

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:

Current Situation

Real estate brokers are regulated by Chapter 475, Florida Statutes. The Florida Real Estate Commission under the Division of Real Estate within the Department of Business and Professional Regulation (DBPR) administers the regulation of real estate brokers.

Currently, a broker may place a lien on real property for nonpayment of commission *only if* the broker is expressly authorized to do so in a contractual agreement.¹ Otherwise, when a buyer or seller refuses to pay a broker’s commission after the commission is due the broker would be required to take legal action by filing a suit against the party to collect the amount owed.

A lien is a right given to a creditor to have a debt satisfied out of some specific property belonging to a debtor. Liens can entitle the holder (lienor) to have a property sold, regardless of the desires of the owner (lienee). As a debtor, the property owner has no choice but to pay the lienor or have the property disposed of by the courts in order to satisfy the lien.

The term “broker” is statutorily defined as a person who for compensation appraises, auctions, buys, sells, exchanges, or leases real property or negotiates the transaction for others. The definition includes a general partner, officer, or director of a partnership or corporation which acts as a broker.

Effect of Proposed Changes

The bill creates Chapter 714, entitling commercial brokers to a lien on commercial property that is the subject of a purchase, lease, or other conveyance. The bill provides that a broker is entitled to a lien in the amount that the broker is due for licensed services, such as brokerage fees, consulting fees, and management fees. A lien is available to a broker named in a written instrument that is signed by the transferor or transferee.²

A lien will attach to the commercial real estate if the broker is entitled to a commission under a written instrument and records a notice of lien prior to the transfer of the commercial real estate which the broker is claiming the lien. The bill provides express exceptions to this recording requirement.

¹ s. 475.42, F.S.

² Under the bill, “transferee” means a person purchasing or otherwise receiving any interest in commercial real estate, and “transferor” means any person selling or otherwise conveying any interest in commercial real estate.

Prior recorded liens, mortgages, and encumbrances, including mechanic's lien, revolving credit liens and future advances of construction loans, have priority over a broker's lien.

"Commercial real estate" means any real estate *other than* real estate containing one to four residential units, or real estate on which no structures are located and which is zoned for single-family residential use. "Commission" means any compensation or consideration owed to a broker licensed in this state for services performed within the scope of the broker's license.

The notice of lien must include; the name of the claimant, the name of the owner of record of the commercial property, a description of the property, the amount for which the lien is claimed, and the real estate license number of the broker. The notice must be signed by the broker and notarized.

The recording requirements for a notice of lien vary, depending on the type of property transaction and the agreed upon time upon which a commission is due:

Commission Due in Installments: A notice of lien may be recorded up to 90 days after the date payment is due. Brokers must provide partial releases as partial payments of commission are received, therefore reducing the amount due under the broker's notice of lien.

Lease of Commercial Real Estate: A notice of lien must be recorded no later than 90 days after the transferee takes possession of the leased premises. If a transferor (i.e. lessor) serves written notice of the intended execution of the lease on a broker at least 10 days prior to the intended execution of the lease, a notice of lien must be recorded before the date indicated in the notice for the execution of the lease.

Future Commission: A notice of lien may be recorded anytime after execution of the lease but no later than 90 days after the event on which the future commission occurs. An action to enforce this type of lien must occur within 2 years after the occurrence on which the future commission is claimed.

Real Estate Sold Before Commission is Due: If the broker has recorded a valid notice of lien prior to the sale or other conveyance of real estate, then the purchaser or transferee will be considered as having notice and will take title to the real estate subject to the lien. A broker claiming a future commission that fails to file a notice of lien before the recording of a deed conveying legal title to the transferee may not claim a lien on the real estate.

In certain circumstances the bill authorizes a notice of lien to be recorded subsequent to an actual conveyance or transfer of commercial real estate. This creates the opportunity for unknowing buyers to purchase real estate that is encumbered with a lien. In practice buyers may assume the cost of commission owed to a broker; however, since the lien is attached to the land, instances may arise where the buyer is subjected to a lien and debt that was created by a contract between the seller and broker. In addition, title insurers will not have an opportunity to reveal an unrecorded lien. This has the potential to raise the number of legal challenges brought by purchasers and title insurance companies.

A broker must serve notice of lien to the owner of the commercial real estate within 10 days after recording a notice of lien. However a broker is not required to deliver a copy of the notice of lien if the notice of lien is recorded within 10 days prior to closing. Failure to deliver a copy of the notice of lien will result in an unenforceable lien.

A broker may file suit to enforce a lien by filing a complaint and sworn affidavit that the notice of lien has been recorded. The proceedings must commence within 2 years after recording the notice of lien or within 2 years after the transfer of the real estate if the lien is based on an option to purchase or lease. The notice of lien will extinguish if proceedings are not commenced within the provided 2 year period.

A complaint must contain: a brief statement of the contract or written instrument with its effective date, a description of the services performed, the amount due and unpaid, a description of the property, and any other facts that are necessary. All liens claimed will be foreclosed in the manner of foreclosing a mortgage under the provision of chapter 702, F.S.

A broker must release the lien in writing upon a written demand by the owner if the claimed commission has been paid to the broker or the time period has expired in which to initiate a suit. Additionally, a broker must release the lien if a condition occurs that would preclude a broker from receiving compensation under the terms of the written agreement.

A broker and the party from whom the commission is claimed may seek alternative dispute resolution upon agreement. The broker's notice of lien will be stayed pending the resolution.

A broker's right to a lien may not be waived, unless the waiver or release of lien is in consideration of payment of the fee or commission claimed by a broker.

When a properly filed lien prevents the closing of a transaction an escrow account will be established from the proceeds of the transaction in an amount sufficient to release the lien. This will grant a broker an equitable lien on the escrow funds, thereby, releasing any lien on the property. If an alternative procedure is acceptable to the transferee that enables the transaction to close then the escrow procedures will not be required.

The bill amends Chapter 475, F.S., in order to permit a broker's lien that is expressly "allowed by law;" currently the chapter permits a broker's lien only when agreed upon by contract. This authorizes commercial liens in Chapter 475, which relates to real estate brokers.

C. SECTION DIRECTORY:

Section 1. Creates the popular name "Commercial Real Estate Lien Act; provides terms; provides that a broker under a written instrument is entitled to a lien in the amount that the broker is due for licensed services; provides for contents for a notice of lien; provides procedures for filing a notice of lien and recording a notice of lien; provides requirement of service of notice of lien; provides procedures and requirements for filing a lawsuit to enforce a lien; provides a statute of limitations; provides for satisfaction or release of lien; provides for an alternative dispute resolution; provides that costs for proceedings brought under this act are borne by the nonprevailing party; provides that a waiver of lien rights is void; provides that prior liens have priority over a broker's lien; provides for an escrow of disputed amounts.

Section 2. Amends section 475.42; allowing a broker's lien on property where allowed by law.

Section 3. The act takes effect July 1, 2004.

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:

In certain circumstances the bill authorizes a notice of lien to be recorded subsequent to an actual conveyance or transfer of commercial real estate. This creates the opportunity for unknowing buyers to purchase real estate that is encumbered with a lien. In practice buyers may assume the cost of commission owed to a broker; however, since the lien is attached to the land, instances may arise where the buyer is subjected to a lien and debt that was created by a contract between the seller and broker. In addition, title insurers will not have an opportunity to reveal an unrecorded lien. This has the potential to raise the number of legal challenges brought by purchasers and title insurance companies.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds.

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Real Property Probate and Trust Law section of the Florida Bar are opposed to this bill, expressing, that as a matter of public policy those entitled to a lien right should have contributed to an increase in the value of the property for the value of the lien, and that the right of lien should not attach by virtue of money owed.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES