to review the agreement before signing, and a homeowner must receive a copy of the signed agreement within 1 business day.
- Provides a homeowner after signing an agreement the right to cancel within 3 business days without penalty. This right may not be waived by either party. In the event of cancellation, any payments made to a consultant are returned to the homeowner within 10 business days of cancellation notice. The bill provides a general format for the agreement.
- Provides that a foreclosure-rescue transaction written agreement be prepared in a specified format. The agreement must state the specifications of any option or right to repurchase the property in foreclosure. At the time the written agreement is signed, the purchaser must give a homeowner on a separate cover sheet a notice of the homeowner’s right to cancel the transaction. A homeowner may cancel a transaction within 3 business days without penalty. This right to cancel may not be waived or limited by either party.
- In the event of cancellation, any payments made to an equity purchaser (purchaser) to the homeowner or by the homeowner to the equity purchaser must be returned at cancellation. The homeowner has a 30-day right to cure any default of the contract with the purchaser, and this right may be exercised on at least three separate occasions during the life of the agreement. The agreement must comply with applicable federal regulations.
- Provides that before or at the time of conveyance, the purchaser must fully assume or discharge any and all liens. If the homeowner has the right to repurchase the property, the purchaser must verify and demonstrate that the homeowner has reasonable ability to make the repurchase payment. Moreover the purchase price must not be unconscionable.
- Applies the existing recording provisions is s. 695.01, F.S., Conveyances to be recorded.— to the presumptions in the act.

- 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.

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:

The bill amends chapter 501, F.S. Consumer Protection

Section 501.2078, F.S. 501.2078 Violations involving individual homeowners during the course of residential foreclosure proceedings; civil penalties.— is substantially amended:

Subsection 1: The bill provides legislative findings and intent.

Subsection 2: Defines terms.

Subsection 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.

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

This section addresses foreclosure-rescue consultant agreements. The bill requires several disclosures to be incorporated into an agreement as a means to enhance homeowner protection. A homeowner is allowed 1 business day to review the agreement before signing, and a homeowner must receive a copy of the signed agreement within 1 business day. A homeowner after signing an agreement has the right to cancel within 3 business days without penalty. A notice of cancellation within three days does not prohibit a consultant from giving a homeowner more time in which to cancel. However, this right of cancellation may not be waived by either party. In the event of cancellation, any payments made to a consultant are returned to the homeowner within 10 business days of the cancellation notice. The bill provides a general format for the agreement.

Subsection 5: Foreclosure-rescue transactions; written agreement.

This section addresses equity purchasers' (purchaser) agreements. Several disclosures are also required to be included in these agreements, including a statement that substantially states that: *I understand that under this agreement I am selling my home to the other undersigned party.* The bill requires at least a 12-point uppercase type written agreement that is completed, signed, and dated by the homeowner and the purchaser before executing any conveyance instrument. The purchaser must give the homeowner a copy of the completed agreement within 1 business day of signage. In the terms and conditions of the agreement, the bill provides a format that must substantially followed. Further, the agreement must comply with applicable federal regulations.

At the time the agreement is signed, a notice of the homeowner's right to cancel must be set forth on a separate cover sheet to the agreement. The homeowner may cancel the transaction without penalty if the homeowner notifies the purchaser of such cancellation by 5:00 on the third business day. Any moneys paid by the purchaser to the homeowner or by the homeowner to the purchaser must be returned at cancellation. This right to cancel does not limit or otherwise affect any other applicable law. Moreover, this right may not be waived or limited by either party.

In any transaction in which the homeowner is provided the right to repurchase the property, the homeowner has a 30-day right to cure any default of the terms of the agreement with the purchaser and this right may be exercised on at least three separate occasions during the life of the agreement. Before or at the time of conveyance, the purchaser must fully assume or discharge any and all liens.

If the homeowner has the right to repurchase the property, the purchaser must verify and demonstrate that the homeowner has reasonable ability to make the repurchase payments. For purposes of this subsection, there is a rebuttable presumption that the homeowner has a reasonable ability to make the required payments, monthly payments for primary housing expenses, and regular monthly principal and interest payments on other personal debt does not exceed 60 percent of the homeowner's monthly gross income. If the homeowner has the right to repurchase, the price the homeowner pays may not

be unconscionable, unfair, or commercially unreasonable. A rebuttable presumption, solely between the purchaser and the homeowner, arises that the transaction was unconscionable if the repurchase price is greater than 17 percent per annum more than the total amount paid by the purchaser to acquire, improve, maintain, and hold the property. The bill applies the existing recording provisions is s. 695.01, F.S., Conveyances to be recorded.— to this presumption.

Subsection 6: Rebuttable presumption.

Any foreclosure-rescue transaction involving a lease option or other repurchase agreement creates a rebuttable presumption, solely between the purchaser and the homeowner, that the transaction is a loan transaction and the conveyance from the homeowner to the purchaser is a mortgage. The bill also applies the existing recording provisions is s. 695.01, F.S., Conveyances to be recorded.— to this presumption

Subsection 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.

Subsection 8:

This act shall take effect October 1, 2008.

C. SECTION DIRECTORY:

Subsection 1: Legislative findings and intent

Subsection 2: Definitions

Sub section 3: Prohibited acts

Subsection 4: Foreclosure-related rescue services; written agreement (foreclosure-rescue consultants)

Subsection 5: Foreclosure-rescue transactions; written agreement (equity purchaser)

Subsection 6: Rebuttable presumption

Subsection 7: Violations

Subsection 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.

On March 13, 2007, the Jobs and Entrepreneurship Council adopted an amendment: The amendment:

- Revises the definition of the term “foreclosure-rescue consultant” by deleting the term “affiliate” of a financial institution. Also, excludes from the definition of “foreclosure-rescue consultant” licensed mortgage brokers and mortgage lenders who are performing within their scope of services as set forth in chapter 494, Mortgage Brokerage and Mortgage Lending.
- Changes 5 day right of cancellation to 3 days for homeowners who sign a contract for foreclosure rescue services.
- Provides in event of cancellation, any moneys paid by the purchaser to the homeowner or by the homeowner to the purchaser must be returned at that time.
- Applies the existing recording provisions is s. 695.01, F.S., Conveyances to be recorded.— to the presumptions in the act.