

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Notice of commencement: Owners are required to record a notice of commencement with the Clerk of the Circuit Court and post either a certified copy thereof or a notarized statement that the notice of commencement has been filed.² The Department of Business and Professional Regulation is required to provide to persons applying for a building permit a printed statement that the right, title, and interest of the person who has contracted for the improvement may be subject to attachment under the Construction Lien Law, and encouraging the owner to record a Notice of Commencement.³ The purpose of the Notice of Commencement is to provide the contractor and all subcontractors and suppliers with the information they need in order to comply with the Construction Lien Law.⁴

Effect of Proposed Changes: The bill requires the statement provided by the Department of Business and Professional Regulation to also contain an explanation of the owner’s rights if a lienor fails to furnish the Notice to Owner. The bill also requires the authority that issues the building permit to mail the statement to the owner.

Rights to a lien by persons who are in privity with an owner: A materialman⁵ or laborer⁶, either of whom is in privity with the owner, or a contractor⁷ who complies with the provisions of the law shall have a lien on the real property improved for any money that is owed for labor, services, materials, or other items required by the direct contract.⁸ In order to perfect the lien, the contractor must record the claim of lien with the Clerk of the Circuit Court within 90 days of when the contractor last performed any labor or services or furnished materials;⁹ serve a copy of the claim of lien on the owner;¹⁰ and furnish

² See s. 713.13, F.S. The notice of commencement must contain a description of the property to be improved; a general description of the improvement; the name and address of the owner; the name and address of the contractor; the name and address of the surety on the payment bond and the amount of such bond; the name and address of any person making a loan for the construction; and the name and address of any other person upon whom notices should be served.

³ See s. 713.135, F.S.

⁴ See “Guide to Florida’s Construction Lien Law” at p.15.

⁵ See s. 713.01(19), F.S. which defines “materialman” as any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement.

⁶ See s. 713.01(15), F.S., which defines “laborer” as any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others.

⁷ See s. 713.01(8), F.S., which defines “contractor” as a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under the contract.

⁸ See s. 713.05, F.S.

⁹ See s. 713.08(5), F.S.

¹⁰ See s. 713.18, F.S.

the contractor's affidavit stating that all lienors under direct contract who have timely served a notice to owner have been paid in full, or if not paid in full, stating the name of each lienor that has not been paid in full and the amount due.¹¹

Effect of Proposed Changes: The bill creates s. 713.015, F.S., which requires direct contracts between an owner and a contractor related to residential properties to contain a form that is contained in the bill, and which puts owners on notice that if the contractor fails to pay subcontractors or material suppliers, such people can look to the property for payment, even if the owner has paid the contractor in full. HB 1719 requires a warning that must be included in the Notice to Owner, which informs owners that the construction lien law allows some unpaid contractors, subcontractors, and sub-subcontractors to file liens against the property. The bill also provides a form for the contractor's final affidavit.

Rights to a lien by persons who are not in privity with an owner: A materialman or laborer who is NOT in privity with the owner, or a subcontractor or sub-subcontractor who complies with the provisions of the law has a lien on the real property improved for any money that is owed for labor, services, or materials furnished.¹² In order to perfect the lien, the lienor must record the claim of lien with the Clerk of the Circuit Court within 90 days of when the lienor last performed services or supplied materials to the job;¹³ serve the claim of lien on the owner; and have served a Notice to Owner no later than 45 days after starting work on the project.¹⁴ The Notice to Owner is merely the way of telling the owner who is on the job in addition to the contractor.¹⁵ In order to avoid double payment, the owner must make sure that the person giving the notice has been paid before making any payments to the contractor and can require the contractor to provide lien waivers from subcontractors or suppliers who have served a Notice to Owner. The total amount of liens allowed may not exceed the amount of the direct contract price.¹⁶

Effect of Proposed Changes: The bill requires a warning to be included on the Claim of Lien form. The warning notifies owners that a construction lien has been placed on the property and that the lien may remain valid for one year under specified circumstances.

Remedies: In addition to other remedies provided in chapter 713, F.S.,¹⁷ any person who willfully files a fraudulent lien¹⁸ commits a third degree felony.¹⁹ The law also provides a penalty for misapplication of moneys received for real property improvements. Persons who knowingly and intentionally fail to properly apply payments are guilty of misapplication of construction funds, with punishment dependent upon the aggregate value of the payments misapplied.²⁰ A person who makes a statement containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers, knowing

¹¹ See s. 713.06(3)(d), F.S.

¹² See s. 713.06, F.S.

¹³ See s. 713.08, F.S.

¹⁴ See s. 713.06(2)(a), F.S.

¹⁵ See "The Guide to Florida's Construction Lien Law" at p.88.

¹⁶ See s. 713.06, F.S.

¹⁷ See s. 713.31, F.S., which allows the court to issue temporary and permanent injunctions, order accountings, grant discovery, marshal assets, and exercise any other appropriate legal or equitable remedies; declare the lien unenforceable; and which allows parties who suffer damages as a result of the filing of a fraudulent lien to have a right of action for damages.

¹⁸ See s. 713.31(2)(a), F.S., which defines a "fraudulent lien" as any lien in which the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to impress such lien or in which the lienor has compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration.

¹⁹ Pursuant to s. 713.31(3), F.S., the 3rd degree felony is punishable as provided in s. 775.082, F.S. (imprisonment not exceeding 5 years); s. 775.083, F.S. (a fine not exceeding \$5000); or s. 775.084, F.S. (enhanced penalties for habitual offenders).

²⁰ See s. 713.345(1)(b), F.S. which provides that misapplication of payments with an aggregate value of \$100,000 or more is a 1st degree felony; misapplication of payments with an aggregate value of \$20,000-\$100,000 is a 2nd degree felony; and misapplication of payments with an aggregate value of less than \$20,000 is a 3rd degree felony.

that the one to whom it was furnished might rely on it, is guilty of a third degree felony.²¹ In addition to criminal penalties, the Construction Industry Licensing Board within the Department of Business and Professional Regulation regulates construction contracting and can take action against a licensee for committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer.²² Note however, that 'financial mismanagement' occurs when valid liens have been recorded against the property of a contractor's customer for supplies or services ordered by the contractor for the customer's job; the contractor has received funds from the customer to pay for the supplies or services; and the contractor has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens.²³

Effect of Proposed Changes: The state attorney or statewide prosecutor is required to forward a copy of the indictment or information filed against a contractor, subcontractor, or sub-subcontractor which charges such person with violation of willfully filing a fraudulent lien, misapplication of moneys received for real property improvements, or making or furnishing a false statement. The Department is required to open an investigation and if probable cause is found, must furnish a copy of the investigative report to the prosecutor and the owner. The bill also creates a permissive inference that a person knowingly and intentionally misapplied construction funds if the contractor has received funds to pay for labor, services or materials and has failed, for a period of at least 45 days, to pay for such labor, services, or materials.

Notification by the lender of a decision to stop funding: If the lender makes a final determination, prior to the distribution of all funds available under a construction loan, that the lender will cease further advances pursuant to the loan, the lender must serve written notice on the contractor and any other lienor who has given the lender notice.²⁴

Effect of Proposed Changes: The bill requires a lender to give a written notice to a borrower prior to making any loan disbursement directly to the owner. The notice is a warning and encouragement for the owner to protect their interests by requiring lien releases from the contractor.

C. SECTION DIRECTORY:

Section 1 creates s. 713.015, F.S., to provide mandatory provisions for residential contracts.

Section 2 amends s. 713.06, F.S., to provide a warning in the Notice to Owner form.

Section 3 amends s. 713.06, F.S., to provide a Contractor's Final Affidavit.

Section 4 amends s. 713.08, F.S., to provide a warning on the Claim of Lien form.

Section 5 amends s. 713.135, F.S., to include an explanation of the owner's rights as provided in the bill in the lien law summary and to require that the statement be mailed to the owner.

Section 6 amends s. 713.31, F.S., to require the state attorney to forward indictments or information filed pursuant to this act, to the Department of Business and Professional Regulation.

Section 7 amends s. 713.345, F.S., to provide permissive inferences that person knowingly and intentionally misapplied construction funds.

Section 8 amends s. 713.3471, F.S., lenders to provide a specified notice to borrowers.

Section 9 amends s. 713.35, F.S., to require the state attorney or statewide prosecutor to forward a copy of the indictment or information filed pursuant to this act, to the Department of Business and Professional Regulation.

Section 10 provides an effective date of October 1, 2003 regarding sections 1,2,4,7, and 8 of the bill, and January 1, 2004 regarding sections 3, 5, and 6 of the bill.

²¹ See s. 713.35, F.S.

²² See s. 489.129(1)(g), F.S., which allows the board to take any of the following actions against a certificate holder or registrant: place on probation or reprimand the licensee; revoke, suspend, or deny the issuance or renewal of the certificate, registration, or certificate of authority; require financial restitution; impose an administrative fine not to exceed \$5000 per violation; require continuing education; or assess costs associated with investigation and prosecution.

²³ See s. 489.129(1)(g)1., F.S.

²⁴ See s. 713.3471, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that this bill aids consumers in protecting their interests under the Construction Lien Law, those consumers may be saved having to pay subcontractors twice.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not affect municipalities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 9, 2003, the Judiciary Committee adopted a strike-all amendment which addressed several issues raised by the industry. Specifically, the strike-all amendment:

- Requires an additional warning statement to the owner as a part of residential construction contracts, on the Notice to Owner form, on the Claim of Lien form, and on the notice provided by the lender prior to making any loan disbursement.

- Provides a form for the Contractor's Final Affidavit.
- Requires the Department of Business and Professional Regulation to furnish a statement containing an explanation of owner's rights, and mail such statement to the owner.
- Requires the Department of Business and Professional Regulation to open an investigation upon receipt of an indictment or information from the state attorney or statewide prosecutor.
- Creates a permissive inference that a person knowingly and intentionally misapplied construction funds.

This analysis is drafted to the bill as amended.