

# 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.)

---

Prepared By: Criminal Justice Committee

---

BILL: CS/SB 588

INTRODUCER: Criminal Justice Committee and Senator Constantine

SUBJECT: Construction Lien Law

DATE: April 19, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Imhof</u>	<u>RI</u>	<b>Fav/2 amendments</b>
2.	<u>Vickers</u>	<u>Yeatman</u>	<u>CA</u>	<b>Favorable</b>
3.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<b>Fav/CS</b>
4.	_____	_____	<u>GA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

## I. Summary:

The bill amends s. 679.705, F.S., to extend by six months the time period during which financing statements are effective.

The bill amends s. 713.135, F.S., to:

- Allow for the local building department to electronically deliver a summary of the Construction Lien Law to the property owner;
- Provide that in addition to a building permit issuing authority, a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement;
- Increase the threshold amount for a notice of commencement from \$5,000 to \$7,500 on those direct contracts to repair or replace an existing heating or air-conditioning system;
- Provide that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit;
- Authorize authorities issuing building permits to accept permit applications electronically and requires an electronic application to include a sworn electronic submission statement; and
- Require that an authority responsible for issuing building permit applications which accept building permit applications in an electronic format provide public Internet access to the electronic building permit applications in a searchable format.

Section 713.18, F.S., is amended to provide electronic evidence of delivery of notices, claims of liens, affidavits and other instruments permitted or required under the construction lien law.

The bill amends s. 713.35, F.S., by revising the list of legal documents to include a waiver or release of lien, or other document in which it is a crime to knowingly and intentionally include certain false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property, knowing that the one to whom it was furnished will part with draw payments or final payment relying on the truth of such statements.

This bill substantially amends the following sections of the Florida Statutes: 679.705, 713.135, 713.18 and 713.35.

## II. Present Situation:

### **Uniform Commercial Code – Expiration of Financing Statements**

When part of the Uniform Commercial Code was rewritten and adopted in 2001, the bill did not become effective until January 1, 2002. This causes a problem with security of loans because financing statements filed between July 1, 2001 and January 1, 2002 will expire six months earlier than the normal five year-expiration.

### **Lien law - Mandatory provisions for direct contracts**

Any direct contract between an owner and a contractor, related to improvements to real property consisting of single or multiple family dwellings up to and including four units, must contain a provision that notifies the owner that a claim of lien may be filed on their property if the contractor or subcontractor fails to pay the subcontractors, sub-subcontractors, or material suppliers or neglects to make other legally required payments, even if the owner has failed to pay the contractor in full.<sup>1</sup>

Lien is not defined in ch. 713, F.S. However, s. 713.015, F.S., provides for the following notice:

**ACCORDING TO FLORIDA'S CONSTRUCTION LIEN LAW (SECTIONS 713.001-713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND ARE NOT PAID IN FULL HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR A SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS OR NEGLECTS TO MAKE OTHER LEGALLY REQUIRED PAYMENTS, THE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED, YOUR**

<sup>1</sup> Section 713.015, F.S. This provision was added in the 2003 Legislative Session by ch. 2003-177 L.O.F. and required the notice in 18-point, capitalized bold-faced type.

PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR A SUBCONTRACTOR MAY HAVE FAILED TO PAY. FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX AND IT IS RECOMMENDED THAT WHENEVER A SPECIFIC PROBLEM ARISES, YOU CONSULT AN ATTORNEY. (Emphasis supplied)

Privity is the term used to indicate a “connection or relationship between two parties, each having a legally recognized interest in the same subject matter,” for example a contract.<sup>2</sup> “The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party.”<sup>3</sup>

### **Notice of Commencement**

The recording of a notice of commencement gives constructive notice that claims of lien may be recorded and may take priority. It does not constitute a lien, cloud, or encumbrance on real property.<sup>4</sup>

Liens for professional services and subdivision improvements attach at the time they are recorded and take priority at that time.<sup>5</sup> Liens of materialmen or laborers who are in privity with the owner and who comply with the provisions of ch. 713, F.S., attach and take priority at the time the notice of commencement is recorded. However, in the event a notice of commencement is not filed, the liens attach and take priority at the time the claim of lien is recorded.

A notice of commencement must be recorded in the clerk's office before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. The notice shall provide:

- a description of the real property;
- a general description of the improvement;
- name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than the owner;
- the name and address of the contractor;
- the name and address of the surety on the payment bond, if any, and the amount of the bond (a copy of the bond must be attached to the notice; however, if the bond is not recorded it may be used as a transfer bond under s. 713.24, F.S.);<sup>6</sup>
- the name and address of any person making a loan for the construction of the improvements; and
- the name and address of a designated person upon whom documents may be served if other than the owner.

---

<sup>2</sup> Black's Law Dictionary (8th ed. 2004)

<sup>3</sup> *Id.*, citing G.H. Treitel, *The Law of Contract* 538 (8th ed. 1991).

<sup>4</sup> Section 713.13(3), F.S.

<sup>5</sup> Section 713.07, F.S.

<sup>6</sup> Section 713.13(1)(e), F.S. A transfer bond allows an owner, who has erred and not recorded the bond with the notice of commencement, to transfer liens which are recorded against the owner's property. A lien may be transferred from the real property by depositing the amount required by s. 713.24(3), F.S., with the Clerk of the Court or by filing a surety bond in that amount with the clerk.

The owner, at his or her option, may designate a person in addition to himself or herself to receive a copy of the lienor's notice as provided in s. 713.06(2)(b), F.S., and if he or she does so, the name and address of such person must be included in the notice.

The notice must state if the contract between the owner and contractor named in the notice is for construction or improvement that takes in excess of one year. Any payments made by the owner after the expiration of the notice are considered improper payments.

A Notice of Commencement is not required in direct contracts to repair or replace an existing heating or air-conditioning system in an amount less than \$5,000.

### **Notice of Commencement and applicability of lien**

When any person applies for a building permit, the authority issuing the permit is required to:

- print on the face of each permit card a statement that the owner's failure to record a notice of commencement may result in the owner paying twice for improvements to the property;
- provide the applicant and the owner of the real property upon which improvements are to be constructed with a printed statement stating 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. The authority must also provide the applicant with a statement from the department providing a summary of construction lien law. The authority must mail the statement to the owner; and
- inform each applicant who is not the person whose right, title, and interest is subject to attachment, that as a condition to the issuance of a building permit, the applicant must promise in good faith that the statement will be delivered to the person whose property is subject to attachment.<sup>7</sup>

### **Notice to Owner - Subdivision improvements and proper payments**

As a pre-requisite to perfecting a lien and recording a claim of lien, all lienors who are not in privity with the owner, except laborers, must serve a notice on the owner.<sup>8</sup> A notice to owner provides the identity of all persons that have furnished labor or materials to improve the owner's property. The notice to owner protects the owner from double payment and establishes priority of lien.<sup>9</sup>

A notice to owner need not be filed by a lienor who, regardless of privity, performs subdivision improvements.<sup>10</sup> Subdivision improvements are those improvements that make real property suitable for improvements, such as excavation, paving, laying pipes for water and gas, etc. Subdivision improvement lienors are only required to record a claim of lien.<sup>11</sup>

---

<sup>7</sup> Section 713.135, F.S.

<sup>8</sup> Section 713.06(2)(a), F.S.

<sup>9</sup> Section 713.06, F.S.

<sup>10</sup> Section 713.04, F.S.

<sup>11</sup> Section 713.04(1), F.S.

With the exception of subdivision improvement contracts, when final payment under a direct contract is due, the contractor must provide the owner a final payment affidavit. The contractor's final payment affidavit must state that all lienors under direct contract 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. Those lienors that fail to provide a notice to owner may lose their lien rights if the owner makes proper payments.<sup>12</sup>

After receipt of a lienor notice to owner,<sup>13</sup> an owner must make proper payments to the lienor. Proper payment means the owner pays all lienors named in the notice directly.<sup>14</sup> Similarly, when an owner receives a contractor's final payment affidavit, the owner must make proper payments to the contractor. Owners that make these payments will have a proper payment defense against any claim of lien.

Owners have a proper payment defense against all lienors, except those involved in subdivision improvements. However, a lienor involved in subdivision improvements is *permitted* to file a notice to owner, thereby invoking the proper payment procedures and giving owners a proper payment defense.

### **Claim of lien**

Perfecting a lien requires the lienor to record the claim of lien. The claim of lien must be signed and verified by the lienor or his or her agent acquainted with the facts stated therein. It must be in a substantially similar format to that provided in s. 713.08(3), F.S. The omission of any details or errors does not, within the discretion of the trial court, prevent the enforcement of the lien. The claim may be amended any time during the time allowed for its recording.

Failure to serve the claim of lien before recording or within 15 days after recording shall render the claim of lien voidable to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service.

Service must be made in one of the following methods:

- by personal service or if a partnership, to one of the partners, or if a corporation to an office, director, managing agent, or business agent;
- by registered or certified mail with postage prepaid or by overnight or second day delivery with evidence of delivery; or
- by posting on the premises.<sup>15</sup>

### **Making or furnishing false statement**

Any person, firm, or corporation who knowingly and intentionally makes or furnishes to another person, firm, or corporation, a written statement in the form of an affidavit, whether or not under oath, containing false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property in this state,

---

<sup>12</sup> Section 713.06(3)(d), F.S.

<sup>13</sup> The notice to owner must be served no later than 45 days from commencing services to the property and before the date of the owner's final payment after the contractor has furnished the required final payment affidavit. s. 713.06(2)(a), F.S.

<sup>14</sup> Section 713.06, F.S.

<sup>15</sup> Section 713.08, F.S.

knowing that the one to whom it was furnished might rely on it, and the one to whom it was furnished will part with draw payments or final payment relying on the truth of the statement as an inducement to do so is guilty of a felony of the third degree.<sup>16</sup>

### **III. Effect of Proposed Changes:**

#### **Expiration of Financing Statements**

The bill amends the expiration date of financing statements that secure loans, by six months, to December 31, 2006. This corrects an apparent oversight in the 2001 re-write of Article 9 of the Uniform Commercial Code (s. 679.705, F.S.)

#### **Notice of commencement and applicability of lien**

The bill amends s. 713.135(1)(b), F.S., to allow for the building permit issuing authority to deliver by electronic mail or other electronic format or facsimile, or personally deliver a summary of the Construction Lien Law to the owner or personally deliver the summary to the owner or, if the owner is required to personally appear to obtain the permit, provide the summary to any owner making improvements to real property.

The bill amends s. 713.135 (1)(d), F.S., to provide that in addition to a building permit issuing authority, a private provider performing inspection services may not perform or approve subsequent inspections until the applicant files by mail, facsimile, hand delivery, or any other means a certified copy of the recorded notice of commencement.

It increases the threshold amount from \$5,000 to \$7,500 in direct contracts to repair or replace an existing heating or air-conditioning system in which a Notice of Commencement need not be filed.

The bill amends s. 713.135(1)(e), F.S., by providing that an issuing authority or a building official may not require that a notice of commencement be recorded as a condition of the application, processing, or issuance of a building permit. It provides that the paragraph does not modify or waive the inspection requirements set forth in the subsection.

The bill amends s. 713.135(4), F.S., to conform with the electronic mail provisions in the new s. 713.135(6)(b), F.S.

The bill amends s. 713.135(6)(b)and(c), F.S., to authorize authorities issuing building permits to accept permit applications electronically. It requires an electronic application to include a sworn electronic submission statement.

It requires that an authority responsible for issuing building permit applications which accepts building permit applications in an electronic format provide public Internet access to the electronic building permit applications in a searchable format.

---

<sup>16</sup> Section 713.35, F.S.

**Electronic evidence of delivery of instruments**

Section 713.18(1)(b), F.S., is amended to provide for electronic evidence of delivery of notices, claims of liens, affidavits and other instruments permitted or required under the construction lien law.

**Making or furnishing false statement**

The bill amends s. 713.35, F.S., by revising the list of legal documents to include a waiver or release of lien, or other document in which it is a crime to knowingly and intentionally include certain false information about the payment status of subcontractors, sub-subcontractors, or suppliers in connection with the improvement of real property, knowing that the one to whom it was furnished will part with draw payments or final payment relying on the truth of such statements.

**Effective Date**

The act would take effect October 1, 2006.

**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:**

By raising the threshold from \$5,000 to \$7,500, there will be a reduction in the number of Notice of Commencements that will be filed on jobs that involve the replacement and repair of heating and air-conditioning systems. This will allow a contractor, sub-contractor or materialman to file a lien upon a property without a Notice of Commencement if the direct contract to repair or replace an existing heating or air-conditioning system is in an amount from \$2,500 to \$7,500.

By making the recording of a Notice of Commencement optional as a condition for an application, processing, or issuance of a building permit, it might give the contractor or owner additional review time to get the Notice of Commencement completed.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

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

---

## **VIII. Summary of Amendments:**

None.

---

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

---