

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1788

SPONSOR: Judiciary Committee and Senator Posey

SUBJECT: Commercial Real Estate Lien Act

DATE: April 9, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill creates the Commercial Real Estate Lien Act. This bill authorizes brokers to secure liens on commercial property that is to be purchased, leased or conveyed to a buyer, in the amount due for brokerage, consulting and management fees, where a written instrument exists.

This bill requires a proper recording of notice by the broker, along with a service of notice to the real estate owner. Under this bill, a proper filing of notice of lien protects the broker’s commission even after the sale or conveyance of the real estate, so that the broker’s lien follows the property. A broker has two years to file a complaint after the recording of notice, or the lien is extinguished.

This bill requires an escrow account to be established when a notice of lien has been filed that would prevent the closing of a transaction or conveyance.

This bill creates chapter 714 and substantially amends s. 475.42 of the Florida Statutes.

II. Present Situation:

Statutory Authority for Real Estate Brokers

Chapter 475 governs licensed real estate brokers. A broker is defined as a person who for compensation or consideration performs a variety of activities, to include appraisals, auctions, sales, exchanges, buying, renting or leasing real property of others or their interests relating to the real property.¹ The Department of Business and Professional Regulation (“Department”)

¹ s. 475.01(1)(a), F.S.

regulates the practice of real estate brokering, through its Florida Real Estate Commission (“Commission”).²

Property Liens

A broker is authorized to place a lien on property only where provided by written contract.³

Florida law authorizes construction and mechanic liens on property. Section 255.071, F.S., provides for certain construction liens on public property.

In the course of completion of a public project, a failure to pay undisputed obligations for labor, services or materials within 30 days entitles the provider to certain remedies.⁴ Remedies for a failure to pay include:

(d) Such other legal or equitable remedies as may be appropriate in accordance with the requirements of law.⁵

This provision has been construed to authorize judgments on property for the undisputed contract obligation.⁶ Similar authority exists for construction liens on private property, under chapter 713, F.S. Section 713.346, F.S., extends these rights to subcontractors, sub-subcontractors, material providers and other suppliers.

Other liens exist, such as for mechanic’s liens,⁷ liens on personal property,⁸ liens on labor in raising crops,⁹ and liens for labor on vessels.¹⁰

These lien laws generally exist to protect those who have provided labor and materials for the improvement of real property.¹¹ This is based on the theory that the property owner should not receive an unjust enrichment, through an improvement in property, and an attendant increase in value, without full compensation.¹²

III. Effect of Proposed Changes:

This bill creates the Commercial Real Estate Lien Act.

Commercial Real Estate

All real estate except the following is covered by the bill:

² s. 475.02(1), F.S.

³ s. 475.42(1)(j), F.S.

⁴ s. 255.071(2), F.S.

⁵ s. 255.071(4)(d), F.S.

⁶ Andrew Feldman, *Pay Now Or Pay More Later: The Current State of the Law on Undisputed Construction Obligations*, Fla. Bar Journal, 28 (October 2003).

⁷ s. 713.56, F.S.

⁸ s. 713.58, F.S.

⁹ s. 713.59, F.S.

¹⁰ s. 713.60, F.S.

¹¹ Daniel R. Vega, *“Here Comes the Money”: A Subcontractor’s and Material Supplier’s Guide To Perfecting Construction Lien and Bond Rights Under Florida Law*, Fla. Bar Journal, 22 (October 2002).

¹² H. Hugh McConnell, *Distinguishing Quantum Meruit and Unjust Enrichment in the Construction Setting*, Fla. Bar Journal,

- One to four residential units;
- No buildings or structures, and zoned for single-family residential; and,
- Single-family residential units sold individually.

Lien

This bill authorizes a broker to have a lien against commercial real estate that is to be purchased, leased, or otherwise conveyed to a buyer, in the amount due for licensed services, such as for brokerage, consulting and management fees, under a written instrument that is valid and enforceable, and signed by a transferor/seller or by a transferee/buyer.

A lien attaches when the broker is entitled to a lien under the terms of a written instrument, and the broker records a notice of lien with the clerk of the circuit court. Certain information is required in the notice of lien. The lien does not relate back to the date of the written instrument.

Provisions are made for the lien to cover the payment of the broker's commission due in installments and to cover the payment of future commissions. A proper filing of notice of lien, including a lien for future commissions, to include those paid through an installment payment agreement, protects the broker's commission even after the sale or conveyance of the real estate, and the lien follows the property. A broker is required to serve notice of the lien to the real estate owner within 10 days after recording notice, unless it is recorded less than 10 days before a closing. A lien is unenforceable without a proper service of notice. A broker is required to provide a partial release as payments or partial payments are made.

Enforcement

A broker is authorized to sue to enforce a lien, but must file a complaint within two years after the recording of notice, or the lien is deemed extinguished. An action on a lien for a future commission must be commenced within two years after the occurrence or transaction on which the future commission is claimed. Certain content requirements for the complaint are provided, as well as procedures for notice under this bill. Improper notice results in a judgment against the plaintiff with prejudice (i.e. suit on the same cause of action is barred). An owner's demand to initiate, or file an answer to a lawsuit must be addressed within 30 days, either through commencement of suit or answer filed; otherwise, the lien shall be extinguished.

Alternative Dispute Resolution

This bill provides for alternative dispute resolution.

Attorney's Fees

Attorney's fees, costs and prejudgment interest are assessed against the non-prevailing party.

Satisfaction or Release of the Lien

A broker is required to acknowledge satisfaction or release of the lien in writing, upon written demand of the owner within a specified time period. A broker may waive lien rights in consideration of the payment of the fee or commission, in addition to other forms of consideration acceptable to the broker. Waiver of lien rights are otherwise void.

Priority

Prior recorded liens are granted priority over a broker's lien, to include certain mechanic's liens and construction liens. This bill provides for an escrow to be established, funded from the proceeds of the transaction or conveyance or other collateral or security in an amount sufficient to release the lien, to be released upon written agreement of the parties, by a court, or by other resolution agreed to by the parties.

This bill amends existing law (s. 475.42, F.S.) to exempt these liens from being considered a violation of the Florida Deceptive and Unfair Trade Practices Act.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

A broker of commercial real estate would have an additional method to enforce a contract for a commission.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under the rules of statutory construction, a section of law that cross-references another section or portion thereof that is subsequently amended does not incorporate those amendments unless the section containing the cross-reference is reenacted (republished). Otherwise, the statutory cross-reference is linked to the version of the section that existed prior to the amendment. Sometimes

the context of the cross-reference does not alter the section or subsection in which it appears and does not necessitate reenactment or republication. However, sometimes the changes can be substantive. In those latter cases, if the section or subsection containing the cross-reference to the amended section is not reenacted or republished, the statutory cross-reference remains linked to the version of the section or subsection that existed prior to the amendment(s), and the new amendment(s) would not be applicable. Section 475.42, F.S., as revised by this bill, is cross-referenced in s. 501.212, F.S., which removes certain practices involving the sale, lease, rental or appraisal of real estate, from the provisions of the Florida Deceptive and Unfair Trade Practices Act.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
