

STORAGE NAME: h0681s1.rpp

DATE: March 23, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
REAL PROPERTY AND PROBATE
ANALYSIS**

BILL #: CS/HB 681

RELATING TO: Construction Liens and Bonds

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

COMPANION BILL(S): SB 1206(s)

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

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS YEAS 9 NAYS 0
 - (2) REAL PROPERTY AND PROBATE YEAS 7 NAYS 0
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill makes several changes to the Construction Lien Law, the purpose of which is to provide a special legal remedy to persons who supply labor, services, or materials during the construction of a home or building in the event they are not paid, as well as to provide procedures for property owners to avoid double payment for such labor, services, or materials.

Specifically, the bill:

- specifies that time periods for serving a Notice of Nonpayment, for bringing an action against a contractor or surety, or for recording a claim of lien are not determined by issuance of a Certificate of Occupancy or Certificate of Substantial Completion;
- clarifies that a Notice to Owner must contain certain information but is not required to adhere to a particular statutory form;
- specifies certain information that is required in a Notice of Commencement and requires building officials to verify that the information is consistent with the building permit application;
- creates an exemption from Notice of Commencement requirements for direct contracts of less than \$5,000 for repair or replacement of an existing heating or air conditioning unit; and,
- provides that procedures for service of a Notice to Owner also apply to service of Preliminary Notices on bonded projects and also authorizes use of overnight or second day mail delivery for all such notices.

The bill does not appear to have a significant fiscal impact on state or local government.

The effective date of the bill is October 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The following general information on construction lien law has been provided by the Committee on Business Regulation and Community Affairs¹:

Part I of chapter 713, F.S., establishes Florida's Construction Lien Law. The purpose of the law is to give those who make the improvements to land a special legal remedy in the event they are not paid for those improvements. An improvement to land can be made by providing labor, services, or materials. The lien law is based on the premise that improvements to real property enhance the value of the property on a permanent basis. The property itself is therefore treated as a possible source of payment to those providing improvements. The lien law also gives the property owner a method to avoid paying twice for improvements.

There are essentially two sides to the construction process: (1) those persons providing the improvements, and (2) the owner of the property who receives the benefits of the improvements. The Construction Lien Law is intended to contain a rational and fair method for balancing the right of both sides.

This method is based on the concept that a person who improves land should be paid. However, this right to payment should not be at the unfair expense of the land owner who, in good faith, pays for improvements without knowledge that some people remained unpaid for their labor, services or materials. To achieve this balance, the lien law places obligations on all parties in the construction process.

Stated simply, the Construction Lien Law requires that the owner protect those persons that the owner knows are on the job. Obviously, the owner knows the contractor is on the job, because the owner has a contract with that person. However, under normal circumstances, the owner may not know who else is on the job. Typical examples of a person on the job without direct contact with owner are subcontractors and material suppliers. The lien law requires these parties to give the owner formal notice that they are on the job.

Once a subcontractor or material supplier has given the owner notice, the owner is required to see to it that that person is paid. If the owner does not protect him, the owner's land may be subjected to the lien law, and the owner may end up paying twice for the improvements.

Thus, the lien law provides protection to all players involved with a construction project. Contractors, subcontractors, sub-subcontractors and material suppliers have protection against nonpayment for their goods or services. And, not least important, owners can get protection from paying more than they agreed to pay for the project.

Please see the "Section-by-Section Analysis" by the Committee on Real Property and Probate for a detailed analysis of the present situation.

B. EFFECT OF PROPOSED CHANGES:

Please see the "Section-by-Section Analysis" by the Committee on Real Property and Probate for a detailed analysis of the effect of proposed changes.

C. APPLICATION OF PRINCIPLES:

¹Analysis of HB 681, Committee on Business Regulation and Consumer Affairs, March 14, 1999.

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency or program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

§§ 255.05; 713.06; 713.08; 713.135; 718.18; 713.23, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 255.05, F.S., to specify that the time period in which a person can file a Notice of Nonpayment, or bring an action against a contractor or surety, must be measured from the last day the claimant furnished labor, services, or materials and must not be determined by other standards, such as issuance of a Certificate of Substantial Occupancy or Certificate of Occupancy.

Current Situation:

Current law requires a claimant to provide a contractor with a Notice of Nonpayment for services or supplies "not later than 90 days after the final furnishing of the labor, services, or materials by the claimant." s. 255.05(2)(a), F.S. (1998 Supp.). Current law also requires an action against the contractor or surety for nonpayment to be commenced "within one year after the performance of the labor or completion of the delivery of the materials or supplies." Id.

There is controversy, however, surrounding the method of determining the dates on which the time periods begin to run. Several Florida courts have held that the one year statute of limitations for actions against a surety begins when a Certificate of Substantial Completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d. DCA 1983). In 1982, the Fifth District Court of Appeal stated that when an architect certifies a building as substantially completed and the owner accepts the building, "the contractor is deemed to have fully performed and any lawsuit which could be brought against the surety under the bond must be brought within one year, according to statute." Florida Board of Regents v. Fidelity & Deposit Company of Maryland, 416 So.2d 30 (Fla. 5th DCA 1982).

Florida courts also apply the "substantial-trivial" test to determine the date on which the time periods begin to run. In 1927, the Supreme Court of Florida held that furnishing an article that is trivial in nature is not sufficient to extend the time for filing a Notice of Lien if a lienor has substantially completed furnishing materials. People's Bank of Jacksonville v. Virginia Bridge & Iron Co., 94 Fla. 474, 113 So. 680 (1927). The contractor in the Viking Builders case urged, however, that the "substantial-trivial" test is impractical in the construction industry. The contractor argued that the time period in which a lien must be filed should be based the following test: the last item of labor or material should be the same as the last item the owner is entitled to receive under the contract. Viking Builders, Inc. v. Felices 391 So.2d 302, 304 (Fla. 5th DCA 1980). The court in Viking Builders found a certain logic in the contractor's argument but pointed out that the statute sets the date at which the time limitation commences as "the final furnishing of the labor or services of materials," which is an event that is not abrupt and obvious but is a question of fact. Id.

The Viking Builders court noted that any resolution of the uncertainty surrounding this issue is necessarily a legislative function, however, the court suggested a possible solution. The court stated that much controversy and litigation could be eliminated if the legislature provided for a written recordable Notice of Completion which conditions the owner's and contractor's rights under the contract and the law to such recordation so that both the owner and contractor obtain certain benefits from asserting the same event. Id. The legislature could also provide that the contractor is not entitled to final payment, or the right to enforce lien rights, until the contractor signs a Notice of Completion. Id. Additionally, the legislature could provide that the time limitation for filing liens does not begin to run, and the owner is not entitled to final inspection and occupancy under applicable building codes, until the owner signs the Notice of Completion. Id. Laborers' and subcontractors' lien rights could also be time limited by reference to the recorded Notice of Completion executed by both the contractor and owner. Id.

Effect of Proposed Change:

Section 255.05(2), F.S. (1998 Supp.), is amended to provide that time periods for service of a Notice of Nonpayment, and for bringing an action against a contractor or a surety, may not be determined by issuance of a Certificate of Occupancy or a Certificate of Substantial Completion. This proposed change nullifies Florida case law which states that the time periods for filing certain notices or for commencing legal action against a contractor or surety bond begins when a Certificate of Substantial Completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d DCA 1983).

Section 2. Amends s. 713.06(2)(c), F.S., to clarify the extent to which the Notice to Owner must adhere to the form provided in statute.

Current Situation:

Currently, s. 713.06, F.S., specifies that a Notice to Owner must be in "substantially" the form delineated in statute. Recently, a Florida court dismissed a lien foreclosure action because the form used by the supplier was not in substantial compliance with the form prescribed by the legislature. Allstar Building Materials, L.T.D. v. Kronauer, 98-1034 (5th DCA 1998). The court stated that the legislature provides a Notice to Owner form which it deems appropriate and that there is no need to 'reinvent the wheel'. Id. The supplier argued that the Notice in question met the requirement because the information provided was substantially the same information provided in the statutory form. Id. The court decided that the supplier's Notice to Owner was insufficient because the Notice was directed to the owner and the contractor, the term "IMPORTANT INFORMATION FOR YOUR PROTECTION" was omitted, and many provisions prominently displayed in the statutory form were dramatically reduced in size and reproduced as though they were footnotes. Id.

Effect of Proposed Change:

The bill clarifies that the Notice to Owner form may be substantially in the form set forth in statute but states that the Notice must include certain information set forth in statute, including a warning to the property owner.

Section 3. Amends s. 713.08(5), F.S. (1998 Supp.), to specify the time period in which a person can record a claim of lien.

Current Situation:

Current law states that a claim of lien may be recorded at any time during the progress of the work, or thereafter, but not later than 90 days after the lienor furnishes the final labor, services, or material. s. 713.08(5), F.S. (1998 Supp.).

Please see Section 1 of "Section-by-Section Analysis" for an analysis of relevant case law.

Effect of Proposed Change:

The bill specifies that the time period within which a claim of lien must be recorded must be measured from the last day the claimant furnishes labor, services, or materials and must not be determined by other standards, such as issuance of a Certificate of Substantial Occupancy or Certificate of Occupancy. There is controversy, however, surrounding the method of determining the date on which the one year period begins.

This proposed change nullifies Florida case law which states that the time periods for filing certain notices or for commencing legal action against a contractor or surety bond begins when a Certificate of Substantial Completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d. DCA 1983).

Section 4. Amends s. 713.135, F.S. (1998 Supp.), to specify certain information that is required in a Notice of Commencement.

Current Situation:

Prior to beginning improvements on any real property, or recommencing completion of any improvement after default or abandonment, the property owner must record a Notice of Commencement in the clerk's office and post a copy at the construction site. s. 713.13(1)(a), F.S., (1998 Supp.). Recording a Notice of Commencement does not constitute a lien, but gives constructive notice that claims of lien may be recorded and may take priority. s. 713.13(5). F.S. (1998 Supp.) The posting of a copy does not constitute a lien on the property, nor actual or constructive notice of any liens. Id.

If a direct contract is more than \$2,500, an applicant for a building permit must file with the authority issuing the permit either a certified copy of the recorded Notice of Commencement or a notarized statement that the Notice of Commencement has been filed for recording. s. 713.135, F.S., (1998 Supp.). If a certified copy of the Notice of Commencement is not filed, the issuing authority must not perform or approve subsequent inspections until a certified copy is filed. Id.

Current law does not specify the information that must be provided in a Notice of Commencement.

Effect of Proposed Change:

The bill specifies the information required in a Notice of Commencement and requires building officials to verify that the information is consistent with the building permit application. The bill also clarifies that building officials may provide copies of a Notice of Commencement upon request.

In addition, the bill creates an exemption from the Notice of Commencement requirements for direct contracts of less than \$5,000 for the repair or replacement of an existing heating or air-conditioning unit.

Section 5. Amends s. 713.18, F.S. (1998 Supp.), to clarify requirements for service of a Notice to Owner and allowable methods of service.

Current Situation:

Currently, the manner of serving notices and other instruments required under the Construction Lien Law is established in s. 713.18, F.S. (1998 Supp.); however, the manner of serving notices required under s. 713.23, F.S. (1998 Supp.) and s. 255.05, F.S. (1998 Supp.) related to payment bonds are not set forth in statute.

Effect of Proposed Change:

The bill clarifies that procedures regarding service of a Notice to Owner also apply to notices that are required for payment bonds. The bill also provides that service of all notices may be made by overnight or second day mail delivery.

Section 6. Amends s. 713.23, F.S. (1998 Supp.), to specify the time period in which a person can serve a Notice of Nonpayment.

Current Situation:

Current law requires a lienor, as a condition precedent to recovery under a bond, to serve a written Notice of Nonpayment to the contractor and the surety not later than 90 days after the lienor furnishes the final labor, services, or materials. s. 713.23(1)(d), F.S. (1998 Supp.). In addition, an action must be instituted against a contractor or surety within 1 year from performance of the labor or completion of delivery of the material and supplies. s. 713.23(1)(e), F.S. (1998 Supp.). There is controversy, however, surrounding the method of determining the date on which the time periods begin to run.

Please see Section 1 of "Section-by-Section Analysis" for an analysis of relevant case law.

Effect of Proposed Change:

The bill specifies that the time period within which a Notice of Nonpayment must be served, or an action against a contractor or surety on a bond must be commenced, must be measured from the last day of furnishing labor, services, or materials by the claimant and must not be determined by other standards, such as issuance of a Certificate of Substantial Completion or Certificate of Occupancy.

This proposed change nullifies Florida case law which states that the time periods for filing certain notices or for commencing legal action against a contractor or surety bond begins when a Certificate of Substantial Completion is issued and the owner accepts the constructed building. Federal Insurance Company v. Exel of Orlando, Inc., 685 So.2d 896 (Fla. 5th DCA 1996); Northwestern, Inc. v. Ward Land Clearing & Drainage, Inc., 500 So.2d 615 (Fla. 1st DCA 1986); Dist. Sch. Bd. of DeSoto County v. Safeco Ins. Co., 434 So.2d 38 (Fla. 2d. DCA 1983).

Section 7. Provides an effective date of October 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Indeterminate.

2. Direct Private Sector Benefits:

Indeterminate.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties 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.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 11, 1999, the Committee on Business Regulation and Consumer Affairs adopted four amendments to HB 681. The amendments traveled with the bill to Committee on Real Property and Probate and are described as follows:

- #1 Deletes the provision in the bill which proposes to clarify that the Notice to Owner required under current law may differ in format, as long as it provides the required information and substantially follows a proscribed statutory form. The amendment replaces that change with a provision that states that certain required information must be part of the notice, but that adherence to a particular form set forth in the statutes is something the notice may do, rather than must do.
- #2 Provides that the Notice of Commencement may be combined with the Notice to Contractor required under s. 713.23, F.S., to streamline the process.
- #3 Provides that a building administrator or building inspector who fails to enforce the Notice of Commencement requirements may be disciplined for such failure.
- #4 Creates an exemption to current Notice of Commencement requirements for replacement of heating and air conditioning systems in an amount less than \$5,000.

On March 18, 1999, the Committee on Real Property and Probate unanimously adopted six amendments and one amendment to the amendment to HB 681. The Committee unanimously passed the bill, as amended, and reported it out favorably as a committee substitute. The seven amendments passed by the Committee on Real Property and Probate are summarized as follows:

- #1 Deletes a provision that subjects a building official to disciplinary action if the official fails to obtain a certified copy of a Notice of Commencement. This is a compromise between the parties working on this bill.
- #2 Specifies the information required in a Notice of Commencement and requires building officials to verify that the information is consistent with the building permit application. The amendment also clarifies that building officials may provide copies of a Notice of Commencement upon request.
- #3 This amendment specifies that the time period in which a person can file a *Notice of Nonpayment or bring an action against a contractor or surety* must be measured from the last day of furnishing labor, services, or materials by the claimant and must not be determined by other standards, such as issuance of a Certificate of Substantial Completion or Certificate of Occupancy.
- #4 This amendment is similar to amendment 3 but specifies that the time period in which a person can file a *claim of lien* must be measured from the last day of furnishing labor, services, or materials by the claimant and must not be determined by other standards, such as issuance of a Certificate of Substantial Completion or Certificate of Occupancy.
- #5 This amendment is similar to amendments 3 and 4 but specifies that the time period in which a person can *serve a Notice of Nonpayment* must be measured from the last day of furnishing labor, services, or materials by the claimant and must not be determined by other standards, such as issuance of a Certificate of Substantial Completion or Certificate of Occupancy.
- #6. This amendment is similar to amendments 3, 4, and 5 but specifies that the time period in which a person can *bring an action against a contractor or surety* must be measured from the last day of furnishing labor, services, or materials by the claimant and must not be determined by other standards, such as issuance of a Certificate of Substantial Completion or Certificate of Occupancy.
- #7. This amendment to the amendment eliminates a cross-reference to the penalty provision that was deleted by amendment #1.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

Prepared by:

Staff Director:

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Rebecca R. Everhart

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DATE: March 23, 1999

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AS REVISED BY THE COMMITTEE ON REAL PROPERTY AND PROBATE:
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