

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 2292

SPONSOR: Governmental Oversight and Productivity Committee and Senator Geller

SUBJECT: Sureties

DATE: March 11, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends various provisions of law relating to bonds as follows:

- It provides that intangible and document excise taxes are to be paid when an insurance company exercises its rights under a mortgage or lien that it has recorded to ensure the performance of an indemnitor to a surety, rather than upon recordation.
- It provides that the willful failure or refusal to pay the document excise tax when mortgage or lien rights are exercised is a first degree misdemeanor.
- It provides that the Division of Alcoholic Beverages and Tobacco may accept a certificate of deposit or an irrevocable letter of credit, in addition to a surety bond as is permitted in current law, for the amount required as surety for cigarette taxes.
- It requires the use of a statutory model public construction bond form.
- It provides that in the event a court increases the amount of a transfer-lien bond to cover the prevailing lienor's attorney's fees and costs that a surety providing the transfer-lien bond is not liable for amounts in excess of the bond, unless the surety has provided a new or amended bond.

This bill amends the following sections of the Florida Statutes: 199.185, 201.23, 210.08, 255.05, and 713.24.

II. Present Situation:

Intangible Personal Property Tax: The intangible personal property tax is imposed on "all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents."¹ Taxable intangible personal property includes, among other

¹ Section 199.023(1), F.S

things, stocks, bonds, notes, other obligations to pay money, and accounts receivable.² A nonrecurring version of this tax, 2 mills on each dollar, is imposed on the just valuation of all notes, bonds, and other obligations for money which are secured by a mortgage, deed of trust, or other lien upon real property situated in this state.³

In *West Flagler Associates, Ltd. v. Department of Revenue*, 633 So.2d 555 (Fla. 3rd DCA 1994), the Court considered whether the nonrecurring intangibles tax had to be paid when mortgages were filed for purposes of securing guaranties issued by banks. In this case, West Flagler paid the intangible property tax when mortgages on land owned by West Flagler were recorded as security for bank guaranties issued to a partner of West Flagler. The Court held that West Flagler should not have been required to pay the intangibles tax at the time of recording by the bank, as s. 199.133, F.S., applies to non-contingent promises to pay actual debts, not contingent liabilities as was at issue in the case.

Thus, under the case law, it would appear that mortgages and liens recorded by insurance companies to secure the performance of an indemnitor to a surety would not be subject to the nonrecurring intangibles tax unless the insurance company exercised its rights under the mortgage or lien, as until that point the insurance company's interest in the property is contingent on the performance of the indemnitor.⁴

Willfully violating or failing to comply with any of the provisions of ch. 199, F.S., governing the intangible personal property tax, constitutes a third degree felony punishable by up to five years in prison and by up to a fine of \$5,000.

Excise Tax on Documents: The excise tax on documents is imposed on deeds, instruments, or writings whereby any lands, tenements, or real property, or any other interest therein, is granted, assigned, transferred, or otherwise conveyed to a person. The amount of the tax is .70 cents for each \$100.00 paid as consideration for the transfer of the real property interest.⁵

Under ch. 201, F.S., it is a first degree misdemeanor for a person to make, sign, issue, or accept any document without the full amount of tax imposed by the chapter being paid. Further, if the proper amount of tax is not paid at recordation, the person liable for the tax must pay the tax and the following additional penalty: (a) 10 percent of the unpaid tax if the failure is for less than 30 days; (b) 10 percent plus an additional 10 percent for each additional 30 days; and (c) one percent interest per month to the Department of Revenue accruing from the time the tax is due until it is paid.⁶

² Section 199.023, F.S.

³ Sections 199.133 and 199.135, F.S.

⁴ Representatives from the business community have indicated, however, that generally this is not followed in practice and that Florida Clerk of Court offices routinely require the payment of the nonrecurring intangibles tax whenever the mortgage or lien is recorded as security. As such, lenders typically do not record the mortgage or lien until the indemnitor defaults because earlier recording would make the surety cost prohibitive. The drawback to recording when an indemnitor defaults is that the lender may ultimately have an interest that is subordinate to other parties who recorded a mortgage or lien on the property since the time the lender issued the surety

⁵ Section 201.02, F.S.

⁶ Section 201.17, F.S.

Cigarette Tax and Bond: The excise tax on cigarettes is imposed on the sale, receipt, purchase, possession, consumption, handling, distribution, and use of cigarettes.⁷ The tax rates vary depending upon the weight and size of the cigarette. For cigarettes weighing less than three pounds per thousand, the following rates apply: (a) for packs of 10 cigarettes or less, the tax is 16.95 cents; and (b) for packs of 20 cigarettes or less, the tax is 33.9 cents. For cigarettes weighing more than three pounds per thousand and that are less than 6 inches long, the following rates apply: (a) for packs of 10 cigarettes or less, the tax is 33.9 cents; and (b) for packs of 20 cigarettes or less, the tax is 67.8 cents. For cigarettes weighing more than three pounds per thousand and that are more than 6 inches long, the following rates apply: (a) for packs of 10 cigarettes or less, the tax is 67.8 cents; and (b) for packs of 20 cigarettes or less, the tax is 135.6 cents.

Persons who are dealers, agents, or distributing agents of cigarettes are required to file a surety bond with the Division of Alcoholic Beverages and Tobacco within the Department of Business and Professional Regulation in the sum of \$10,000 as surety for the payment of all taxes, except that the division may reduce the amount of the bond to as low as \$1,000 where the division finds that such reduced bond will be adequate to secure payment of cigarette taxes.⁸

Surety and Payment/Performance Bonds: In Florida, “surety insurance” is defined to include payment and performance bonds.⁹ Such bonds are contracts in which a surety company, which is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.^{10 11}

Unlike a normal insurance situation in which there is a two-party relationship, i.e., the insurer and the insured, the nature of surety is a triparty relationship, which consists of: (a) the obligee, which may be either the person purchasing the performance from the contractor in the case of a performance bond or the subcontractor/supplier expecting payment from the contractor in the case of a payment bond; (b) a principal, e.g., the contractor; and (c) the surety that provides the bond to protect against the principal’s default. A second difference between a normal insurance relationship and a surety relationship is that the surety requires a principal to indemnify the surety against losses sustained by the carrier if the surety must perform or pay under the bonds. In this instance, the principal is referred to as the indemnitor to the surety.¹²

Any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work is required to deliver to the public owner a payment and performance bond with a state

⁷ Section 210.02, F.S.

⁸ Section 210.08, F.S.

⁹ Section 624.606, F.S.

¹⁰ *Surety Bonds: A Basic User’s Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Daniel Toomey and Tamara McNulty, Winter, 2002.

¹¹ Although surety is oft times referred to in law as “surety insurance,” legal commentators have explained that this is somewhat of a misnomer, as it does not insure the purchaser of the surety, i.e., the general contractor, against claims such as poor workmanship; rather, the surety insurance protects the obligee against the general contractor’s default. *Id.*

¹² *Id.*

authorized surety insurer.¹³ Statute further provides that this bond may be in substantially the same form as a model form public construction bond that is provided in the subsection.¹⁴

Construction Lien Law: Under the “Construction Lien Law” contained in Part I of ch. 713, F.S., specified persons are permitted to impose a lien against real property to secure payment to that person for construction of, or improvements or repair to, that real property.¹⁵ Property owners may exempt themselves from this effect with respect to subcontractors by requiring a general contractor to deliver to the owner a payment bond for at least the amount of the original contract price before commencing construction.¹⁶ Any subcontractors’ liens filed subsequent to delivery of a payment bond are imposed against the payment bond, rather than the real property.¹⁷ Delivery of a payment bond does not, however, exempt a property owner from any liens imposed by the general contractor itself.¹⁸

Any lien claimed under the Construction Lien Law may be transferred by any person having an interest in the real property on which the lien is imposed, or the contract under which the lien is claimed, from the property to other security.¹⁹ The transfer may be accomplished by either depositing in the clerk’s office a sum of money, or filing in the clerk’s office a bond executed as surety by a surety insurer licensed to do business in Florida. Any number of liens may be transferred to one security.²⁰

The purpose of the transfer-lien provision is to permit any owner, whether or not he is in privity with a lienor, to remove the cloud of a lien from his property against which the lien is impressed, in order to make the property alienable, and he may do so either before or after suit to recover on the lien.²¹

Further, the transfer-lien provision states that if the court finds that the amount of the deposit or bond in excess of the amount claimed in the claim of lien is insufficient to pay the lienor’s attorney’s fees and court costs incurred in the action to enforce the lien, the court must increase the amount of the cash deposit or lien transfer bond.²²

III. Effect of Proposed Changes:

Section 1. The bill amends s. 199.185, F.S, which provides exemptions to the intangibles tax, to specify that mortgages and liens that are recorded to secure the performance of an indemnitor to a surety by insurance companies are temporarily exempt from the chapter. Under the bill, the

¹³ Section 255.05(1), F.S.

¹⁴ Section 255.05(3), F.S.

¹⁵ The “Construction Lien Law” contained in Part I of ch. 713, F.S., applies only to private projects. For public projects, performance and payment bonds are required. Section 255.05, F.S.

¹⁶ Sections 713.02(6) and 713.23(1)(a), F.S.

¹⁷ *Coordinate Constructors v. Florida Fill, Inc.*, 387 So.2d 1006 (Fla. 3rd DCA 1980).

¹⁸ Section 713.02(6), F.S.

¹⁹ Section 713.24(1), F.S.

²⁰ *Id.*

²¹ 36 Fla.Jur.2d Mechanics’ Liens s. 33.

²² *Id.* at s. 37.; Section 713.24(3), F.S.

nonrecurring 2 mill tax would not be due until the insurance company exercises its rights under the mortgage or lien, i.e., forecloses.²³

The bill further provides that the recording of the mortgage or lien retains priority as of the date of the recording over any other subsequent filings by other parties, notwithstanding that the enforcement of the recorded mortgage or lien on the indemnity occurs after those filings. Further, any action against the indemnitor affecting the mortgage or lien constitutes notice to the insurance company.

Finally, the bill provides that the failure or refusal to pay the tax does not affect the mortgage or lien, but that willful violation or failure to comply with the subsection is subject to the penalties set forth in s. 199.282, F.S.

Section 2. The bill amends s. 201.23, F.S, which provides exemptions to the document excise tax, to specify that mortgages and liens that are recorded to secure the performance of an indemnitor to a surety by insurance companies are temporarily exempt from the chapter. Under the bill, the document excise tax normally applicable to this transaction would not be due until the insurance company exercises its rights under the mortgage or lien, i.e., forecloses.

The bill further provides that the recording of the mortgage or lien retains priority as of the date of the recording over any other subsequent filings by other parties, notwithstanding that the enforcement of the recorded mortgage or lien on the indemnity may be after the subsequent filings. Further, any action against the indemnitor affecting the mortgage or lien constitutes notice to the insurance company.

Finally, the bill provides that the failure or refusal to pay the tax due under the subsection does not affect the mortgage or lien, but that the willful failure or refusal to do so results in a first degree misdemeanor punishable as provided in ss. 775.082 and 775.083, F.S.

Section 3. The bill amends s. 210.08, F.S., to provide that the Division of Alcoholic Beverages and Tobacco within the Department of Business and Professional Regulation may accept a certificate of deposit or an irrevocable letter of credit,²⁴ rather than a surety bond, as surety for the payment of cigarette taxes.

Section 4. The bill amends s. 255.05, F.S.(3), F.S., to provide that the performance and payment bonds required by government entities for public buildings and works projects must be the same as the model public construction bond form contained in the subsection. Further, the bill amends the model form to require the bond to contain the following: (a) the principal business address and telephone numbers of the contractor, surety, and public owner; (b) the amount of bond; (c) a description of the project; (d) a statement indicating that s. 255.05, F.S., controls the rights and obligations of the parties; and (e) the dates of the contract and bond.

²³ This appears to be a statutory clarification of case law. See "Present Situation" entitled "Surety and Payment/Performance Bonds," *supra*.

²⁴ An "irrevocable letter of credit" is contract to pay on compliance with its terms, and needs no formal acknowledgement or acceptance other than is therein stated. *Black's Law Dictionary*, Fifth Edition.

Section 5. The bill amends s. 713.24(3), F.S., to state that a surety providing a transfer-lien bond is not liable in excess of that bond amount, unless it provides a new or amended bond.

Section 6. The bill provides an effective date of July 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill's potential reduction of specified taxes may result in a reduction in the base of state revenues that are shared with local government. This bill, however, does not reduce the percentage of revenues shared with local government. Thus, the prohibition against limiting local governments' ability to receive state tax revenue, as set forth in Art. VII, s. 18 of the Florida Constitution is not invoked by this bill.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The bill delays the payment of intangibles and document excise taxes on mortgages and liens that are recorded to secure the performance of an indemnitor to a surety by insurance companies until rights under the mortgage or lien are exercised.²⁵ As such, the bill eliminates taxes in those instances where the insurance company never exercises its rights under the mortgage or lien.

B. Private Sector Impact:

The bill may reduce costs associated with surety bonds due to the contingent payment of taxes afforded by the bill.

C. Government Sector Impact:

In the event, the insurance company does not exercise its rights under the mortgage or lien, no taxes will be paid. Thus, there may be a loss of revenue to the state. The fiscal impact, however, of this bill is indeterminate as of the date of this analysis. The Revenue Estimating Conference intends to consider this bill at its next meeting.

²⁵ It would appear that case law would currently permit this delayed payment of intangibles taxes; however, as discussed in Footnote 4, *supra*, representatives of the business community have indicated that this holding is not followed in practice.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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