



Civil Justice Subcommittee

Thursday, January 16, 2020

8:30 AM – 11:30 AM

404 HOB

Meeting Packet

**Jose Oliva
Speaker**

**Bob Rommel
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Thursday, January 16, 2020 08:30 am

End Date and Time: Thursday, January 16, 2020 11:30 am

Location: Sumner Hall (404 HOB)

Duration: 3.00 hrs

Consideration of the following bill(s):

CS/HB 283 Liens and Bonds by Business & Professions Subcommittee, Toledo

CS/HB 307 Law Enforcement Vehicles by Business & Professions Subcommittee, LaMarca

HB 519 Private Property Rights Protection by Grant, J.

HB 567 Correction of Errors in Deeds by Altman

HB 741 Asbestos Trust Claims by Leek

Workshop on Legal Advertising

Pursuant to rule 7.11, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Wednesday, January 15, 2020.

By request of the Chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Wednesday, January 15, 2020.

NOTICE FINALIZED on 01/14/2020 4:08PM by Ellerkamp.Donna

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 283 Liens and Bonds
SPONSOR(S): Business & Professions Subcommittee, Toledo and others
TIED BILLS: IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	10 Y, 1 N, As CS	Brackett	Anstead
2) Civil Justice Subcommittee		Mawn	Luczynski
3) Commerce Committee			

SUMMARY ANALYSIS

A construction lien is designed to protect those who provide work or materials to improve property for a property owner and who are not in direct contract with the owner, such as subcontractors, laborers, and material suppliers. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien on the property if they are not paid for their services and all notice requirements are met.

CS/HB 283:

- Provides that a person may not be required to sign a waiver or release of lien that is different from the form provided in statute in exchange for payment, except pursuant to contractual agreement;
- Prohibits any provisions in a waiver or release of lien that are not related to the waiver or release unless the person has agreed to those provisions in their initial contract.
- Provides that the statutory requirements for a waiver of a right to claim against a bond for public construction projects also apply to Department of Transportation construction projects.
- Provides that licensed building and general contractors who provide construction management services may record a construction lien.
- Clarifies that construction liens may be filed against a lease for private leaseholds on public property.
- Provides that a person may file one claim of lien for multiple contracts with the same owner.
- Provides that an owner may not record a notice of termination until each person who worked on the property has been paid.
- Provides that an owner must provide a copy of the notice of termination to a person who timely serves a notice to owner after the notice of termination has been recorded.
- Allows a lien to be transferred to a payment bond obtained by a subcontractor if the person who filed the lien is working for the subcontractor.
- Increases the amount needed to obtain a security in order to transfer a lien to the security.
- Provides that a prevailing party is entitled to attorney's fees in actions to enforce liens that have been transferred to securities.
- Clarifies the definition of "final furnishing" related to specially fabricated materials.
- Provides that construction liens have priority over debts that are recorded after the construction lien is recorded, even if such debts relate back to a debt that was recorded before the construction lien attached pursuant to the operation of "any common law doctrine or remedy."
- Removes the requirement that a notice of commencement must include:
 - The owner or lessee's interest in the property; and
 - A statement that an ownership interest is a leasehold interest if a lessee contracted for the work.

The bill does not appear to have a fiscal impact on state and local governments.

The bill provides for an effective date of July 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0283b.CJS

DATE: 1/14/2020

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Construction Liens

Florida law ensures that people who work on construction projects can obtain payment for their work. Any person who provides services, labor, or materials for improving, repairing, or maintaining real property (except public property) may place a construction lien on the property, provided the person meets the procedural guidelines set forth in current law.¹

The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. Florida law requires that some notices, demands, and requests be in the statutory form provided in statute, while others do not have to be in the statutory form. The following notices are required by the act: Notice of Commencement,² Notice to Owner,³ Claim of Lien,⁴ Notice of Termination,⁵ Waiver or Release of Lien,⁶ Notice of Contest of Lien,⁷ Contractor's Final Payment Affidavit,⁸ and Demands of Written Statement of Account.⁹

Under part I of chapter 713, F.S., a person who is not in privity or direct contract with the owner, such as subcontractors and material suppliers, who intends to secure the right to claim a lien against the property must take several additional steps. For example, if a payment bond¹⁰ does not apply, a services or materials provider must serve a notice to owner¹¹ (in the statutory form provided) that sets forth the person's name and address and the nature of the services or materials furnished or to be furnished to the owner's property.¹² The notice informs the owner of who is providing services or materials on their property, and that the person serving the notice is looking to the owner to ensure he or she receives payment for their services or materials.¹³ The notice to owner must be served no later than 45 days after the person begins furnishing labor, services, or materials.¹⁴

Once the owner receives a notice to owner, the owner must obtain a waiver or release of lien (not required to be in the statutory form) from that person before paying the contractor. Otherwise, a payment to the contractor may constitute an improper payment and the owner is liable to the person if he or she is not paid by the contractor.¹⁵

¹ Ch. 713, F.S.

² S. 713.13, F.S.;

² S. 713.06(2), F.S.; *MHB Construction Services, LLC v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So. 3d 587, 589 (Fla. 4th DCA 2011) ("Though the Notice of Commencement was originally required to trigger a commencement date from which to measure time limitations under the Mechanic's Lien Law, the information contained in the Notice of Commencement provides all the details necessary to complete a Notice to Owner.")

³ S. 713.06(2), F.S.

⁴ S. 713.08, F.S.

⁵ S. 713.132, F.S.

⁶ S. 713.20, F.S.

⁷ S. 713.22(2), F.S.

⁸ S. 713.06(3), F.S.

⁹ S. 713.16, F.S.

¹⁰ A payment bond guarantees that a contractor will pay subcontractors, laborers, and material suppliers for their work. It forms a three part contract between the owner, the contractor, and they surety, and exempts the owner from the construction lien law because the surety insurer providing the bond guarantees the subcontractors, laborers, and material suppliers will receive payment for their work or materials. Current law requires contractors to obtain a payment bond for public projects over \$100,000 and allows such a bond on all other projects. See Bond, Black's Law Dictionary (11th ed. 2019); S. 255.05, F.S.

¹¹ S. 713.06(2), F.S.

¹² S. 713.06(2)(a), F.S.

¹³ *Stocking Building Supply of Florida, Inc. v. Soares Da Costa Construction Services, LLC*, 76 So. 3d 313, 319 (Fla 3d DCA 2011).

¹⁴ *Id.*

¹⁵ *Id.*; S. 713.06, F.S.

Waiver or Release of Lien - Current Law

Prior to making a payment to a contractor, an owner must request that a person who served a notice to owner provide a waiver or release of lien. A waiver or release of lien is essentially a receipt provided by the person who served a notice to owner acknowledging payment for services performed or materials provided and a waiver of their ability to file a lien for those services or materials.¹⁶ A waiver or release of lien can be a partial waiver for some of the person's services or materials or it can be a final waiver for all of the person's services or materials.¹⁷ A person may not waive or release their right to file a lien prior to doing work or providing materials. However, a person may waive or release their right to file a lien prior to receiving payment for their services or materials.¹⁸

Current law provides a statutory form for a waiver or release of lien. However, current law does not require that the waiver or release of lien be in the statutory form.¹⁹ Thus, a waiver or release of lien may be substantially different from the form and it may include additional provisions that are not included in the form. However, an owner may not require a person to sign a waiver or release of lien that is substantially different from the form.²⁰

The form provides that the person who served the notice to owner waives their right to claim a lien for services or materials provided for the job on the owner's property in exchange for a certain sum of money.²¹ The form entitled "Waiver and Release of Lien Upon Partial or Final Payment" states:

"The undersigned lienor, in consideration of the (sum of or final payment in the amount of) \$, hereby waives and releases its lien and right to claim a lien for labor, services, or materials furnished to (insert the name of your customer) on the job of (insert the name of the owner) to the described property (insert description of the property)."²²

Industry blogs and news reports indicate it has become routine in the industry for the form for a waiver or release of lien to include other miscellaneous provisions, and that subcontractors and material suppliers should be warned about signing a waiver or release of lien without understanding the extra provisions. They advise to carefully inspect a waiver or release to ensure someone does not unknowingly sign a waiver or release that includes additional provisions such as a waiver or release of all claims, damages, losses, or expenses.²³

Right to Claim Against a Payment Bond - Current Law

Similar to a waiver or release of lien, in a situation where there is a payment bond, prior to making a payment to a subcontractor, laborer, or material supplier, a contractor may request the person provide a waiver of right to claim against the payment bond.

A waiver of right to claim against a bond is similar to a waiver or release of lien. Like a waiver or release of lien, a waiver of right to claim against the bond is essentially a receipt provided by the person acknowledging payment for services performed or materials provided and a waiver of their ability to seek payment from the surety.²⁴

¹⁶ S. 713.20, F.S.; Leonard Klingen, *Florida's unwieldy but effective construction lien law*, Florida Bar Journal (Jan./Feb. 2019), <https://www.floridabar.org/the-florida-bar-journal/floridas-unwieldy-but-effective-construction-lien-law/> (last visited Jan. 6, 2020).

¹⁷ S. 713.20, F.S.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Alex Benarroche, *Florida's "Non-Required" Statutory Lien Waivers Can Lead to Confusion*, Levelset (May 20, 2019), <https://www.levelset.com/blog/florida-statutory-lien-waivers-lead-to-confusion/> (last visited Jan. 6, 2020); Craig Distel, *Understanding waivers and releases for Florida construction contractors*, (Dec. 20, 2018), <https://mcdonaldhopkins.com/Insights/Blog/Industry-Insights/2018/12/20/Understanding-waivers-and-releases-for-Florida-construction-contractors> (last visited Jan. 6, 2020).

²⁴ Ss. 255.05(2), & 713.235, F.S.

Current law provides a statutory form for a waiver of right to claim against a bond, which is similar to a waiver or release of a lien. Current law provides that a contractor may not require a person to sign a waiver of right to claim against a bond that is substantially different from the form. However, also like a waiver or release of lien, the statutory form for the waiver of right to claim against a bond is not required, and a waiver of right to claim against a bond may be different from the form and it may include additional provisions that are not included in the statutory form.²⁵

According to industry experts, any person required to provide a claim against a bond must ensure they carefully inspect a waiver or release to ensure they do not unknowingly sign a waiver or release that includes additional provisions such as a waiver or release of all claims, damages, losses, or expenses.²⁶

Waiver or Release of Lien and Right to Claim Against a Payment Bond - Effect of the Bill

CS/HB 283 provides that a person may not be required to sign a waiver or release of lien or a right to claim against a payment bond that is different from the statutory forms in order to receive payment, unless the person agreed to sign a different form in his or her contract with the contractor.

The bill provides that any provision in a waiver or release of lien or a right to claim against a bond that is not related to the waiver or release of lien or the right to claim against a bond is not enforceable, unless the person agreed to those provisions in his or her contract with the contractor.

Payment Bonds for Department of Transportation Construction Jobs - Current Law

Current law requires the successful bidder on a construction or maintenance contract project for the Department of Transportation (DOT) to obtain a payment bond.²⁷ Subcontractors, laborers, and material suppliers are able to make a claim against the bond if they do not get paid.²⁸

These types of bonds work similarly to other construction payment bonds. A person cannot waive their right to make a claim against the bond in advance, but they can waive their right to make a claim against the bond in order to receive payment. However, current law does not require that the statutory form for a waiver of right to claim against a bond be used for waivers related to DOT construction or maintenance projects, so a person may be required to sign a waiver that has additional provisions in it that are not related to the waiver.²⁹

Payment Bonds for Department of Transportation Construction Jobs - Effect of the Bill

The bill requires that the statutory form for waiving a right to claim against a bond be used for DOT construction and maintenance projects.

For DOT construction or maintenance projects, the bill provides:

- A person may not be required to sign a waiver of a right to claim against a payment bond that is different from the statutory form in order to receive payment unless the person signed a contract, which requires the person to sign a different form; and
- Any provision in a waiver of a right to claim against a bond that is not related to the waiver or release of lien or the right to claim against a bond is not enforceable, unless the person agreed to those provisions in his or her contract with the contractor.

²⁵ *Id.*

²⁶ Benarroche, *supra* note 23.

²⁷ S. 337.18, F.S.

²⁸ *Id.*

²⁹ *Id.*

Licensed General and Building Contractors - Current Law

Licensed construction contractors are either certified by or registered with the Construction Industry Licensing Board (CILB). The CILB is housed in the Department of Business and Professional Regulation (DBPR) and consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB is responsible for licensing, regulating, and disciplining certified construction contractors.³⁰

"Certified contractors" are individuals who pass the state competency examination and obtain a certificate of competency issued by DBPR. Certified contractors are permitted to practice in any jurisdiction in the state.³¹

"Registered contractors" are individuals that have taken and passed a local competency examination and can practice contracting only in the local jurisdiction for which the license is issued.³²

A licensed "general contractor" is a person who may contract for any type of construction service, and may perform any type of construction service unless they are required to subcontract the work to a licensed subcontractor.³³

A licensed "building contractor" is a person who may contract for construction services for commercial and residential buildings that do not exceed three stories in height, or for construction for any size building if the construction does not affect the structural frame of the building. A licensed building contractor may perform any of the above construction services unless they are required to subcontract the work to a licensed subcontractor.³⁴

Construction Management Services - Current Law

Construction managers and construction management entities or companies are responsible for the overall management of a construction project from the predesign phase to project completion.³⁵ This can include providing preconstruction planning, reviewing designs, estimating costs, determining the value of different building products, project scheduling, contract negotiation, bid procedures, and coordination of trade contractors and safety programs.³⁶

Construction managers and construction management businesses are not regulated or licensed by the DBPR. Generally, construction managers and construction management businesses are also not required to be licensed contractors, engineers or architects. However, if the construction manager or construction management business is performing any activity that otherwise requires a license, they must have that specific license or employ someone that holds such license.³⁷

Section 255.103, F.S., allows a local government entity to hire a construction manager for a construction project. The construction manager is "responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally responsible for the successful, timely, and economical completion of the construction project."³⁸ Section 255.103, F.S., also allows a local government to hire a program management entity. The program management entity is "responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services."³⁹ Construction managers and program management entities hired

³⁰ See generally Ch. 489, F.S.

³¹ S. 489.105, F.S.

³² S. 489.103, F.S.

³³ Ss. 489.105(3), & 489.113, F.S.

³⁴ *Id.*

³⁵ The Florida Bar, *Florida Construction Law Practice*, Chapter 4: Rights and Liabilities of Construction Managers (9th ed. 2018).

³⁶ *Id.*

³⁷ *Id.*

³⁸ S. 255.103(2), F.S.

³⁹ S. 255.103(3), F.S.

by local governments are not required to be a licensed contractor, engineer, or architect. However, if such persons or entities are not licensed, they must hire a licensed professional to perform any job that does require a license.⁴⁰

Section 255.32, F.S., allows the state to hire construction managers for construction projects. Construction managers hired by the state must be licensed general or building contractors. The construction manager “coordinates and supervises a construction project from the conceptual development stage through final construction, including the scheduling, selection, contracting with, and directing of specialty trade contractors, and the value engineering of a project.”⁴¹

The construction lien law allows any person who provides services, labor, or materials for improving real property (except public property) to place a construction lien on the property.⁴² However, it is unclear if construction managers may place a lien on a property because they do not necessarily provide labor, services, or materials that improves real property.⁴³ Some courts have determined that construction managers are not permitted to file such a lien.⁴⁴ The lien law also provides that a contractor may file a lien for any money owed to him or her for labor, services, or materials.⁴⁵ The construction lien law defines a “contractor” as any person other than materialmen or laborer who contracts with an owner to improve the owner’s real property. The definition also includes a licensed architect and engineer who improve real property through a design-build contract.⁴⁶ However, the contractor definition does not include construction manager services.⁴⁷

Licensed Contractors and Construction Management Services - Effect of the Bill

The bill amends the construction lien law’s definition of “contractor” to include any licensed general or building contractor who provides construction management or program management services. This gives licensed general and building contractors who provide construction management or program management services the ability to file a lien for their services.

The bill defines construction management services to mirror the definition of a construction management entity in s. 255.103, F.S., providing that such services include: “responsibility for scheduling and coordination in both preconstruction and construction phases and for the successful, timely, and economical completion of the construction project.” The bill also defines program management services to mirror the definition of a program management entity in s. 255.103, F.S., providing that such services include: “responsibility for scheduling control, cost control, and coordination in providing or procuring planning, design, and construction.”

Construction Liens for Private Leasehold Interests in Public Property - Current Law

Although construction liens generally apply to the owner of the property improved, construction liens may also apply in situations where the property owner’s tenant has contracted for the improvement.⁴⁸ However, if a tenant contracts for improvements to real property, the contractor is only able to file a lien

⁴⁰ *Id.*

⁴¹ S. 255.32(1)(a), F.S.

⁴² See generally Ch. 713, F.S.

⁴³ Scott Wolfe Jr., *Can Construction Managers File Mechanics Liens?* Levelset, (Jul. 19, 2019), <https://www.levelset.com/blog/can-construction-managers-file-mechanics-liens/> (last visited Jan. 6, 2020).

⁴⁴ *O’Kon and Company, Inc. v. Riedel*, 540 So. 2d 836, 839-40 (Fla. 1st DCA 1988) (“Chapter 713 which provides for professionals offering services to file a lien for services, does not include ‘project managers.’”) *Medellin v. MLA Consulting, Inc.*, 69 So. 3d 372 (Fla. 5th DCA 2011) (A person cannot file a construction lien for home construction consulting services because it does not improve real property.); See The Florida Bar *supra* note 35.

⁴⁵ S. 713.05, F.S.

⁴⁶ S. 713.01(8), F.S.

⁴⁷ *Id.*

⁴⁸ Adam B. Edgecombe, *How do construction liens impact a commercial landlord in Florida?*, JimersonBirr (May 7, 2019), <https://www.jimersonfirm.com/blog/2019/05/how-construction-liens-impact-commercial-landlord/> (last visited Jan. 6, 2020).

against the tenant's leasehold interest, instead of against the real property, unless the tenant contracts for an improvement with the landlord's agreement.⁴⁹

Construction liens may not be filed against public property, but construction lien law does not currently indicate whether liens may be filed against the private leasehold interests of a tenant on public property.⁵⁰ However, according to industry experts, in some cases liens may be filed against private leasehold interests on public property, such as when airlines and car rental agencies lease property within public airports.⁵¹

Construction Liens for Private Leasehold Interests in Public Property - Effect of the Bill

The bill amends the definition of "real property" to include private leaseholds on public property, which allows a person to file a construction lien against a private leasehold interest on public property.

Final Furnishing of & Specially Fabricated Materials - Current Law

In order to record a construction lien on real property, a person must record a claim of lien with the clerk of court of the county where the property is located and serve the owner with the claim of lien. The person must serve the owner with the claim of lien before recording the lien or within 15 days of recording the lien.⁵² If a claim of lien is not recorded, the lien is void to the extent that the failure or delay is shown to have prejudiced any person entitled to rely on service of the claim of lien.⁵³

A person may file a claim of lien at any time during the progress of work. However, a person may not file a claim of lien later than 90 days after the final furnishing of labor or materials by the person.⁵⁴ Current law provides that the final furnishing date is the last day the person furnishes labor, services, or materials. The date may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of final completion, and does not include correction of deficiencies in the person's previously performed work or materials supplied. Further, with respect to rental equipment, the term means the date that the rental equipment was last on the job site and available for use.⁵⁵

Materials must be incorporated in the jobsite in order for the materials to be considered furnished. Current law provides that the delivery of materials to the jobsite is prima facie evidence that the materials have been incorporated into the jobsite.⁵⁶ However, "specially fabricated materials" do not have to be incorporated into a jobsite in order for the materials to be considered furnished.⁵⁷ Since specially fabricated materials cannot be used for another project, Florida courts have determined that specially fabricated materials do not have to be delivered to a jobsite in order for the supplier to file a lien on the real property.⁵⁸ However, current law does not provide a date to determine the last day specially fabricated materials are furnished.

⁴⁹ S. 713.10, F.S.

⁵⁰ See generally Ch. 713, F.S.

⁵¹ H. Wesley, *Property Interests Subject to Construction Liens in Florida*, (Sep. 21, 2018), <https://www.lorman.com/resources/property-interests-subject-to-construction-liens-in-florida-17322> (last visited Jan. 6, 2020); 8 Fla. Prac., Constr. Law Manual § 8.3 (2019-2020 ed.).

⁵² S. 713.08, F.S.

⁵³ S. 713.08(4), F.S.

⁵⁴ S. 713.08(5), F.S.

⁵⁵ S. 713.01(12), F.S.

⁵⁶ S. 713.01(13), F.S.

⁵⁷ Specially fabricated materials are materials made for a particular project and are not suited or readily adaptable for use in a different project. *Surf Properties v. Markowitz Bros.*, 75 So. 298, 302 (Fla. 1954).

⁵⁸ *Oolite Industries, Inc. v. Millman Construction Company, Inc.*, 501 So. 2d 655, 656 (Fla. 3rd DCA 1987); *Aquatic Plant Management, Inc. v. Paramount Engineering, Inc.*, 977 So. 2d 600, 603, (Fla. 4th DCA 2007).

Final Furnishing of Specially Fabricated Materials - Effect of the Bill

The bill provides that the final furnishing date for specially fabricated materials is the date that the last portion of the specially fabricated materials is delivered to the jobsite, or if any portion of the specially fabricated materials is not delivered to the jobsite by no fault of the material supplier, the final furnishing date is the later of:

- One year after the date the material supplier completes the fabrication;
- One year after the date the material supplier receives the last portion of the specially fabricated materials needed to complete the order; or
- The date the notice of commencement expires.

Claim of Lien - Current Law

A person may record a single claim of lien for multiple services or materials that are provided to different lots, parcels, or tracts of land (properties) as long as the multiple services or materials are under the same contract, the contract is directly with the owner, and the properties have the same owner.⁵⁹ However, a person may not record a single claim of lien for multiple services or materials if there is more than one contract, even if the contracts for services and materials are with the same owner.⁶⁰

Claim of Lien - Effect of the Bill

The bill provides that a person may record a single claim of lien for multiple services or materials for multiple contracts and multiple properties as long as the contracts are directly with the owner, and the owner is the same owner for all the contracts and properties.

Construction Lien Priority - Current Law

Construction liens have priority over any conveyance, encumbrance, or demand (debt) not recorded against the real property prior to the time the lien attaches. Any debt recorded prior to the time the lien attaches and any proceeds thereof, regardless of when disbursed, have priority over construction liens.⁶¹ However, under the common law doctrine of subrogation, any debt that is recorded after the time a lien attaches will take priority over the lien if the debt was obtained to satisfy a previous debt that was recorded prior to the time the construction lien attaches.⁶²

The doctrine of subrogation is the substitution of one party for another, where one party pays the debt of another party, entitling the paying party to rights, remedies, or securities (including priority) that would otherwise belong to the original debtor.⁶³ There are two types of subrogation: conventional and equitable.⁶⁴ Conventional subrogation occurs when parties who have recorded debts against real property agree that a person who pays the debt of one of the parties will have the rights, remedies, and securities of that party.⁶⁵ Equitable subrogation does not depend on a contract. It arises by operation of law to provide a remedy and prevent unjust enrichment.⁶⁶ Equitable subrogation applies when the person paying the debt or lien with higher priority: made the payment to protect his or her own interest; did not act as a volunteer; is not primarily liable for the debt he or she is paying; paid off the entire debt; and subrogating the person for the original debtor does not prejudice the rights of another debt holder.⁶⁷ If a person meets the requirements of equitable subrogation then he or she will have the

⁵⁹ S. 713.09, F.S.

⁶⁰ *Lee v. All Florida Construction Co.*, 662 So. 2d 365, 366-67 (Fla. 5th DCA 1995).

⁶¹ S. 713.07(3), F.S.

⁶² *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933); *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

⁶³ Black's Law Dictionary (11th ed. 2019).

⁶⁴ *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999).

⁶⁵ *Id.*

⁶⁶ *Federal Land Bank of Columbia v. Godwin*, 107 Fla. 537, 549-551 (Fla. 1933).

⁶⁷ *Bankers Lending Company, LLC v. Angela Jackson*, 253 So. 3d 1174, 1177 (Fla. 5th DCA 2018).

rights, remedies, and securities of the debt or lien he or she paid regardless if any other person with a debt or lien against the property agrees to it.⁶⁸

Construction Lien Priority - Effect of the Bill

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, *including* any debt that relates back to a debt recorded before the construction lien is recorded “pursuant to the operation of any common law doctrine or remedy.”

Notice of Commencement - Current Law

Before construction begins, a property owner or the owner’s authorized agent generally must file a notice of commencement for recording by the clerk of court in the official records. The notice of commencement must also be posted on the construction site, and filed with the building department before the first inspection.⁶⁹ The notice of commencement determines the priority of construction liens, provides details needed to fill out a notice to owner, establishes the date on which the statute of limitations begins to run, and protects owners from double payments.⁷⁰

Current law provides a statutory form for the notice of commencement, and the notice must be substantially similar to the form. The notice of commencement must contain information describing: the real property on which the improvement will be located; a general description of the improvement; the name and address of the owner and contractor; information relating to a surety bond, if a bond applies; the contact information for the lender for the project; contact information designated by the owner upon whom notices may be served; the notice’s expiration date; a warning in all caps stating that the notice must be recorded and payments after the notice expires could be improper and lead to the owner paying twice.⁷¹

The owner’s information required in the notice of commencement must include:⁷²

- The name and address of the owner or lessee if the lessee contracted for the work;
- The owner or lessee’s interest in the property;
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work;
- The name and address of the fee simple titleholder⁷³ (if different from the owner); and
- Any person designated by the owner to receive a claim of lien.

Notice of Commencement - Effect of the Bill

The bill repeals the requirement that the notice of commencement must include:

- The owner or lessee’s interest in the property; and
- A statement that the ownership interest is a leasehold interest if a lessee contracted for the work.

⁶⁸ *Id.*

⁶⁹ Ss. 713.13(1)(a), & 713.135(1)(d), F.S.

⁷⁰ *Stocking*, 76 So. 3d 313, 317; The Florida Senate Committee on Regulated Industries, *Review of the Florida Construction Lien Law*, November 2007, http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-149ri.pdf (last visited Jan. 6, 2020); Fred Dudley, William A. Buzzett, & Deborah Kaveney Kearney, *Construction Lien Law Reform: The Equilibrium of Change*, 18 Fla. St. U. L. Rev., 278 (1991).

⁷¹ S. 713.13(1)(a), F.S.

⁷² S. 713.13(1)(d), F.S.

⁷³ The construction lien law does not define fee simple titleholder; however, Black’s Law Dictionary defines fee simple title as an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs. Black’s Law Dictionary (11th ed. 2019).

Notice of Termination - Current Law

Current law allows an owner to terminate a notice of commencement before it expires. In order to terminate a notice of commencement, an owner must record a notice of termination that includes:⁷⁴

- All the information in the notice of commencement, including the notice of commencement's reference numbers in the official records of the clerk of court;
- The date which the notice of commencement is terminated, which may not be earlier than 30 days after the notice of termination is recorded;
- A statement that all persons who worked on the property have been paid in full; and
- A statement that the owner has served a copy of the notice of termination to every person with a direct contract with the owner and every person who served the owner with a notice to owner.

An owner may record a notice of termination after:⁷⁵

- The construction project has been completed; or
- Work stops on the project and every person who worked on the property has been paid in full.

If the owner serves a copy of the notice of termination on every person with a direct contract with the owner and who served a notice to owner, a notice of commencement will terminate 30 days after the notice of termination is recorded or on the termination date stated in the notice, whichever is later.⁷⁶

Notice of Termination - Effect of the Bill

The bill provides that an owner must serve a copy of the notice of termination on any person who timely serves a notice to the owner after the owner has recorded the notice of termination. The bill also provides that a notice of termination takes effect against such person 30 days after he or she receives the copy of the notice of termination. Further, the bill provides that the notice of termination must include a statement that the owner will serve a copy of the notice on any person who timely serves a notice to owner after the notice of termination has been recorded.

The bill allows an owner to record a notice of termination only after all persons who have worked on the property have been paid in full and removes the option for the owner to file a notice of termination after a construction project has completed. The bill also removes the requirement that a person may not record a notice of termination until work has stopped on the project, when choosing to record after every person has been paid in full.

Manner of Serving Documents - Current Law

Notices, claims, and waivers must be served by one of the following methods:⁷⁷

- By actual delivery to the person being served;
- By common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery; or
- By posting on the construction site if service cannot be performed by the other two methods.

Service by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is mailed, if it is:⁷⁸

- Sent to the last address shown in the notice of commencement or, in the absence of a notice, to the last address shown in the building permit application, or to the last known address of the person to be served; and

⁷⁴ S. 713.132(1), F.S.

⁷⁵ S. 713.132(3), F.S.

⁷⁶ S. 713.132(4), F.S.

⁷⁷ S. 713.18(1), F.S.

⁷⁸ 713.18(3), F.S.

- Returned as being “refused,” “moved, not forwardable,” or “unclaimed,” or is otherwise not delivered or deliverable through no fault of the person serving the item.

Manner of Serving Documents - Effect of the Bill

The bill provides that service by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail is effective on the day the notice, claim, or waiver is mailed or shipped.

Notice of Nonpayment for a Payment Bond - Current Law

Since a payment bond exempts the owner from having construction liens placed on their real property, the surety guarantees a subcontractor, laborer, or material supplier that they will receive payment from the general contractor. If the general contractor fails to pay, the subcontractor, laborer, or material supplier will seek payment from the surety. In order to receive protection under a payment bond for a public or private project, a subcontractor, laborer, or material supplier lacking a direct contract with the contractor must provide a written notice of nonpayment to the contractor and the surety.⁷⁹

Notice of Nonpayment for a Payment Bond - Effect of the Bill

The bill provides that a subcontractor, laborer, or material supplier must provide a notice of nonpayment to the general contractor and a copy of the notice of nonpayment to the surety.

Transfer of Liens to a Security - Current Law

If a lien is recorded against a piece of property, any person who has an interest in the property may have the lien transferred off the property and on to a security by depositing money with the clerk of court or filing a bond executed by a licensed surety insurer with the clerk of court.⁸⁰ The amount of money deposited or the bond must be in an amount that includes:⁸¹

- The amount of the lien;
- Interest for at least three years; and
- \$1,000 or 25 percent of the lien amount, whichever is greater.

Any person who has an interest in the security or the lien property may file an action in the civil court where the security is deposited to enforce a lien or to recover against the security. An action to enforce a transferred lien must be commenced within one year of filing the lien. If a person has filed an action to enforce a lien and the lien is transferred to a security, the person must file an action to recover against the lien within one year of the transfer.⁸²

Contractors can transfer liens filed by one of their subcontractors, laborers, or material suppliers to a security to appease an owner who is worried about their property. This allows a project to keep moving forward while still providing a remedy for non-payment.⁸³

Transfer of Liens to a Security - Effect of the Bill

The bill increases the amount required to transfer a lien by providing that the amount deposited or the amount of the bond, in addition to the amount of the lien and interest, must include \$1,000 or 35 percent of the lien amount, whichever is greater. The bill provides that a lien may also be transferred to a payment bond obtained by a subcontractor if:

- The lien is filed by a person working under the subcontractor;

⁷⁹ Ss. 255.05(2), & 713.23(1)(d), F.S.

⁸⁰ S. 713.24(1), F.S.

⁸¹ *Id.*

⁸² S. 713.24, F.S.

⁸³ Levelset, *Primer on Mechanics Lien Bonds and Bonding a Mechanics Lien*, (Aug. 29, 2019), <https://www.levelset.com/blog/primer-on-mechanic-lien-bonds-and-bonding-off-a-mechanics-lien/> (last visited Jan. 6, 2020).

- The lien is not filed by the subcontractor or the contractor; and
- The subcontractor obtained the payment bond at the time of beginning work.

Any provision in the subcontractor's payment bond is unenforceable if it:

- Restricts the classes of persons who may file a claim against the bond;
- Restricts the venue of any proceeding involving the bond;
- Limits or expands the duration of the bond; or
- Includes any additional condition required to enforce a claim for a payment against the bond that is not required by the construction lien law.

Attorney's Fees - Current Law

The prevailing party in an action to enforce a lien or a claim against a bond is entitled to reasonable attorney's fees.

Attorney's Fees - Effect of the Bill

The bill provides that a prevailing party in an action to enforce a lien transferred to a security is also entitled to reasonable attorney's fees.

B. SECTION DIRECTORY:

- Section 1.** Amends s. 255.05, F.S., relating to bonds of contractor constructing public buildings; form; action by claimants.
- Section 2.** Amends s. 337.18, F.S., relating to surety bonds for construction or maintenance contracts; requirement with respect to contract award; bond requirements; defaults; damage assessments.
- Section 3.** Amends s. 713.01, F.S., relating to definitions.
- Section 4.** Amends s. 713.07, F.S., relating to priority of liens.
- Section 5.** Amends s. 713.09, F.S., relating to single claim of lien.
- Section 6.** Amends s. 713.13, F.S., relating to notice of commencement.
- Section 7.** Amends s. 713.132, F.S., relating to notice of termination.
- Section 8.** Amends s. 713.18, F.S., relating to manner of serving notices and other instruments.
- Section 9.** Amends s. 713.20, F.S., relating to waiver or release of liens.
- Section 10.** Amends s. 713.23, F.S., relating to payment bond.
- Section 11.** Amends s. 713.235, F.S., relating to waivers of right to claim against payment bond; forms.
- Section 12.** Amends s. 713.24, F.S., relating to transfer of liens to security.
- Section 13.** Amends s. 713.29, F.S., relating to attorney's fees.
- Section 14.** Provides an effective date of July 1, 2020.

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:

Unknown.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to effect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that construction liens have priority over any debt not recorded against the real property prior to the time the lien attaches, including any debt that relates back to a debt recorded before the construction lien is recorded pursuant to the operation of "any common law doctrine or remedy." It is not clear exactly what "pursuant to the operation of any common law doctrine or remedy" means or how many common law doctrines or remedies exist. Thus, the effect of this provision is unknown.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 11, 2019, the Business & Professions Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Provided that a subcontractor may not be required to sign a waiver or release of lien that is different from the form provided in statute in exchange for payment;
- Prohibited any provisions in a waiver or release of lien that are not related to the waiver or release unless the subcontractor has agreed to those provisions in their initial contract.
- Provided that the statutory requirements for waivers of right to claim against a bond for public construction projects also apply to DOT construction projects.

- Provided that licensed building and general contractors who provide construction management services may record a construction lien.
- Provided that construction liens may be filed against a lease when a construction project is for a private entity leasing public property.
- Provided that a person may file one claim of lien for multiple contracts with the same owner.
- Removed the use of the term “owner of record” from the notice of commencement thereby maintaining current law.
- Provided that an owner may not record a notice of termination until each person who worked on the property has been paid.
- Provided that an owner must provide a copy of the notice of termination to a person who timely serves a notice to owner after the notice of termination has been recorded.
- Allowed a lien to be transferred to a payment bond obtained by a subcontractor if the person who filed the lien is working for the subcontractor.
- Increased the amount needed to obtain a bond in order to transfer a lien to the bond.
- Provided that a prevailing party is entitled to attorney’s fees in actions to enforce liens that have been transferred to bonds.

1 A bill to be entitled
2 An act relating to liens and bonds; amending s.
3 255.05, F.S.; requiring that a copy of a notice of
4 nonpayment be served on the surety; prohibiting a
5 person from requiring a claimant to furnish a certain
6 waiver in exchange for or to induce certain payments;
7 providing that specified provisions in certain waivers
8 are unenforceable; providing an exception; amending s.
9 337.18, F.S.; providing that certain waivers apply to
10 certain contracts; amending s. 713.01, F.S.; revising
11 definitions; amending s. 713.07, F.S.; providing that
12 certain liens have priority over certain subordinate
13 conveyances, encumbrances, or demands; amending s.
14 713.09, F.S.; authorizing a lienor to record one claim
15 of lien for multiple direct contracts; amending s.
16 713.13, F.S.; revising information to be included in a
17 notice of commencement; amending s. 713.132, F.S.;
18 revising requirements for a notice of termination;
19 amending s. 713.18, F.S.; providing that service of an
20 instrument is effective on the date of shipping;
21 amending ss. 713.20 and 713.235, F.S.; prohibiting a
22 person from requiring a lienor to furnish a certain
23 waiver or release in exchange for or to induce certain
24 payments; providing that specified provisions in
25 certain waivers or releases are unenforceable;

26 providing an exception; amending s. 713.23, F.S.;

27 requiring that a copy of a notice of nonpayment be

28 served on the surety; amending s. 713.24, F.S.;

29 revising the process to transfer a lien to security;

30 revising the amounts of certain deposits or bonds;

31 amending s. 713.29, F.S.; authorizing attorney fees in

32 actions to enforce a lien that has been transferred to

33 security; providing an effective date.

34

35 Be It Enacted by the Legislature of the State of Florida:

36

37 Section 1. Paragraphs (a), (d), and (f) of subsection (2)

38 of section 255.05, Florida Statutes, are amended to read:

39 255.05 Bond of contractor constructing public buildings;

40 form; action by claimants.—

41 (2) (a) 1. If a claimant is no longer furnishing labor,

42 services, or materials on a project, a contractor or the

43 contractor's agent or attorney may elect to shorten the time

44 within which an action to enforce any claim against a payment

45 bond must be commenced by recording in the clerk's office a

46 notice in substantially the following form:

47 NOTICE OF CONTEST OF CLAIM

48 AGAINST PAYMENT BOND

49 To: ... (Name and address of claimant) ...

50 You are notified that the undersigned contests your notice

51 of nonpayment, dated,, and served on the
 52 undersigned on,, and that the time within
 53 which you may file suit to enforce your claim is limited to 60
 54 days after the date of service of this notice.

55 DATED on,

56 Signed: ...(Contractor or Attorney)...

57 The claim of a claimant upon whom such notice is served and who
 58 fails to institute a suit to enforce his or her claim against
 59 the payment bond within 60 days after service of such notice is
 60 extinguished automatically. The contractor or the contractor's
 61 attorney shall serve a copy of the notice of contest on ~~to~~ the
 62 claimant at the address shown in the notice of nonpayment or
 63 most recent amendment thereto and shall certify to such service
 64 on the face of the notice and record the notice.

65 2. A claimant, except a laborer, who is not in privity
 66 with the contractor shall, before commencing or not later than
 67 45 days after commencing to furnish labor, services, or
 68 materials for the prosecution of the work, serve the contractor
 69 with a written notice that he or she intends to look to the bond
 70 for protection. A claimant who is not in privity with the
 71 contractor and who has not received payment for furnishing his
 72 or her labor, services, or materials shall serve a written
 73 notice of nonpayment on the contractor and a copy of the notice
 74 on the surety. The notice of nonpayment shall be under oath and
 75 served during the progress of the work or thereafter but may not

76 | be served earlier than 45 days after the first furnishing of
77 | labor, services, or materials by the claimant or later than 90
78 | days after the final furnishing of the labor, services, or
79 | materials by the claimant or, with respect to rental equipment,
80 | later than 90 days after the date that the rental equipment was
81 | last on the job site available for use. Any notice of nonpayment
82 | served by a claimant who is not in privity with the contractor
83 | which includes sums for retainage must specify the portion of
84 | the amount claimed for retainage. An action for the labor,
85 | services, or materials may not be instituted against the
86 | contractor or the surety unless the notice to the contractor and
87 | notice of nonpayment have been served, if required by this
88 | section. Notices required or permitted under this section must
89 | be served in accordance with s. 713.18. A claimant may not waive
90 | in advance his or her right to bring an action under the bond
91 | against the surety. In any action brought to enforce a claim
92 | against a payment bond under this section, the prevailing party
93 | is entitled to recover a reasonable fee for the services of his
94 | or her attorney for trial and appeal or for arbitration, in an
95 | amount to be determined by the court, which fee must be taxed as
96 | part of the prevailing party's costs, as allowed in equitable
97 | actions. The time periods for service of a notice of nonpayment
98 | or for bringing an action against a contractor or a surety are
99 | ~~shall be~~ measured from the last day of furnishing labor,
100 | services, or materials by the claimant and may not be measured

101 | by other standards, such as the issuance of a certificate of
 102 | occupancy or the issuance of a certificate of substantial
 103 | completion. The negligent inclusion or omission of any
 104 | information in the notice of nonpayment that has not prejudiced
 105 | the contractor or surety does not constitute a default that
 106 | operates to defeat an otherwise valid bond claim. A claimant who
 107 | serves a fraudulent notice of nonpayment forfeits his or her
 108 | rights under the bond. A notice of nonpayment is fraudulent if
 109 | the claimant has willfully exaggerated the amount unpaid,
 110 | willfully included a claim for work not performed or materials
 111 | not furnished for the subject improvement, or prepared the
 112 | notice with such willful and gross negligence as to amount to a
 113 | willful exaggeration. However, a minor mistake or error in a
 114 | notice of nonpayment, or a good faith dispute as to the amount
 115 | unpaid, does not constitute a willful exaggeration that operates
 116 | to defeat an otherwise valid claim against the bond. The service
 117 | of a fraudulent notice of nonpayment is a complete defense to
 118 | the claimant's claim against the bond. The notice of nonpayment
 119 | under this subparagraph must include the following information,
 120 | current as of the date of the notice, and must be in
 121 | substantially the following form:

122 | NOTICE OF NONPAYMENT

123 | To: ...(name of contractor and address)...

124 | ...(name of surety and address)...

125 | The undersigned claimant notifies you that:

151 Personally Known OR Produced Identification
 152 Type of Identification Produced.....

153 (d) A person may not require a claimant to furnish a
 154 waiver that is different from the forms in paragraphs (b) and
 155 (c) in exchange for, or to induce payment of, a progress payment
 156 or final payment, unless the claimant has entered into a direct
 157 contract that requires the claimant to furnish a waiver that is
 158 different from the forms in paragraphs (b) and (c).

159 (f) Any provisions in a waiver that are ~~is~~ not related to
 160 the waiver of right to claim against a payment bond as provided
 161 in this subsection are unenforceable, unless the claimant has
 162 otherwise agreed to those provisions in the claimant's direct
 163 contract substantially similar to the forms in this subsection
 164 is enforceable in accordance with its terms.

165 Section 2. Paragraph (c) of subsection (1) of section
 166 337.18, Florida Statutes, is amended to read:

167 337.18 Surety bonds for construction or maintenance
 168 contracts; requirement with respect to contract award; bond
 169 requirements; defaults; damage assessments.-

170 (1)

171 (c) A claimant, except a laborer, who is not in privity
 172 with the contractor shall, before commencing or not later than
 173 90 days after commencing to furnish labor, materials, or
 174 supplies for the prosecution of the work, furnish the contractor
 175 with a notice that he or she intends to look to the bond for

176 protection. A claimant who is not in privity with the contractor
177 and who has not received payment for his or her labor,
178 materials, or supplies shall deliver to the contractor and to
179 the surety written notice of the performance of the labor or
180 delivery of the materials or supplies and of the nonpayment. The
181 notice of nonpayment may be served at any time during the
182 progress of the work or thereafter but not before 45 days after
183 the first furnishing of labor, services, or materials, and not
184 later than 90 days after the final furnishing of the labor,
185 services, or materials by the claimant or, with respect to
186 rental equipment, not later than 90 days after the date that the
187 rental equipment was last on the job site available for use. An
188 action by a claimant, except a laborer, who is not in privity
189 with the contractor for the labor, materials, or supplies may
190 not be instituted against the contractor or the surety unless
191 both notices have been given. Notices required or permitted
192 under this section may be served in any manner provided in s.
193 713.18, and provisions for the waiver of claims against a
194 payment bond contained in s. 255.05(2) apply to all contracts
195 under this section.

196 Section 3. Subsections (8), (12), and (26) of section
197 713.01, Florida Statutes, are amended to read:

198 713.01 Definitions.—As used in this part, the term:

199 (8) "Contractor" means a person other than a materialman
200 or laborer who enters into a contract with the owner of real

201 property for improving it, or who takes over from a contractor
 202 as so defined the entire remaining work under such contract. The
 203 term "contractor" includes an architect, landscape architect, or
 204 engineer who improves real property pursuant to a design-build
 205 contract authorized by s. 489.103(16). The term "contractor"
 206 also includes a licensed general contractor or building
 207 contractor, as those terms are defined in s. 489.105(3) (a) and
 208 (b), who provides construction management services, which
 209 include responsibility for scheduling and coordination in both
 210 preconstruction and construction phases and for the successful,
 211 timely, and economical completion of the construction project,
 212 or who provides program management services, which include
 213 responsibility for schedule control, cost control, and
 214 coordination in providing or procuring planning, design, and
 215 construction.

216 (12) "Final furnishing" means the last date that the
 217 lienor furnishes labor, services, or materials. Such date may
 218 not be measured by other standards, such as the issuance of a
 219 certificate of occupancy or the issuance of a certificate of
 220 final completion, and does not include the correction of
 221 deficiencies in the lienor's previously performed work or
 222 materials supplied. With respect to rental equipment, the term
 223 means the date that the rental equipment was last on the ~~job~~
 224 site of the improvement and available for use. With respect to
 225 specialty fabricated materials, the term means the date that the

226 last portion of the specially fabricated materials is delivered
 227 to the site of the improvement, or if any portion of the
 228 specially fabricated materials is not delivered to the site of
 229 the improvement by no fault of the lienor, the term means 1 year
 230 after the date the lienor completes the fabrication, 1 year
 231 after the date the lienor receives the last portion of the
 232 specially fabricated materials needed to complete the order, or
 233 the date the notice of commencement expires, whichever is later.

234 (26) "Real property" means the land that is improved and
 235 the improvements thereon, including fixtures, except any such
 236 property owned by the state or any county, municipality, school
 237 board, or governmental agency, commission, or political
 238 subdivision, provided, however, that a private leasehold
 239 interest in such government-owned property which is improved and
 240 the leasehold improvements shall be considered real property for
 241 purposes of this part.

242 Section 4. Subsection (3) of section 713.07, Florida
 243 Statutes, is amended to read:

244 713.07 Priority of liens.—

245 (3) All such liens shall have priority over any
 246 conveyance, encumbrance, or demand not recorded against the real
 247 property before ~~prior to~~ the time such lien attached as provided
 248 herein, including those subordinate conveyances, encumbrances,
 249 or demands that would otherwise relate back to any conveyance,
 250 encumbrance, or demand recorded before the time such lien

251 attaches pursuant to the operation of any common law doctrine or
252 remedy; but any conveyance, encumbrance, or demand recorded
253 before ~~prior to~~ the time such lien attaches and any proceeds
254 thereof, regardless of when disbursed, shall have priority over
255 such liens.

256 Section 5. Section 713.09, Florida Statutes, is amended to
257 read:

258 713.09 Single claim of lien.—A lienor may ~~is required to~~
259 record only one claim of lien covering his or her entire demand
260 against the real property when the amount demanded is for labor
261 or services or material furnished for more than one improvement
262 under the same direct contract or multiple direct contracts. The
263 single claim of lien is sufficient even though the improvement
264 is for one or more improvements located on separate lots,
265 parcels, or tracts of land. If materials to be used on one or
266 more improvements on separate lots, parcels, or tracts of land
267 ~~under one direct contract~~ are delivered by a lienor to a place
268 designated by the person with whom the materialman contracted,
269 other than the site of the improvement, the delivery to the
270 place designated is prima facie evidence of delivery to the site
271 of the improvement and incorporation in the improvement. The
272 single claim of lien may be limited to a part of multiple lots,
273 parcels, or tracts of land and their improvements or may cover
274 all of the lots, parcels, or tracts of land and improvements. If
275 a ~~In each~~ claim of lien under this section is for multiple

276 direct contracts, the owner under the direct contracts ~~contract~~
277 must be the same person for all lots, parcels, or tracts of land
278 against which a single claim of lien is recorded.

279 Section 6. Paragraphs (a) and (d) of subsection (1) of
280 section 713.13, Florida Statutes, are amended to read:

281 713.13 Notice of commencement.—

282 (1) (a) Except for an improvement that is exempt under
283 ~~pursuant to~~ s. 713.02(5), an owner or the owner's authorized
284 agent before actually commencing to improve any real property,
285 or recommencing completion of any improvement after default or
286 abandonment, whether or not a project has a payment bond
287 complying with s. 713.23, shall record a notice of commencement
288 in the clerk's office and forthwith post either a certified copy
289 thereof or a notarized statement that the notice of commencement
290 has been filed for recording along with a copy thereof. The
291 notice of commencement shall contain the following information:

292 1. A description sufficient for identification of the real
293 property to be improved. The description should include the
294 legal description of the property and also should include the
295 street address and tax folio number of the property if available
296 or, if there is no street address available, such additional
297 information as will describe the physical location of the real
298 property to be improved.

299 2. A general description of the improvement.

300 3. The name and address of the owner, the owner's interest

301 in the site of the improvement, and the name and address of the
 302 fee simple titleholder, if other than such owner.

303 4. The name and address of the lessee, if the ~~A~~ lessee ~~who~~
 304 contracts for the improvements as is an owner as defined in s.
 305 713.01 ~~under s. 713.01(23)~~ and ~~must be listed as the owner~~
 306 ~~together with a statement that the ownership interest is a~~
 307 ~~leasehold interest.~~

308 ~~5.4.~~ The name and address of the contractor.

309 ~~6.5.~~ The name and address of the surety on the payment
 310 bond under s. 713.23, if any, and the amount of such bond.

311 ~~7.6.~~ The name and address of any person making a loan for
 312 the construction of the improvements.

313 ~~8.7.~~ The name and address within the state of a person
 314 other than himself or herself who may be designated by the owner
 315 as the person upon whom notices or other documents may be served
 316 under this part; and service upon the person so designated
 317 constitutes service upon the owner.

318 (d) A notice of commencement must be in substantially the
 319 following form:

320 Permit No..... Tax Folio No.....

321 NOTICE OF COMMENCEMENT

322 State of....

323 County of....

324 The undersigned hereby gives notice that improvement will be
 325 made to certain real property, and in accordance with Chapter

326 713, Florida Statutes, the following information is provided in
 327 this Notice of Commencement.

328 1. Description of property: ...(legal description of the
 329 property, and street address if available)....

330 2. General description of improvement:.....

331 3.a. Owner: ...(name and address)....

332 b. Owner's phone number:.....

333 4.a. Lessee, if the lessee contracted for the
 334 improvements: ...(name and address)....

335 b. Lessee's phone number:..... ~~owner information or Lessee~~
 336 ~~information if the Lessee contracted for the improvement:~~

337 ~~a. Name and address:.....~~

338 ~~b. Interest in property:.....~~

339 c. Name and address of fee simple titleholder (if
 340 different from Owner listed above):.....

341 ~~5.a.4.a.~~ Contractor: ...(name and address)....

342 b. Contractor's phone number:.....

343 ~~6.5.~~ Surety (if applicable, a copy of the payment bond is
 344 attached):

345 a. Name and address:.....

346 b. Phone number:.....

347 c. Amount of bond: \$.....

348 ~~7.a.6.a.~~ Lender: ...(name and address)....

349 b. Lender's phone number:.....

350 ~~8.7.~~ Persons within the State of Florida designated by

351 Owner upon whom notices or other documents may be served as
 352 provided in ~~by~~ Section 713.13(1)(a)8. ~~713.13(1)(a)7.~~, Florida
 353 Statutes:

354 a. Name and address:.....

355 b. Phone numbers of designated persons:.....

356 9.a.8.a. ~~9.a.8.a.~~ In addition to himself or herself, Owner
 357 designates of to receive a copy of the
 358 Lienor's Notice as provided in Section 713.13(1)(b), Florida
 359 Statutes.

360 b. Phone number of person or entity designated by
 361 owner:.....

362 10.9. ~~10.9.~~ Expiration date of notice of commencement (the
 363 expiration date will be 1 year after ~~from~~ the date of recording
 364 unless a different date is specified).....

365 WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE
 366 EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER
 367 PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA
 368 STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS
 369 TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND
 370 POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU
 371 INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN
 372 ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF
 373 COMMENCEMENT.

374 ... (Signature of Owner or Lessee, or Owner's or Lessee's
 375 Authorized Officer/Director/Partner/Manager) ...

376 ... (Signatory's Title/Office)...

377 The foregoing instrument was acknowledged before me this

378 day of, ... (year) ..., by ... (name of person) ... as ... (type

379 of authority, . . . e.g. officer, trustee, attorney in

380 fact) ... for ... (name of party on behalf of whom instrument was

381 executed)

382 ... (Signature of Notary Public - State of Florida)...

383 ... (Print, Type, or Stamp Commissioned Name of Notary Public)...

384 Personally Known OR Produced Identification

385 Type of Identification Produced.....

386 Section 7. Paragraphs (b) and (f) of subsection (1) and

387 subsections (3) and (4) of section 713.132, Florida Statutes,

388 are amended to read:

389 713.132 Notice of termination.—

390 (1) An owner may terminate the period of effectiveness of

391 a notice of commencement by executing, swearing to, and

392 recording a notice of termination that contains:

393 (b) The recording office document with the ~~book and page~~

394 reference numbers and date of the notice of commencement;

395 (f) A statement that the owner has, before recording the

396 notice of termination, served a copy of the notice of

397 termination ~~on the contractor and~~ on each lienor who has a

398 direct contract with the owner or who has timely served a notice

399 to owner, and a statement that the owner will serve a copy of

400 the notice of termination on each lienor who timely serves a

401 notice to owner after the notice of termination has been
402 recorded. The owner is not required to serve a copy of the
403 notice of termination on any lienor who has executed a waiver
404 and release of lien upon final payment in accordance with s.
405 713.20.

406 (3) An owner may ~~not~~ record a notice of termination at any
407 time after ~~except after completion of construction, or after~~
408 ~~construction ceases before completion and all lienors have been~~
409 paid in full or pro rata in accordance with s. 713.06(4).

410 (4) If an owner or a contractor, by fraud or collusion,
411 knowingly makes any fraudulent statement or affidavit in a
412 notice of termination or any accompanying affidavit, the owner
413 and the contractor, or either of them, ~~as the case may be,~~ is
414 liable to any lienor who suffers damages as a result of the
415 filing of the fraudulent notice of termination, ~~and~~ and any such
416 lienor has a right of action for damages ~~occasioned thereby~~.

417 (5) ~~(4)~~ A notice of termination must be served before
418 recording on each lienor who has a direct contract with the
419 owner and on each lienor who has timely and properly served a
420 notice to owner in accordance with this part. A notice of
421 termination must be recorded in the public records of the county
422 in which the project is located. If properly served before
423 recording in accordance with this subsection, the notice of
424 commencement terminates 30 days after the notice of termination
425 is recorded in the public records ~~is effective to terminate the~~

426 ~~notice of commencement at the later of 30 days after recording~~
427 ~~of the notice of termination or a later~~ the date stated in the
428 notice of termination as the date on which the notice of
429 commencement is terminated. However, if a lienor, who began work
430 under the notice of commencement before its termination, lacks a
431 direct contract with the owner, and timely serves his or her
432 notice to owner after the notice of termination has been
433 recorded, the owner must serve a copy of the notice of
434 termination upon such lienor, and the termination of the notice
435 of commencement as to that lienor is effective 30 days after
436 service of the notice of termination ~~if the notice of~~
437 ~~termination has been served pursuant to paragraph (1)(f) on the~~
438 ~~contractor and on each lienor who has a direct contract with the~~
439 ~~owner or who has served a notice to owner.~~

440 Section 8. Paragraph (a) of subsection (3) of section
441 713.18, Florida Statutes, is amended to read:

442 713.18 Manner of serving notices and other instruments.—

443 (3) (a) Service of an instrument pursuant to this section
444 is effective on the date of mailing or shipping the instrument
445 if it:

446 1. Is sent to the last address shown in the notice of
447 commencement or any amendment thereto or, in the absence of a
448 notice of commencement, to the last address shown in the
449 building permit application, or to the last known address of the
450 person to be served; and

451 2. Is returned as being "refused," "moved, not
 452 forwardable," or "unclaimed," or is otherwise not delivered or
 453 deliverable through no fault of the person serving the item.

454 Section 9. Subsections (6) and (8) of section 713.20,
 455 Florida Statutes, are amended to read:

456 713.20 Waiver or release of liens.—

457 (6) A person may not require a lienor to furnish a lien
 458 waiver or release of lien that is different from the forms in
 459 subsection (4) or subsection (5) in exchange for, or to induce
 460 payment of, a progress payment or final payment, unless the
 461 lienor has entered into a direct contract that requires the
 462 lienor to furnish a waiver or release that is different from the
 463 forms in subsection (4) or subsection (5).

464 (8) Any provisions in a lien waiver or lien release that
 465 are ~~is~~ not related to the waiver or release of lien rights as
 466 provided in this section are unenforceable, unless the lienor
 467 has otherwise agreed to those provisions in the lienor's direct
 468 contract substantially similar to the forms in subsections (4)
 469 and (5) is enforceable in accordance with the terms of the lien
 470 waiver or lien release.

471 Section 10. Paragraph (d) of subsection (1) of section
 472 713.23, Florida Statutes, is amended to read:

473 713.23 Payment bond.—

474 (1)

475 (d) In addition, a lienor who has not received payment for

476 | furnishing his or her labor, services, or materials must, as a
477 | condition precedent to recovery under the bond, serve a written
478 | notice of nonpayment on ~~to~~ the contractor and a copy of the
479 | notice on the surety. The notice must be under oath and served
480 | during the progress of the work or thereafter, but may not be
481 | served later than 90 days after the final furnishing of labor,
482 | services, or materials by the lienor, or, with respect to rental
483 | equipment, later than 90 days after the date the rental
484 | equipment was on the job site and available for use. A notice of
485 | nonpayment that includes sums for retainage must specify the
486 | portion of the amount claimed for retainage. The required notice
487 | satisfies this condition precedent with respect to the payment
488 | described in the notice of nonpayment, including unpaid finance
489 | charges due under the lienor's contract, and with respect to any
490 | other payments which become due to the lienor after the date of
491 | the notice of nonpayment. The time period for serving a notice
492 | of nonpayment is ~~shall be~~ measured from the last day of
493 | furnishing labor, services, or materials by the lienor and may
494 | not be measured by other standards, such as the issuance of a
495 | certificate of occupancy or the issuance of a certificate of
496 | substantial completion. The failure of a lienor to receive
497 | retainage sums not in excess of 10 percent of the value of
498 | labor, services, or materials furnished by the lienor is not
499 | considered a nonpayment requiring the service of the notice
500 | provided under this paragraph. If the payment bond is not

501 recorded before commencement of construction, the time period
502 for the lienor to serve a notice of nonpayment may at the option
503 of the lienor be calculated from the date specified in this
504 section or the date the lienor is served a copy of the bond.
505 However, the limitation period for commencement of an action on
506 the payment bond as established in paragraph (e) may not be
507 expanded. The negligent inclusion or omission of any information
508 in the notice of nonpayment that has not prejudiced the
509 contractor or surety does not constitute a default that operates
510 to defeat an otherwise valid bond claim. A lienor who serves a
511 fraudulent notice of nonpayment forfeits his or her rights under
512 the bond. A notice of nonpayment is fraudulent if the lienor has
513 willfully exaggerated the amount unpaid, willfully included a
514 claim for work not performed or materials not furnished for the
515 subject improvement, or prepared the notice with such willful
516 and gross negligence as to amount to a willful exaggeration.
517 However, a minor mistake or error in a notice of nonpayment, or
518 a good faith dispute as to the amount unpaid, does not
519 constitute a willful exaggeration that operates to defeat an
520 otherwise valid claim against the bond. The service of a
521 fraudulent notice of nonpayment is a complete defense to the
522 lienor's claim against the bond. The notice under this paragraph
523 must include the following information, current as of the date
524 of the notice, and must be in substantially the following form:

525 NOTICE OF NONPAYMENT

526 To ...(name of contractor and address)...

527 ...(name of surety and address)...

528 The undersigned lienor notifies you that:

529 1. The lienor has furnished ...(describe labor, services,

530 or materials)... for the improvement of the real property

531 identified as ...(property description).... The corresponding

532 amount unpaid to date is \$...., of which \$.... is unpaid

533 retainage.

534 2. The lienor has been paid to date the amount of \$....

535 for previously furnishing ...(describe labor, services, or

536 materials)... for this improvement.

537 3. The lienor expects to furnish ...(describe labor,

538 services, or materials)... for this improvement in the future

539 (if known), and the corresponding amount expected to become due

540 is \$.... (if known).

541 I declare that I have read the foregoing Notice of Nonpayment

542 and that the facts stated in it are true to the best of my

543 knowledge and belief.

544 DATED on,

545 ...(signature and address of lienor)...

546 STATE OF FLORIDA

547 COUNTY OF.....

548 The foregoing instrument was sworn to (or affirmed) and

549 subscribed before me this day of, ...(year)...., by

550 ...(name of signatory)....

551 ...(Signature of Notary Public - State of Florida)...

552 ...(Print, Type, or Stamp Commissioned Name of Notary

553 Public)...

554 Personally Known OR Produced Identification

555 Type of Identification Produced.....

556 Section 11. Subsections (3) and (5) of section 713.235,

557 Florida Statutes, are amended to read:

558 713.235 Waivers of right to claim against payment bond;

559 forms.-

560 (3) A person may not require a claimant to furnish a

561 waiver that is different from the forms in subsections (1) and

562 (2) in exchange for, or to induce payment of, a progress payment

563 or final payment, unless the claimant has entered into a direct

564 contract that requires the claimant to furnish a waiver that is

565 different from the forms in subsections (1) and (2).

566 (5) Any provisions in a waiver that are ~~is~~ not related to

567 the waiver of a claim against the payment bond as provided in

568 this section are unenforceable, unless the claimant has

569 otherwise agreed to those provisions in the claimant's direct

570 contract ~~substantially similar to the forms in this section is~~

571 ~~enforceable in accordance with its terms.~~

572 Section 12. Subsection (1) of section 713.24, Florida

573 Statutes, is amended to read:

574 713.24 Transfer of liens to security.-

575 (1) Any lien claimed under this part may be transferred,

576 by any person having an interest in the real property upon which
577 the lien is imposed or the contract under which the lien is
578 claimed, from such real property to other security by doing one
579 of the following either:

580 (a) Depositing in the clerk's office a sum of money; ~~or~~

581 (b) Recording ~~Filing~~ in the clerk's office a bond executed
582 as surety by a surety insurer licensed to do business in this
583 state; or

584 (c) Recording in the clerk's office a bond executed as
585 surety by a surety insurer licensed to do business in this
586 state, which was furnished by a subcontractor under whose
587 subcontract the lienor's claim emanates, and which must be
588 recorded and served with a notice of bond in the same manner as
589 a payment bond furnished under s. 713.23(2). For purposes of
590 this paragraph, the subcontract payment bond must have been
591 furnished at the time the subcontractor's work commenced and
592 before the claim of lien was recorded. The subcontract payment
593 bond may not be used to transfer a lien of the contractor or the
594 subcontractor that is the principal on the subcontract payment
595 bond. Any provision in the subcontract payment bond that
596 restricts the classes of persons who are protected by the
597 subcontract payment bond, restricts the venue of any proceeding
598 relating to the subcontract payment bond, limits or expands the
599 effective duration of the subcontract payment bond, or includes
600 conditions precedent to the enforcement of a claim against the

601 subcontract payment bond beyond those provided in this part is
602 unenforceable.

603
604 Such deposit or bond must ~~either~~ to be in an amount at least
605 equal to the amount demanded in such claim of lien, plus
606 interest thereon at the legal rate for 3 years, plus \$1,000 or
607 35 ~~25~~ percent of the amount demanded in the claim of lien,
608 whichever is greater, to apply on any attorney ~~attorney's~~ fees
609 and court costs that may be taxed in any proceeding to enforce
610 said lien. Such deposit or bond shall be conditioned to pay any
611 judgment or decree which may be rendered for the satisfaction of
612 the lien for which such claim of lien was recorded. Upon making
613 such deposit or filing such bond, the clerk shall make and
614 record a certificate showing the transfer of the lien from the
615 real property to the security and shall mail a copy thereof by
616 registered or certified mail to the lienor named in the claim of
617 lien so transferred, at the address stated therein. Upon filing
618 the certificate of transfer, the real property shall thereupon
619 be released from the lien claimed, and such lien shall be
620 transferred to said security. In the absence of allegations of
621 privity between the lienor and the owner, and subject to any
622 order of the court increasing the amount required for the lien
623 transfer deposit or bond, no other judgment or decree to pay
624 money may be entered by the court against the owner. The clerk
625 shall be entitled to a service charge for making and serving the

626 certificate, in the amount of up to \$20, from which the clerk
627 shall remit \$5 to the Department of Revenue for deposit into the
628 General Revenue Fund. If the transaction involves the transfer
629 of multiple liens, an additional charge of up to \$10 for each
630 additional lien shall be charged, from which the clerk shall
631 remit \$2.50 to the Department of Revenue for deposit into the
632 General Revenue Fund. For recording the certificate and
633 approving the bond, the clerk shall receive her or his usual
634 statutory service charges as prescribed in s. 28.24. Any number
635 of liens may be transferred to one such security.

636 Section 13. Section 713.29, Florida Statutes, is amended
637 to read:

638 713.29 Attorney ~~Attorney's~~ fees.—In any action brought to
639 enforce a lien, including a lien that has been transferred to
640 security, or to enforce a claim against a bond under this part,
641 the prevailing party is entitled to recover a reasonable fee for
642 the services of her or his attorney for trial and appeal or for
643 arbitration, in an amount to be determined by the court, which
644 fee must be taxed as part of the prevailing party's costs, as
645 allowed in equitable actions.

646 Section 14. This act shall take effect July 1, 2020.

Amendment No.

AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

You are notified that the undersigned contests your notice of nonpayment, dated,, and served on the undersigned on,, and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on,

Signed: ...(Contractor or Attorney)...

The claim of a claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice is extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest on ~~to~~ the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, serve the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for furnishing his or her labor, services, or materials shall serve a written

Amendment No.

42 notice of nonpayment on the contractor and a copy of the notice
43 on the surety. The notice of nonpayment shall be under oath and
44 served during the progress of the work or thereafter but may not
45 be served earlier than 45 days after the first furnishing of
46 labor, services, or materials by the claimant or later than 90
47 days after the final furnishing of the labor, services, or
48 materials by the claimant or, with respect to rental equipment,
49 later than 90 days after the date that the rental equipment was
50 last on the job site available for use. Any notice of nonpayment
51 served by a claimant who is not in privity with the contractor
52 which includes sums for retainage must specify the portion of
53 the amount claimed for retainage. An action for the labor,
54 services, or materials may not be instituted against the
55 contractor or the surety unless the notice to the contractor and
56 notice of nonpayment have been served, if required by this
57 section. Notices required or permitted under this section must
58 be served in accordance with s. 713.18. A claimant may not waive
59 in advance his or her right to bring an action under the bond
60 against the surety. In any action brought to enforce a claim
61 against a payment bond under this section, the prevailing party
62 is entitled to recover a reasonable fee for the services of his
63 or her attorney for trial and appeal or for arbitration, in an
64 amount to be determined by the court, which fee must be taxed as
65 part of the prevailing party's costs, as allowed in equitable
66 actions. The time periods for service of a notice of nonpayment

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

67 or for bringing an action against a contractor or a surety are
68 ~~shall be~~ measured from the last day of furnishing labor,
69 services, or materials by the claimant and may not be measured
70 by other standards, such as the issuance of a certificate of
71 occupancy or the issuance of a certificate of substantial
72 completion. The negligent inclusion or omission of any
73 information in the notice of nonpayment that has not prejudiced
74 the contractor or surety does not constitute a default that
75 operates to defeat an otherwise valid bond claim. A claimant who
76 serves a fraudulent notice of nonpayment forfeits his or her
77 rights under the bond. A notice of nonpayment is fraudulent if
78 the claimant has willfully exaggerated the amount unpaid,
79 willfully included a claim for work not performed or materials
80 not furnished for the subject improvement, or prepared the
81 notice with such willful and gross negligence as to amount to a
82 willful exaggeration. However, a minor mistake or error in a
83 notice of nonpayment, or a good faith dispute as to the amount
84 unpaid, does not constitute a willful exaggeration that operates
85 to defeat an otherwise valid claim against the bond. The service
86 of a fraudulent notice of nonpayment is a complete defense to
87 the claimant's claim against the bond. The notice of nonpayment
88 under this subparagraph must include the following information,
89 current as of the date of the notice, and must be in
90 substantially the following form:

91 NOTICE OF NONPAYMENT

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

92 To: ...(name of contractor and address)...

93 ...(name of surety and address)...

94 The undersigned claimant notifies you that:

95 1. Claimant has furnished ...(describe labor, services, or
96 materials)... for the improvement of the real property
97 identified as ...(property description).... The corresponding
98 amount unpaid to date is \$...., of which \$.... is unpaid
99 retainage.

100 2. Claimant has been paid to date the amount of \$.... for
101 previously furnishing ...(describe labor, services, or
102 materials)... for this improvement.

103 3. Claimant expects to furnish ...(describe labor,
104 services, or materials)... for this improvement in the future
105 (if known), and the corresponding amount expected to become due
106 is \$.... (if known).

107 I declare that I have read the foregoing Notice of Nonpayment
108 and that the facts stated in it are true to the best of my
109 knowledge and belief.

110 DATED on,

111 ...(signature and address of claimant)...

112 STATE OF FLORIDA

113 COUNTY OF

114 The foregoing instrument was sworn to (or affirmed) and
115 subscribed before me this....day of, ...(year)...., by
116 ...(name of signatory)....

Amendment No.

117 ...(Signature of Notary Public - State of Florida)...
118 ...(Print, Type, or Stamp Commissioned Name of Notary
119 Public)...

120 Personally Known OR Produced Identification
121 Type of Identification Produced.....

122 (d) A person may not require a claimant to furnish a
123 waiver that is different from the forms in paragraphs (b) and
124 (c) in exchange for, or to induce payment of, a progress payment
125 or final payment, unless the claimant has entered into a direct
126 contract that requires the claimant to furnish a waiver that is
127 different from the forms in paragraphs (b) and (c).

128 (f) Any provisions in a waiver that are is not related to
129 the waiver of right to claim against a payment bond as provided
130 in this subsection are unenforceable, unless the claimant has
131 otherwise agreed to those provisions in the claimant's direct
132 contract substantially similar to the forms in this subsection
133 is enforceable in accordance with its terms.

134 Section 2. Paragraph (c) of subsection (1) of section
135 337.18, Florida Statutes, is amended to read:

136 337.18 Surety bonds for construction or maintenance
137 contracts; requirement with respect to contract award; bond
138 requirements; defaults; damage assessments.-

139 (1)

140 (c) A claimant, except a laborer, who is not in privity
141 with the contractor shall, before commencing or not later than

Amendment No.

142 90 days after commencing to furnish labor, materials, or
143 supplies for the prosecution of the work, furnish the contractor
144 with a notice that he or she intends to look to the bond for
145 protection. A claimant who is not in privity with the contractor
146 and who has not received payment for his or her labor,
147 materials, or supplies shall deliver to the contractor and to
148 the surety written notice of the performance of the labor or
149 delivery of the materials or supplies and of the nonpayment. The
150 notice of nonpayment may be served at any time during the
151 progress of the work or thereafter but not before 45 days after
152 the first furnishing of labor, services, or materials, and not
153 later than 90 days after the final furnishing of the labor,
154 services, or materials by the claimant or, with respect to
155 rental equipment, not later than 90 days after the date that the
156 rental equipment was last on the job site available for use. An
157 action by a claimant, except a laborer, who is not in privity
158 with the contractor for the labor, materials, or supplies may
159 not be instituted against the contractor or the surety unless
160 both notices have been given. Notices required or permitted
161 under this section may be served in any manner provided in s.
162 713.18, and provisions for the waiver of claims against a
163 payment bond contained in s. 255.05(2) apply to all contracts
164 under this section.

165 Section 3. Subsections (8), (12), and (26) of section
166 713.01, Florida Statutes, are amended to read:

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

167 713.01 Definitions.—As used in this part, the term:

168 (8) "Contractor" means a person other than a materialman
169 or laborer who enters into a contract with the owner of real
170 property for improving it, or who takes over from a contractor
171 as so defined the entire remaining work under such contract. The
172 term "contractor" includes an architect, landscape architect, or
173 engineer who improves real property pursuant to a design-build
174 contract authorized by s. 489.103(16). The term "contractor"
175 also includes a licensed general contractor or building
176 contractor, as those terms are defined in s. 489.105(3) (a) and
177 (b), who provides construction management services, which
178 include responsibility for scheduling and coordination in both
179 preconstruction and construction phases and for the successful,
180 timely, and economical completion of the construction project,
181 or who provides program management services, which include
182 responsibility for schedule control, cost control, and
183 coordination in providing or procuring planning, design, and
184 construction.

185 (12) "Final furnishing" means the last date that the
186 lienor furnishes labor, services, or materials. Such date may
187 not be measured by other standards, such as the issuance of a
188 certificate of occupancy or the issuance of a certificate of
189 final completion, and does not include the correction of
190 deficiencies in the lienor's previously performed work or
191 materials supplied. With respect to rental equipment, the term

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

192 means the date that the rental equipment was last on the ~~job~~
193 site of the improvement and available for use. With respect to
194 specialty fabricated materials, the term means the date that the
195 last portion of the specialty fabricated materials is delivered
196 to the site of the improvement, or if any portion of the
197 specialty fabricated materials is not delivered to the site of
198 the improvement by no fault of the lienor, the term means 1 year
199 after the date the lienor completes the fabrication, 1 year
200 after the date the lienor receives the last portion of the
201 specialty fabricated materials needed to complete the order, or
202 the date the notice of commencement expires, whichever is later.

203 (26) "Real property" means the land that is improved and
204 the improvements thereon, including fixtures, except any such
205 property owned by the state or any county, municipality, school
206 board, or governmental agency, commission, or political
207 subdivision, provided, however, that a private leasehold
208 interest in such government-owned property which is improved and
209 the leasehold improvements shall be considered real property for
210 purposes of this part.

211 Section 4. Section 713.09, Florida Statutes, is amended to
212 read:

213 713.09 Single claim of lien.—A lienor may ~~is required to~~
214 record only one claim of lien covering his or her entire demand
215 against the real property when the amount demanded is for labor
216 or services or material furnished for more than one improvement

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

217 | under the same direct contract or multiple direct contracts. The
218 | single claim of lien is sufficient even though the improvement
219 | is for one or more improvements located on separate lots,
220 | parcels, or tracts of land. If materials to be used on one or
221 | more improvements on separate lots, parcels, or tracts of land
222 | ~~under one direct contract~~ are delivered by a lienor to a place
223 | designated by the person with whom the materialman contracted,
224 | other than the site of the improvement, the delivery to the
225 | place designated is prima facie evidence of delivery to the site
226 | of the improvement and incorporation in the improvement. The
227 | single claim of lien may be limited to a part of multiple lots,
228 | parcels, or tracts of land and their improvements or may cover
229 | all of the lots, parcels, or tracts of land and improvements. If
230 | a ~~In each~~ claim of lien under this section is for multiple
231 | direct contracts, the owner under the direct contracts ~~contract~~
232 | must be the same person for all lots, parcels, or tracts of land
233 | against which a single claim of lien is recorded.

234 | Section 5. Paragraphs (a) and (d) of subsection (1) of
235 | section 713.13, Florida Statutes, are amended to read:

236 | 713.13 Notice of commencement.—

237 | (1) (a) Except for an improvement that is exempt under
238 | ~~pursuant to~~ s. 713.02(5), an owner or the owner's authorized
239 | agent before actually commencing to improve any real property,
240 | or recommencing completion of any improvement after default or
241 | abandonment, whether or not a project has a payment bond

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

242 complying with s. 713.23, shall record a notice of commencement
243 in the clerk's office and forthwith post either a certified copy
244 thereof or a notarized statement that the notice of commencement
245 has been filed for recording along with a copy thereof. The
246 notice of commencement shall contain the following information:

247 1. A description sufficient for identification of the real
248 property to be improved. The description should include the
249 legal description of the property and also should include the
250 street address and tax folio number of the property if available
251 or, if there is no street address available, such additional
252 information as will describe the physical location of the real
253 property to be improved.

254 2. A general description of the improvement.

255 3. The name and address of the owner, the owner's interest
256 in the site of the improvement, and the name and address of the
257 fee simple titleholder, if other than such owner.

258 4. The name and address of the lessee, if the A lessee who
259 contracts for the improvements as is an owner as defined in s.
260 713.01 under s. 713.01(23) and must be listed as the owner
261 together with a statement that the ownership interest is a
262 leasehold interest.

263 5.4. The name and address of the contractor.

264 6.5. The name and address of the surety on the payment
265 bond under s. 713.23, if any, and the amount of such bond.

266 7.6. The name and address of any person making a loan for

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

267 the construction of the improvements.

268 ~~8.7.~~ The name and address within the state of a person
269 other than himself or herself who may be designated by the owner
270 as the person upon whom notices or other documents may be served
271 under this part; and service upon the person so designated
272 constitutes service upon the owner.

273 (d) A notice of commencement must be in substantially the
274 following form:

275 Permit No..... Tax Folio No.....

276 NOTICE OF COMMENCEMENT

277 State of....

278 County of....

279 The undersigned hereby gives notice that improvement will be
280 made to certain real property, and in accordance with Chapter
281 713, Florida Statutes, the following information is provided in
282 this Notice of Commencement.

283 1. Description of property: ...(legal description of the
284 property, and street address if available)....

285 2. General description of improvement:.....

286 3.a. Owner: ...(name and address)....

287 b. Owner's phone number:.....

288 c. Name and address of fee simple titleholder (if
289 different from Owner listed above):.....

290 4.a. Lessee, if the lessee contracted for the
291 improvements: ...(name and address)....

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

292 b. Lessee's phone number:..... ~~owner information or Lessee~~
293 ~~information if the Lessee contracted for the improvement:~~
294 ~~a. Name and address:.....~~
295 ~~b. Interest in property:.....~~
296 ~~c. Name and address of fee simple titleholder (if~~
297 ~~different from Owner listed above):.....~~
298 5.a.4.a. Contractor: ...(name and address)....
299 b. Contractor's phone number:.....
300 ~~6.5.~~ Surety (if applicable, a copy of the payment bond is
301 attached):
302 a. Name and address:.....
303 b. Phone number:.....
304 c. Amount of bond: \$.....
305 7.a.6.a. Lender: ...(name and address)....
306 b. Lender's phone number:.....
307 ~~8.7.~~ Persons within the State of Florida designated by
308 Owner upon whom notices or other documents may be served as
309 provided in ~~by~~ Section 713.13(1)(a)8. ~~713.13(1)(a)7.~~, Florida
310 Statutes:
311 a. Name and address:.....
312 b. Phone numbers of designated persons:.....
313 9.a.8.a. In addition to himself or herself, Owner
314 designates of to receive a copy of the
315 Lienor's Notice as provided in Section 713.13(1)(b), Florida
316 Statutes.

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

317 b. Phone number of person or entity designated by
318 owner:.....

319 ~~10.9.~~ Expiration date of notice of commencement (the
320 expiration date will be 1 year after ~~from~~ the date of recording
321 unless a different date is specified).....

322 WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE
323 EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER
324 PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA
325 STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS
326 TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND
327 POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU
328 INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN
329 ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF
330 COMMENCEMENT.

331 ...(Signature of Owner or Lessee, or Owner's or Lessee's
332 Authorized Officer/Director/Partner/Manager)...

333 ...(Signatory's Title/Office)...

334 The foregoing instrument was acknowledged before me this
335 day of, ...(year)...., by ...(name of person)... as ...(type
336 of authority, . . . e.g. officer, trustee, attorney in
337 fact)... for ...(name of party on behalf of whom instrument was
338 executed).....

339 ...(Signature of Notary Public - State of Florida)...

340 ...(Print, Type, or Stamp Commissioned Name of Notary Public)...

341 Personally Known OR Produced Identification

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

342 Type of Identification Produced.....

343 Section 6. Paragraphs (b) and (f) of subsection (1) and
344 subsections (3) and (4) of section 713.132, Florida Statutes,
345 are amended to read:

346 713.132 Notice of termination.—

347 (1) An owner may terminate the period of effectiveness of
348 a notice of commencement by executing, swearing to, and
349 recording a notice of termination that contains:

350 (b) The official records ~~recording office document book~~
351 ~~and page~~ reference numbers and recording date affixed by the
352 recording office on ~~of~~ the recorded notice of commencement;

353 (f) A statement that the owner has, before recording the
354 notice of termination, served a copy of the notice of
355 termination ~~on the contractor and~~ on each lienor who has a
356 direct contract with the owner or who has timely served a notice
357 to owner, and a statement that the owner will serve a copy of
358 the notice of termination on each lienor who timely serves a
359 notice to owner after the notice of termination has been
360 recorded. The owner is not required to serve a copy of the
361 notice of termination on any lienor who has executed a waiver
362 and release of lien upon final payment in accordance with s.
363 713.20.

364 (3) An owner may ~~not~~ record a notice of termination at any
365 time after ~~except after completion of construction, or after~~
366 ~~construction ceases before completion and all lienors have been~~

Amendment No.

367 | paid in full or pro rata in accordance with s. 713.06(4).

368 | (4) If an owner or a contractor, by fraud or collusion,
369 | knowingly makes any fraudulent statement or affidavit in a
370 | notice of termination or any accompanying affidavit, the owner
371 | and the contractor, or either of them, ~~as the case may be,~~ is
372 | liable to any lienor who suffers damages as a result of the
373 | filing of the fraudulent notice of termination,~~†~~ and any such
374 | lienor has a right of action for damages ~~occasioned thereby.~~

375 | (5)-(4) A notice of termination must be served before
376 | recording on each lienor who has a direct contract with the
377 | owner and on each lienor who has timely and properly served a
378 | notice to owner in accordance with this part before the
379 | recording of the notice of termination. A notice of termination
380 | must be recorded in the official records of the county in which
381 | the project is located. If properly served before recording in
382 | accordance with this subsection, the notice of termination
383 | terminates the period of effectiveness of the notice of
384 | commencement 30 days after the notice of termination is recorded
385 | in the official records is effective to terminate the notice of
386 | commencement at the later of 30 days after recording of the
387 | notice of termination or a later the date stated in the notice
388 | of termination as the date on which the notice of commencement
389 | is terminated. However, if a lienor, who began work under the
390 | notice of commencement before its termination, lacks a direct
391 | contract with the owner, and timely serves his or her notice to

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

392 owner after the notice of termination has been recorded, the
393 owner must serve a copy of the notice of termination upon such
394 lienor, and the termination of the notice of commencement as to
395 that lienor is effective 30 days after service of the notice of
396 termination ~~if the notice of termination has been served~~
397 ~~pursuant to paragraph (1)(f) on the contractor and on each~~
398 ~~lienor who has a direct contract with the owner or who has~~
399 ~~served a notice to owner.~~

400 Section 7. Subsections (1) through (4) of section 713.18,
401 Florida Statutes, are amended to read:

402 713.18 Manner of serving notices and other instruments.-

403 (1) Service of any document notices, ~~claims of lien,~~
404 ~~affidavits, assignments, and other instruments~~ permitted or
405 required under this part, s. 255.05 or s. 337.18, or copies
406 thereof when so permitted or required, unless otherwise
407 specifically provided in this part, must be made by one of the
408 following methods:

409 (a) By hand actual delivery to the person to be served; if
410 a partnership, to one of the partners; if a corporation, to an
411 officer, director, managing agent, or business agent; or, if a
412 limited liability company, to a member or manager.

413 (b) By common carrier delivery service or by registered,
414 Global Express Guaranteed, or certified mail to the person to be
415 served, with postage or shipping paid by the sender and with
416 evidence of delivery, which may be in an electronic format.

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

417 (c) By posting on the site of the improvement if service
418 as provided by paragraph (a) or paragraph (b) cannot be
419 accomplished.

420 (2) ~~Notwithstanding subsection (1),~~ Service ~~service~~ of a
421 notice to owner or a preliminary notice to contractor under s.
422 255.05, s. 337.18, s. 713.06, or s. 713.23 is effective as of
423 the date of mailing if:

424 (a) The notice is mailed by registered, Global Express
425 Guaranteed, or certified mail, with postage prepaid, to the
426 person to be served at any of the addresses set forth in
427 subsection (3);

428 (b) The notice is mailed within 40 days after the date the
429 lienor first furnishes labor, services, or materials; and

430 (c)1. The person who served the notice maintains a
431 registered or certified mail log that shows the registered or
432 certified mail number issued by the United States Postal
433 Service, the name and address of the person served, and the date
434 stamp of the United States Postal Service confirming the date of
435 mailing; or

436 2. The person who served the notice maintains ~~electronic~~
437 tracking records approved or generated by the United States
438 Postal Service containing the postal tracking number, the name
439 and address of the person served, and verification of the date
440 of receipt by the United States Postal Service.

441 (3) (a) Service of a document ~~an instrument~~ pursuant to

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

442 this section is effective on the date of mailing or shipping ~~the~~
443 ~~instrument~~ if it:

444 1. Is sent to the last address shown in the notice of
445 commencement or any amendment thereto or, in the absence of a
446 notice of commencement, to the last address shown in the
447 building permit application, or to the last known address of the
448 person to be served; and

449 2. Is returned as being "refused," "moved, not
450 forwardable," or "unclaimed," or is otherwise not delivered or
451 deliverable through no fault of the person serving the item.

452 (b) If the address shown in the notice of commencement or
453 any amendment to the notice of commencement, or, in the absence
454 of a notice of commencement, in the building permit application,
455 is incomplete for purposes of mailing or delivery, the person
456 serving the document ~~item~~ may complete the address and properly
457 format it according to United States Postal Service addressing
458 standards using information obtained from the property appraiser
459 or another public record without affecting the validity of
460 service under this section.

461 (4) A document ~~notice~~ served by a lienor on one owner or
462 one partner of a partnership owning the real property is deemed
463 notice to all owners and partners.

464 Section 8. Subsections (6) and (8) of section 713.20,
465 Florida Statutes, are amended to read:

466 713.20 Waiver or release of liens.—

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

467 (6) A person may not require a lienor to furnish a lien
468 waiver or release of lien that is different from the forms in
469 subsection (4) or subsection (5) in exchange for, or to induce
470 payment of, a progress payment or final payment, unless the
471 lienor has entered into a direct contract that requires the
472 lienor to furnish a waiver or release that is different from the
473 forms in subsection (4) or subsection (5).

474 (8) Any provisions in a lien waiver or lien release that
475 are ~~is~~ not related to the waiver or release of lien rights as
476 provided in this section are unenforceable, unless the lienor
477 has otherwise agreed to those provisions in the lienor's direct
478 contract substantially similar to the forms in subsections (4)
479 and (5) is enforceable in accordance with the terms of the lien
480 waiver or lien release.

481 Section 9. Paragraph (d) of subsection (1) of section
482 713.23, Florida Statutes, is amended to read:

483 713.23 Payment bond.—

484 (1)

485 (d) In addition, a lienor who has not received payment for
486 furnishing his or her labor, services, or materials must, as a
487 condition precedent to recovery under the bond, serve a written
488 notice of nonpayment on ~~to~~ the contractor and a copy of the
489 notice on the surety. The notice must be under oath and served
490 during the progress of the work or thereafter, but may not be
491 served later than 90 days after the final furnishing of labor,

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

492 services, or materials by the lienor, or, with respect to rental
493 equipment, later than 90 days after the date the rental
494 equipment was on the job site and available for use. A notice of
495 nonpayment that includes sums for retainage must specify the
496 portion of the amount claimed for retainage. The required notice
497 satisfies this condition precedent with respect to the payment
498 described in the notice of nonpayment, including unpaid finance
499 charges due under the lienor's contract, and with respect to any
500 other payments which become due to the lienor after the date of
501 the notice of nonpayment. The time period for serving a notice
502 of nonpayment is ~~shall be~~ measured from the last day of
503 furnishing labor, services, or materials by the lienor and may
504 not be measured by other standards, such as the issuance of a
505 certificate of occupancy or the issuance of a certificate of
506 substantial completion. The failure of a lienor to receive
507 retainage sums not in excess of 10 percent of the value of
508 labor, services, or materials furnished by the lienor is not
509 considered a nonpayment requiring the service of the notice
510 provided under this paragraph. If the payment bond is not
511 recorded before commencement of construction, the time period
512 for the lienor to serve a notice of nonpayment may at the option
513 of the lienor be calculated from the date specified in this
514 section or the date the lienor is served a copy of the bond.
515 However, the limitation period for commencement of an action on
516 the payment bond as established in paragraph (e) may not be

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

517 expanded. The negligent inclusion or omission of any information
518 in the notice of nonpayment that has not prejudiced the
519 contractor or surety does not constitute a default that operates
520 to defeat an otherwise valid bond claim. A lienor who serves a
521 fraudulent notice of nonpayment forfeits his or her rights under
522 the bond. A notice of nonpayment is fraudulent if the lienor has
523 willfully exaggerated the amount unpaid, willfully included a
524 claim for work not performed or materials not furnished for the
525 subject improvement, or prepared the notice with such willful
526 and gross negligence as to amount to a willful exaggeration.
527 However, a minor mistake or error in a notice of nonpayment, or
528 a good faith dispute as to the amount unpaid, does not
529 constitute a willful exaggeration that operates to defeat an
530 otherwise valid claim against the bond. The service of a
531 fraudulent notice of nonpayment is a complete defense to the
532 lienor's claim against the bond. The notice under this paragraph
533 must include the following information, current as of the date
534 of the notice, and must be in substantially the following form:

NOTICE OF NONPAYMENT

536 To ...(name of contractor and address)...

537 ...(name of surety and address)...

538 The undersigned lienor notifies you that:

539 1. The lienor has furnished ...(describe labor, services,
540 or materials)... for the improvement of the real property
541 identified as ...(property description).... The corresponding

Amendment No.

542 amount unpaid to date is \$...., of which \$.... is unpaid
543 retainage.

544 2. The lienor has been paid to date the amount of \$....
545 for previously furnishing ...(describe labor, services, or
546 materials)... for this improvement.

547 3. The lienor expects to furnish ...(describe labor,
548 services, or materials)... for this improvement in the future
549 (if known), and the corresponding amount expected to become due
550 is \$.... (if known).

551 I declare that I have read the foregoing Notice of Nonpayment
552 and that the facts stated in it are true to the best of my
553 knowledge and belief.

554 DATED on,

555 ...(signature and address of lienor)...

556 STATE OF FLORIDA

557 COUNTY OF.....

558 The foregoing instrument was sworn to (or affirmed) and
559 subscribed before me this day of, ...(year)..., by
560 ...(name of signatory)....

561 ...(Signature of Notary Public - State of Florida)...

562 ...(Print, Type, or Stamp Commissioned Name of Notary
563 Public)...

564 Personally Known OR Produced Identification

565 Type of Identification Produced.....

566 Section 10. Subsections (3) and (5) of section 713.235,

Amendment No.

567 Florida Statutes, are amended to read:

568 713.235 Waivers of right to claim against payment bond;
569 forms.-

570 (3) A person may not require a claimant to furnish a
571 waiver that is different from the forms in subsections (1) and
572 (2) in exchange for, or to induce payment of, a progress payment
573 or final payment, unless the claimant has entered into a direct
574 contract that requires the claimant to furnish a waiver that is
575 different from the forms in subsections (1) and (2).

576 (5) Any provisions in a waiver that are ~~is~~ not related to
577 the waiver of a claim against the payment bond as provided in
578 this section are unenforceable, unless the claimant has
579 otherwise agreed to those provisions in the claimant's direct
580 contract substantially similar to the forms in this section is
581 enforceable in accordance with its terms.

582 Section 11. Subsection (1) of section 713.24, Florida
583 Statutes, is amended to read:

584 713.24 Transfer of liens to security.-

585 (1) Any lien claimed under this part may be transferred,
586 by any person having an interest in the real property upon which
587 the lien is imposed or the contract under which the lien is
588 claimed, from such real property to other security by doing one
589 of the following either:

590 (a) Depositing in the clerk's office a sum of money; ~~or~~

591 (b) Recording ~~Filing~~ in the clerk's office a bond executed

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

592 as surety by a surety insurer licensed to do business in this
593 state; or

594 (c) Recording in the clerk's office a bond executed as
595 surety by a surety insurer licensed to do business in this
596 state, which was furnished by a subcontractor under whose
597 subcontract the lienor's claim emanates, and which must be
598 recorded and served with a notice of bond in the same manner as
599 a payment bond furnished under s. 713.23(2). For purposes of
600 this paragraph, the subcontract payment bond must have been
601 furnished at the time the subcontractor's work commenced and
602 before the claim of lien was recorded. The subcontract payment
603 bond may not be used to transfer a lien of the contractor or the
604 subcontractor that is the principal on the subcontract payment
605 bond. Any provision in the subcontract payment bond that
606 restricts the classes of persons who are protected by the
607 subcontract payment bond, restricts the venue of any proceeding
608 relating to the subcontract payment bond, limits or expands the
609 effective duration of the subcontract payment bond, or includes
610 conditions precedent to the enforcement of a claim against the
611 subcontract payment bond beyond those provided in this part is
612 unenforceable. 7

613
614 Such deposit or bond must ~~either to~~ be in an amount at least
615 equal to the amount demanded in such claim of lien, plus
616 interest thereon at the legal rate for 3 years, plus \$1,000 or

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

617 | 35 ~~25~~ percent of the amount demanded in the claim of lien,
618 | whichever is greater, to apply on any attorney ~~attorney's~~ fees
619 | and court costs that may be taxed in any proceeding to enforce
620 | said lien. Such deposit or bond shall be conditioned to pay any
621 | judgment or decree which may be rendered for the satisfaction of
622 | the lien for which such claim of lien was recorded. Upon making
623 | such deposit or filing such bond, the clerk shall make and
624 | record a certificate showing the transfer of the lien from the
625 | real property to the security and shall mail a copy thereof by
626 | registered or certified mail to the lienor named in the claim of
627 | lien so transferred, at the address stated therein. Upon filing
628 | the certificate of transfer, the real property shall thereupon
629 | be released from the lien claimed, and such lien shall be
630 | transferred to said security. In the absence of allegations of
631 | privity between the lienor and the owner, and subject to any
632 | order of the court increasing the amount required for the lien
633 | transfer deposit or bond, no other judgment or decree to pay
634 | money may be entered by the court against the owner. The clerk
635 | shall be entitled to a service charge for making and serving the
636 | certificate, in the amount of up to \$20, from which the clerk
637 | shall remit \$5 to the Department of Revenue for deposit into the
638 | General Revenue Fund. If the transaction involves the transfer
639 | of multiple liens, an additional charge of up to \$10 for each
640 | additional lien shall be charged, from which the clerk shall
641 | remit \$2.50 to the Department of Revenue for deposit into the

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

Amendment No.

642 General Revenue Fund. For recording the certificate and
643 approving the bond, the clerk shall receive her or his usual
644 statutory service charges as prescribed in s. 28.24. Any number
645 of liens may be transferred to one such security.

646 Section 12. Section 713.29, Florida Statutes, is amended
647 to read:

648 713.29 Attorney ~~Attorney's~~ fees.—In any action brought to
649 enforce a lien, including a lien that has been transferred to
650 security, or to enforce a claim against a bond under this part,
651 the prevailing party is entitled to recover a reasonable fee for
652 the services of her or his attorney for trial and appeal or for
653 arbitration, in an amount to be determined by the court, which
654 fee must be taxed as part of the prevailing party's costs, as
655 allowed in equitable actions.

656 Section 13. This act shall take effect July 1, 2020.

657

658 -----

659 **T I T L E A M E N D M E N T**

660 Remove everything before the enacting clause and insert:

661 An act relating to liens and bonds; amending s. 255.05,
662 F.S.; requiring that a copy of a notice of nonpayment be
663 served on the surety; prohibiting a person from requiring a
664 claimant to furnish a certain waiver in exchange for or to
665 induce certain payments; providing that specified
666 provisions in certain waivers are unenforceable; providing

Amendment No.

667 an exception; amending s. 337.18, F.S.; providing that
668 certain waivers apply to certain contracts; amending s.
669 713.01, F.S.; revising definitions; amending s. 713.09,
670 F.S.; authorizing a lienor to record one claim of lien for
671 multiple direct contracts; amending s. 713.13, F.S.;
672 revising information to be included in a notice of
673 commencement; amending s. 713.132, F.S.; revising
674 requirements for a notice of termination; amending s.
675 713.18, F.S.; providing additional grounds for service of a
676 document; providing that service of a document may be by
677 hand delivery; providing that service of a document is
678 effective on the date of mailing or shipping; making
679 technical changes; amending ss. 713.20 and 713.235, F.S.;
680 prohibiting a person from requiring a lienor to furnish a
681 certain waiver or release in exchange for or to induce
682 certain payments; providing that specified provisions in
683 certain waivers or releases are unenforceable; providing an
684 exception; amending s. 713.23, F.S.; requiring that a copy
685 of a notice of nonpayment be served on the surety; amending
686 s. 713.24, F.S.; revising the process to transfer a lien to
687 security; revising the amounts of certain deposits or
688 bonds; amending s. 713.29, F.S.; authorizing attorney fees
689 in actions to enforce a lien that has been transferred to
690 security; providing an effective date.

691

097649 - h0283-strikeall.docx

Published On: 1/15/2020 6:40:32 PM

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 307 Law Enforcement Vehicles
SPONSOR(S): Business & Professions Subcommittee, LaMarca and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 476

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N, As CS	Brackett	Anstead
2) Civil Justice Subcommittee		Mawn	Luczynski
3) Commerce Committee			

SUMMARY ANALYSIS

Condominium associations, homeowners' associations, and cooperatives are allowed to create and enforce restrictive covenants that limit the use of association property. Owners, tenants, and guests must comply with these restrictions or they could be subject to monetary fines or suspension of their right to use the association's common elements. A common restrictive covenant created by such associations includes a restriction or prohibition on parking certain vehicles, such as commercial vehicles, in certain location within the association's property.

CS/HB 307 prohibits condominium associations, homeowners' associations, and cooperatives from preventing a law enforcement officer who is an owner, or an owner's tenant, guest, or invitee, from parking his or her assigned law enforcement vehicle in an area where an owner, or an owner's tenant, guest, or invitee, has a right to park.

The bill does not have a fiscal impact on state and local governments.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Community Associations

The Florida Division of Condominiums, Timeshares and Mobile Homes (Division), within the Department of Business and Professional Regulation (DBPR), provides consumer protection for Florida residents living in regulated communities through education, complaint resolution, mediation and arbitration, and developer disclosure. The Division has regulatory authority over the following business entities and individuals:

- Condominium Associations;
- Cooperative Associations;
- Florida Mobile Home Parks and related associations;
- Vacation Units and Timeshares;
- Yacht and Ship Brokers and related business entities; and
- Homeowners' Associations (limited to arbitration of election and recall disputes).

Condominiums

A condominium is a form of real property ownership created pursuant to ch. 718, F.S., the Condominium Act, comprised of units which may be owned by one or more persons along with an undivided right of access to common elements.¹ A condominium is created by recording a declaration of condominium in the public records of the county where the condominium is located.² A declaration governs the relationships among condominium unit owners and the condominium association. Specifically, a declaration of condominium may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property. All unit owners are members of the condominium association, an entity responsible for the operation and maintenance of the common elements owned by the unit owners. The condominium association is overseen by an elected board of directors, commonly referred to as a "board of administration." The board enacts bylaws which govern the association's administration.

Cooperatives

A cooperative is a form of property ownership created pursuant to ch. 719, F.S., the Cooperative Act. The real property is owned by the cooperative association, and individual units are leased to the residents who own shares in the cooperative association.³ The lease payment amount is the pro-rata share of the operational expenses of the cooperative. Cooperatives operate similarly to condominiums and the laws regulating cooperatives are in many instances nearly identical to those regulating condominiums.

Homeowners' Associations

A homeowners' association (HOA) is an association of residential property owners in which voting membership is made up of parcel owners and membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel.⁴ Only HOAs whose covenants and restrictions include mandatory assessments are regulated by

¹ S. 718.103(11), F.S.

² S. 718.104(2), F.S.

³ S. 719.103(2) and (26), F.S.

⁴ S. 720.301(9), F.S.

ch. 720, F.S., the Homeowners' Association Act. Like a condominium or cooperative, an HOA is administered by an elected board of directors. The powers and duties of an HOA include the powers and duties provided in the Homeowners' Association Act, and in the association's governing documents, which include the recorded covenants and restrictions, together with the bylaws, articles of incorporation, and duly adopted amendments to those documents. No state agency has direct oversight of HOAs. However, Florida law provides HOA procedures, minimum operating requirements, and for a mandatory binding arbitration program, administered by the Division, for certain election and recall disputes.

Community Association Fines and Suspensions

Owners, tenants, and guests must comply with a condominium, cooperative, or HOA's declaration, bylaws, and rules. Condominium associations, cooperatives, and HOAs ("community associations") may levy fines against or suspend the right of an owner, occupant, or a guest of an owner or occupant, to use the common elements or any other association property for failing to comply with any provision in the association's governing documents. A suspension for failing to comply with the community association's declaration, bylaws, or rules may not be for an unreasonable amount of time.⁵

No fine may exceed \$100 per violation, although a fine may be levied on the basis of each day of a continuing violation provided that fine does not exceed \$1,000. However, a fine levied by an HOA may exceed \$1,000 if the governing documents authorize it. Fines levied by condominium associations and cooperatives may not become a lien on the property, and fines levied by an HOA that do not exceed \$1,000 may not become a lien on the property.⁶

A community association may suspend an owner, tenant, or guest's ability to use the association's common elements or any other association property if the owner is more than 90 days delinquent in paying a monetary obligation, including a fine. The suspension may remain in effect until the fine is paid.⁷ A community association may also suspend an owner's voting rights for any monetary obligation that exceeds \$1,000 and is more than 90 days delinquent.⁸

Restrictive Covenants

A community association may enact and enforce covenants as a condition for living in the association. A covenant is an agreement, or contract, which grants a right or imposes a liability. Covenants can range from requiring owners to pay a portion of the common expenses to restrictions on the age of permanent residents.⁹

A restrictive covenant limits the use of community association property. Restrictive covenants imposed by a community association's declaration are valid unless they are clearly ambiguous, wholly arbitrary, or violate a public policy or a constitutional right. Restrictions imposed by a community association's board of directors must also be reasonable.¹⁰

⁵ Ss. 718.303, 719.303, & 720.305, F.S.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Ss. 718.104(5), 718.112(3), 719.1035, 719.106(2), 720.301(4), & 720.304(1), F.S.; Peter Dunbar, *The Condominium Concept*, 10-11 (15th ed. 2017-18).

¹⁰ *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143, 1144 (Fla. 4th DCA 1984); *Hidden Harbour Estates, Inc. v. Basso*, 393 So. 2d 637, 639-40 (Fla. 3rd DCA 1981).

Commercial Vehicles

A community association restrictive covenant may restrict or prohibit the parking of certain vehicles, such as commercial vehicles, on association property. However, many times the community association's governing documents do not define the term "commercial vehicle," which can lead to confusion about what constitutes a commercial vehicle.¹¹

Florida Courts have upheld HOA provisions restricting the parking of commercial vehicles even where the HOA has failed to define "commercial vehicle."¹² However, in June of 2005, the Town of Davie ("Davie") requested an advisory opinion from the Florida Office of the Attorney General on the definition of commercial vehicle.¹³ Specifically, Davie inquired as to whether a marked law enforcement vehicle is a commercial vehicle for the purposes of parking in a community association.¹⁴ This followed after a Davie HOA prohibited commercial vehicles from parking in the driveways within the HOA and informed a property owner that the owner's law enforcement vehicle was a commercial vehicle and could not be parked in the driveway.¹⁵

The Attorney General determined that a law enforcement vehicle is not a commercial vehicle because a commercial vehicle is used by a business for the purpose of economic gain, and law enforcement services are an integral part of government and are not provided for economic gain.¹⁶ The Attorney General also noted that assigning a police vehicle to an officer to drive during off-duty hours to provide a quicker response when called to an emergency would directly benefit the public, and the presence of a police vehicle in a neighborhood may serve as a crime deterrent.¹⁷

Recently, the media reported that a Clearwater police officer may be subject to hundreds of dollars in HOA fines if the officer continued to park a marked police cruiser in her driveway instead of her garage,¹⁸ as the HOA's declaration prohibits owners from parking commercial vehicles and marked law enforcement vehicles in driveways.¹⁹ According to the media reports, the HOA has changed its position and now lets the police officer park a marked cruiser in her driveway.²⁰ However, media reports indicate that the exception only applies to that specific police officer, and all future owners with law enforcement vehicles may not park them in their driveways.²¹

¹¹ Mike Antich, *Discrimination Against Vocational Vehicles*, Automotive Fleet (Dec. 22, 2017), <https://www.automotive-fleet.com/160128/discrimination-against-vocational-vehicles> (last visited Jan. 6, 2020); Clinton Morrell, *Are law enforcement vehicles subject to Community Association "commercial vehicle" bans?*, The Condo & HOA Law Bulletin (Feb. 8, 2016), <https://thecondoandhoalawbulletin.com/2016/02/08/are-law-enforcement-vehicles-subject-to-community-association-commercial-vehicle-bans/> (last visited Jan. 6, 2020).

¹² *Cottrell v. Miskove*, 605 So. 2d 572, 573 (Fla. 2nd DCA 1992) (The terms "commercial" and "vehicle" are well defined terms and when combined the term is not vague, ambiguous, or unclear.).

¹³ 05-36 Fla. Op. Att'y Gen.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Heather Leigh, *HOA Tells Clearwater Officer to Move Her Police Cruiser into Her Garage or Face Legal Action*, ABC Action News Tampa Bay, (Aug. 27, 2019), <https://www.abcactionnews.com/news/region-pinellas/hoa-tells-clearwater-officer-to-move-her-police-cruiser-into-her-garage-or-face-legal-action> (last visited Jan. 6, 2020); WFTS Staff, *HOA Tells Florida Officer to Move Her Police Cruiser off Her Driveway or Face Legal Action*, News Channel 5 Nashville (Sep. 1, 2019), <https://www.newschannel5.com/news/national/hoa-tells-florida-officer-to-move-her-police-cruiser-into-off-her-driveway-or-face-legal-action> (last visited Jan. 6, 2020).

¹⁹ Amended and Restated Master Declaration of Covenants and Restrictions for Cross Pointe, <http://crosspointehoa.com/wp-content/uploads/2013/06/Cross-Pointe-Declaration-Final-031813.pdf> (last visited Jan. 6, 2020).

²⁰ Heather Leigh, *HOA Now Allowing Clearwater Police Officer to Park Cruiser in Driveway*, ABC Action News Tampa Bay, (Sep. 11, 2019), <https://www.abcactionnews.com/news/region-pinellas/hoa-now-allowing-clearwater-police-officer-to-park-cruiser-in-driveway> (last visited Jan. 6, 2020).

²¹ *Id.*

Law Enforcement Officer

Chapter 943, F.S., is the Department of Law Enforcement Act.²² Section 943.10(1), F.S, defines “law enforcement officer” as any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is crime prevention and detection or the enforcement of the state’s penal, criminal, traffic, or highway laws. The definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time, part-time, and auxiliary law enforcement officers but does not include support personnel employed by the employing agency.²³

Effect of the Bill

CS/HB 307 prohibits HOAs, condominium associations, and cooperatives from preventing a law enforcement officer, as defined in s. 943.10(1), F.S., who is an owner, or an owner’s tenant, guest, or invitee, from parking his or her assigned law enforcement vehicle in an area where an owner, or an owner’s tenant, guest, or invitee, has a right to park.

The bill takes effect upon becoming law.

B. SECTION DIRECTORY:

Section 1: Creates s. 718.129, F.S., relating to law enforcement vehicles.

Section 2: Creates s. 719.131, F.S., relating to law enforcement vehicles.

Section 3. Creates s. 720.318, F.S., relating to law enforcement vehicles.

Section 4: Provides an effective date of upon becoming law.

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:

The bill may save a law enforcement officer who is an owner, or an owner’s tenant, guest, or invitee, in a community association from being assessed and subsequently paying fines for parking his or her

²² S. 943.01, F.S.

²³ S. 943.10(1), F.S.

assigned law enforcement vehicle in an area where an owner, or an owner's tenant, guest, or invitee, has a right to park. Other private sector economic impacts are unknown.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to effect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 6, 2019, the Business & Professions Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The committee substitute:

- Defined "law enforcement officer" by adopting the definition of "law enforcement officer" under the Department of Law Enforcement Act; and
- Clarified that a law enforcement officer may only park his or her "assigned" law enforcement vehicle in an area the officer has a right to park as an owner, tenant, guest, or invitee.

1 A bill to be entitled
 2 An act relating to law enforcement vehicles; creating
 3 ss. 718.129, 719.131, and 720.318, F.S.; providing
 4 that community associations may not prohibit a law
 5 enforcement officer from parking his or her assigned
 6 law enforcement vehicle in certain areas; providing an
 7 effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Section 718.129, Florida Statutes, is created
 12 to read:

13 718.129 Law enforcement vehicles.—An association may not
 14 prohibit a law enforcement officer, as defined in s. 943.10(1),
 15 who is a unit owner, or a tenant, guest, or invitee of a unit
 16 owner, from parking his or her assigned law enforcement vehicle
 17 in an area where the unit owner, or tenant, guest, or invitee of
 18 the unit owner, otherwise has a right to park.

19 Section 2. Section 719.131, Florida Statutes, is created
 20 to read:

21 719.131 Law enforcement vehicles.—An association may not
 22 prohibit a law enforcement officer, as defined in s. 943.10(1),
 23 who is a unit owner, or a tenant, guest, or invitee of a unit
 24 owner, from parking his or her assigned law enforcement vehicle
 25 in an area where the unit owner, or tenant, guest, or invitee of

26 | the unit owner, otherwise has a right to park.

27 | Section 3. Section 720.318, Florida Statutes, is created
28 | to read:

29 | 720.318 Law enforcement vehicles.—An association may not
30 | prohibit a law enforcement officer, as defined in s. 943.10(1),
31 | who is a parcel owner, or a tenant, guest, or invitee of a
32 | parcel owner, from parking his or her assigned law enforcement
33 | vehicle in an area where the parcel owner, or tenant, guest, or
34 | invitee of the parcel owner, otherwise has a right to park.

35 | Section 4. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 519 Private Property Rights Protection

SPONSOR(S): Grant, J.

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Jones	Luczynski
2) Commerce Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Takings Clause of the U.S. Constitution prohibits the government from depriving a person of his or her private property for public use "without just compensation." However, not every government action burdening private property amounts to an illegal "taking" under the Takings Clause. Florida law provides legal remedies when a local government burdens property rights in a manner that does not amount to a "taking":

- If a local government enacts a regulation inordinately burdening private property:
 - The property owner may notify the government of the burden;
 - The government must make a written offer to settle the claim; and
 - The property owner may:
 - Accept the settlement offer; or
 - Reject the offer, and file a lawsuit against the government for damages.
- If the local government unreasonably rejects a property owner's proposed use of his or her property, otherwise known as an "exaction," the property owner may sue the government after providing notice and allowing the government an opportunity to:
 - Explain why the exaction is lawful; or
 - Agree to remove the exaction.

The prevailing party can recover attorney fees and costs if certain conditions are met.

HB 519 requires a local government, when settling property rights claims, to treat similar properties similarly. If the government settles or the property owner secures a judgment declaring an inordinate burden, there is a presumption that similarly situated parcels are also inordinately burdened and entitled to the same settlement terms or judicial determination. The bill also makes it easier for a private property owner to challenge a local regulation burdening his or her property by:

- Allowing a jury or the court to consider business damages in making its damages calculation.
- Removing a provision allowing the government to seek attorney fees and costs when a property owner refuses a bona fide offer which reasonably would have resolved the property claim fairly.

When a local government is poised to impose an exaction upon private property, the bill allows the property owner to sue without having to wait for written notice of the exaction. The bill requires the Department of Transportation to give a right of first refusal to a previous owner before disposing of property in certain cases.

The bill does not appear to have a fiscal impact on state government, but appears to have an indeterminate negative impact on local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Takings Clause

The U.S. Constitution prohibits the government from depriving a person of his or her private property for public use "without just compensation."¹ However, some government actions restrict the use of private property without amounting to a "taking" as contemplated by the U.S. Constitution.

Bert J. Harris, Jr., Private Property Rights Protection Act

In 1995, the Florida Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act (Act), codified as s. 70.001, F.S.² The Act created a new cause of action for private property owners whose real property is inordinately burdened by a government action³ not rising to the level of a taking.⁴ The inordinate burden can apply in the context of either an existing use of real property or a vested right to a specific use.⁵

Before filing an action under the Act, a claimant must generally give 150 days' notice to the government entity, along with a valid appraisal showing the loss in fair market value.⁶ The government must notify all property owners adjacent to the claimant's property of the pending claim. The government must make a written settlement offer to the claimant, which may include an offer to:

- Adjust land development or permit standards;
- Transfer developmental rights;
- Land swaps or exchanges;
- Mitigation;
- Conditioning the amount of development or use permitted;
- Issue a development order, variance, special exception, or other extraordinary relief;
- Purchase the property or an interest therein; or
- Other actions, including making no changes to the proposed government action.⁷

This encourages settlement of property rights claims and allows a government to settle individually with each property owner to avoid unnecessarily burdening property rights.

The property owner may reject the settlement offer and file an action in circuit court.⁸ The court must determine whether the government inordinately burdened the property, and if so, calculate the percentage of responsibility for each government entity. A jury must determine damages and cannot consider any business damages relative to development, activity, or use the government has restricted or prohibited.⁹

¹ U.S. Const. amend. 5; see *also* art. I, ss. 2, 9, Fla. Const. (restricting the deprivation of private property).

² Ch. 95-181, Laws of Fla.

³ S. 70.001(3)(d), F.S., provides that the term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

⁴ S. 70.001(1), (9), F.S.

⁵ S. 70.001(2), F.S.

⁶ S. 70.001(4)(a), F.S.

⁷ S. 70.001(4)(c), F.S.

⁸ S. 70.001(5)(b), F.S.

⁹ S. 70.001(6), F.S.

The claimant is entitled to recover costs and attorney fees incurred from the time the action was filed if:

- The claimant prevails; and
- The court determines that the settlement offer was not a bona fide offer which reasonably would have resolved the claim.

The government is entitled to recover costs and attorney fees if:

- The government prevails; and
- The court determines the claimant did not accept a bona fide settlement offer which reasonably would have resolved the claim fairly.¹⁰

A claim cannot be filed more than one year after the government applies a law or regulation to the property at issue. The one-year timeframe begins running when the law or regulation unequivocally impacts the property and notice is mailed to the property owner.¹¹ If the law or regulation does not unequivocally impact the property, or if notice is not mailed, the one-year period does not start until the government formally denies a request for development or variance.

Private Property Rights and Unconstitutional Exactions

The doctrine of unconstitutional conditions prohibits the government from denying a benefit to a person because he or she exercises or vindicates a constitutional right.¹²

In 2013, in *Koontz v. St. Johns River Water Management District*,¹³ the United States Supreme Court held that a government cannot deny a land-use permit based on the landowner's refusal to agree to the government's demands to relinquish property unless there is an essential nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.¹⁴ Extortionate demands for property in the land-use permitting context violate the Fifth Amendment Takings Clause not because they take property, but because they impermissibly burden the right not to have property taken without just compensation.¹⁵

The property owner in *Koontz* owned land consisting primarily of wetlands. He wanted to develop part of his property and offered a conservation easement to the St. Johns River Water Management District (district). The district rejected his proposal and said it would deny his permit unless he agreed to scale back his plan and give the district a larger conservation easement or to maintain the plan but pay to improve separate land owned by the district. The district offered to consider alternative approaches as well. The property owner sued the district under s. 373.617, F.S., which allows property owners to sue a government for action related to land-use permitting that constitutes an unlawful taking.

The *Koontz* court found that while the district's conditions unconstitutionally burdened the landowner's Fifth Amendment rights, no constitutional taking had occurred. The Court left it to the states to determine remedies available to a landowner who is subjected to an unconstitutional demand, but where no actual taking occurs.¹⁶ The Court explained:

Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional

¹⁰ S. 70.001(6)(c), F.S.

¹¹ S. 70.001(11), F.S.

¹² *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013).

¹³ *Id.* at 2586.

¹⁴ *Id.* at 2595.

¹⁵ *Id.* at 2596.

¹⁶ *Id.* at 2597.

law but of the cause of action—whether state or federal—on which the landowner relies.¹⁷

Consequently, the Court left unanswered the question of whether the landowner in *Koontz* could recover damages for unconstitutional conditions claims predicated on the Takings Clause because the landowner's claim was based on Florida law.¹⁸ Specifically, because s. 373.617, F.S., allows for damages when a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation," it is a question of state law as to whether that provision covers an unconstitutional conditions claim.¹⁹

Remedy for Unlawful Government Exaction

In 2015, the Legislature enacted s. 70.45, F.S., to provide a state cause of action against a prohibited exaction. A "prohibited exaction" is any condition imposed by the government on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.²⁰

A property owner may bring an action to recover damages caused by a prohibited exaction in addition to any other remedies available in law or equity, if:

- The prohibited exaction is imposed or required, in writing, as a final condition for approval of the proposed land use; and
- At least 90 days before filing the action, but no later than 180 days after the exaction is imposed, the property owner gives the government written notice:
 - Identifying the exaction;
 - Explaining why it is unlawful; and
 - Estimating the damages.²¹

Upon receiving written notice of the alleged claim, the governmental entity must review the notice and respond in writing by identifying the basis for the exaction and explaining why the exaction is proportionate to the harm created by the proposed use of real property, or by proposing to remove or modify the exaction. The government's written response may only be used against it in subsequent litigation for assessing attorney fees and costs.

For a claim filed under s. 70.45, F.S., the government has the burden to prove the exaction has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate. The property owner has the burden of proving damages resulting from the prohibited exaction.

The prevailing party in an action under s. 70.45, F.S., may recover attorney fees and costs. If the court determines the exaction lacks an essential nexus to a legitimate public purpose, the court must award attorney fees and costs to the property owner.

Conveyance of Property by Department of Transportation

The Department of Transportation is authorized under s. 337.25, F.S., to purchase, lease, exchange, or otherwise acquire any land, property interests, buildings, or other improvements necessary to secure or use transportation rights-of-way for existing, proposed, or anticipated transportation facilities:

- On the State Highway System;
- On the State Park Road System;

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2597-98.

²⁰ S. 70.45(1)(c), F.S.

²¹ S. 70.45, F.S.

- In a rail corridor; or
- In a transportation corridor designated by the department.²²

If the department determines acquired property is no longer needed for a transportation facility, it may dispose of the property.²³ The department may afford a right of first refusal to the local government or other political subdivision in the jurisdiction where the parcel is located, except when:

- The property was donated to the state for transportation purposes, and:
 - The facility has not been constructed for at least 5 years;
 - Plans have not been prepared; and
 - The property is not located in a transportation corridor.
- The property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects.
- At the discretion of the department, a sale to a person other than an abutting property owner would be inequitable.²⁴

Effect of Proposed Changes

Bert J. Harris, Jr., Private Property Rights Protection Act

HB 519 amends the Bert J. Harris, Jr., Private Property Rights Protection Act to:

- Change the timeframe under which a claimant must notify the government before filing an action from 150 days to 90 days;
- Allow the claimant to have the court, rather than a jury, determine damages;
- Remove the prohibition that the factfinder cannot consider business damages in making a determination of the claimant's damages; and
- Change the process for attorney fees and costs by:
 - Allowing a prevailing claimant to recover attorney fees and costs incurred from the time he or she files notice with the government instead of from the time he or she files suit; and
 - Removing the provision allowing a government to recover attorney fees and costs.

The bill provides that when a property owner submits a claim under the Act based on a regulation or ordinance applied to more than one residential parcel, and the case settles or the property owner obtains a judgment declaring an inordinate burden, there is a presumption that similarly situated residential parcels are also inordinately burdened and entitled to equivalent settlement terms or a judicial determination of an inordinate burden. This presumption is rebuttable by clear and convincing evidence, and similarly situated parcels are evaluated on a parcel-by-parcel basis.

The similarly situated residential property owner must submit the specified appraisal at least 120 days before a trial on the merits of the damages portion of the proceedings. The government is encouraged to negotiate settlement terms consistent with settlement agreements for similarly situated residential parcels during the 90-day notice period of claims. Under the bill, settlement offers are presumed to protect the public interest.

The bill also provides that if the government does not provide a mailed notice to the property owner when a law or regulation affects the property, the one-year timeframe for filing suit does not apply and the property owner may, at any time, notify the government in writing that the law or regulation restricts property usage. Within 45 days of receiving the notice, the government must respond in writing, clarifying whether the law or regulation applies to the owner's property, and if so, to what extent. If the government's response indicates the law or regulation is applicable and imposes new limitations, the owner may file suit immediately without having to go through the normal application process for a

²² S. 337.25(1)(a), F.S.

²³ S. 337.25(4), F.S.

²⁴ *Id.*

development order, development permit, or building permit, as doing so would be futile and a waste of resources. The owner must file suit within one year of receiving the response from the government stating that limitations apply to the property.

Unconstitutional Exaction Challenges Under s. 70.45, F.S.

With respect to an action challenging an unlawful exaction, the bill clarifies that the property owner may sue as soon as he or she must comply with the exaction or condition of approval. This means that under certain circumstances the property owner no longer has to wait to sue until the government gives written notice of the exaction.

Conveyance of Property by Department of Transportation

The bill provides that before the department disposes of property under s. 337.25, F.S., it must offer a written right of first refusal to the previous property owner at the department's current estimate of property value, except when:

- The property was donated to the state for transportation purposes, and:
 - The facility has not been constructed for at least 5 years;
 - Plans have not been prepared; and
 - The property is not located in a transportation corridor.
- The property was originally acquired specifically to provide replacement housing for persons displaced by transportation projects.

Under the bill, the right of first refusal must give the previous owner fifteen days to accept the offer. If the previous owner exercises the right of first refusal, he or she has sixty days to close on the property. If the previous owner does not exercise the right, the department may not offer new terms to a different buyer without first allowing the previous owner a chance to accept the new terms.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

Section 1: Amends s. 70.001, F.S., relating to private property rights protection.

Section 2: Amends s. 70.45, F.S., relating to governmental exactions.

Section 3: Amends s. 337.25, F.S, relating to acquisition, lease, and disposal of real and personal property.

Section 4: Provides an effective date of July 1, 2020.

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:

The bill may have an indeterminate negative fiscal impact on local governments by:

- Making it easier for a private property owner to challenge a local government regulation that burdens the property.
- Requiring a local government, when it makes a settlement offer to a property owner, to treat all other similarly situated residential properties within the political subdivision similarly.
- Allowing a jury or the court to consider business damages in making its calculation to determine a property owner's damages.
- Removing the right of a government to seek attorney fees and costs when a property owner unreasonably refuses a bona fide offer to settle a property claim.
- Requiring the Department of Transportation, in certain situations, to offer a previous property owner a right of first refusal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill streamlines and simplifies the process for a private property owner to sue the government for enacting a regulation that burdens private property rights. The bill also allows the jury or the court, in an action for damages, to consider business damages. These provisions may have an indeterminate positive impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to private property rights protection;
3 amending s. 70.001, F.S.; revising legislative intent;
4 revising notice of claim requirements for property
5 owners; revising procedures for determination of
6 compensation; creating a presumption that certain
7 settlements of claims apply to all similarly situated
8 residential properties within a political subdivision
9 under certain circumstances; authorizing property
10 owners to bring claims against governmental entities
11 in certain circumstances; providing that property
12 owners are not required to submit formal development
13 applications or proceed through formal application
14 processes to bring claims in specified circumstances;
15 amending s. 70.45, F.S.; providing a definition;
16 authorizing property owners to bring actions to
17 declare prohibited exactions invalid; amending s.
18 337.25, F.S.; requiring the Department of
19 Transportation to afford a right of first refusal to
20 the previous property owner before disposing of
21 property in certain circumstances; providing an
22 effective date.

23
24 Be It Enacted by the Legislature of the State of Florida:
25

26 Section 1. Subsections (1), (4), (5), (6), and (11) of
 27 section 70.001, Florida Statutes, are amended to read:

28 70.001 Private property rights protection.—

29 (1) This act may be cited as the "Bert J. Harris, Jr.,
 30 Private Property Rights Protection Act." The Legislature
 31 recognizes that some laws, regulations, and ordinances of the
 32 state and political entities in the state, as applied, may
 33 inordinately burden, restrict, or limit private property rights
 34 without amounting to a taking under the State Constitution or
 35 the United States Constitution. The Legislature determines that
 36 there is an important state interest in protecting the interests
 37 of private property owners from such inordinate burdens. The
 38 Legislature further recognizes that it is in the public interest
 39 to ensure that all similarly situated residential properties are
 40 subject to the same rules and regulations. Therefore, it is the
 41 intent of the Legislature that, as a separate and distinct cause
 42 of action from the law of takings, the Legislature herein
 43 provides for relief, or payment of compensation, when a new law,
 44 rule, regulation, or ordinance of the state or a political
 45 entity in the state, as applied, unfairly affects real property.

46 (4) (a) Not less than 90 ~~150~~ days before ~~prior to~~ filing an
 47 action under this section against a governmental entity, a
 48 property owner who seeks compensation under this section must
 49 present the claim in writing to the head of the governmental
 50 entity, ~~except that if the property is classified as~~

51 ~~agricultural pursuant to s. 193.461, the notice period is 90~~
52 ~~days.~~ The property owner must submit, along with the claim, a
53 bona fide, valid appraisal that supports the claim and
54 demonstrates the loss in fair market value to the real property.
55 If the action of government is the culmination of a process that
56 involves more than one governmental entity, or if a complete
57 resolution of all relevant issues, in the view of the property
58 owner or in the view of a governmental entity to whom a claim is
59 presented, requires the active participation of more than one
60 governmental entity, the property owner shall present the claim
61 as provided in this section to each of the governmental
62 entities.

63 (b) The governmental entity shall provide written notice
64 of the claim to all parties to any administrative action that
65 gave rise to the claim, and to owners of real property
66 contiguous to the owner's property at the addresses listed on
67 the most recent county tax rolls. Within 15 days after the claim
68 is presented, the governmental entity shall report the claim in
69 writing to the Department of Legal Affairs, and shall provide
70 the department with the name, address, and telephone number of
71 the employee of the governmental entity from whom additional
72 information may be obtained about the claim during the pendency
73 of the claim and any subsequent judicial action.

74 (c) During the 90-day-notice period ~~or the 150-day-notice~~
75 ~~period~~, unless extended by agreement of the parties, the

76 governmental entity shall make a written settlement offer to
 77 effectuate:

78 1. An adjustment of land development or permit standards
 79 or other provisions controlling the development or use of land.

80 2. Increases or modifications in the density, intensity,
 81 or use of areas of development.

82 3. The transfer of developmental rights.

83 4. Land swaps or exchanges.

84 5. Mitigation, including payments in lieu of onsite
 85 mitigation.

86 6. Location on the least sensitive portion of the
 87 property.

88 7. Conditioning the amount of development or use
 89 permitted.

90 8. A requirement that issues be addressed on a more
 91 comprehensive basis than a single proposed use or development.

92 9. Issuance of the development order, a variance, a
 93 special exception, or any other extraordinary relief.

94 10. Purchase of the real property, or an interest therein,
 95 by an appropriate governmental entity or payment of
 96 compensation.

97 11. No changes to the action of the governmental entity.

98
 99 If the property owner accepts a settlement offer, ~~either~~ before
 100 or after filing an action, the governmental entity may implement

101 the settlement offer by appropriate development agreement; by
102 issuing a variance, a special exception, or any other
103 extraordinary relief; or by any other appropriate method,
104 subject to paragraph (d).

105 (d)1. When a governmental entity enters into a settlement
106 agreement under this section which would have the effect of a
107 modification, variance, or ~~a~~ special exception to the
108 application of a rule, regulation, or ordinance as it would
109 otherwise apply to the subject real property, the relief granted
110 shall protect the public interest served by the regulations at
111 issue and be the appropriate relief necessary to prevent the
112 governmental regulatory effort from inordinately burdening the
113 real property. Settlement offers made pursuant to paragraph (c)
114 shall be presumed to protect the public interest.

115 2. When a governmental entity enters into a settlement
116 agreement under this section which would have the effect of
117 contravening the application of a statute as it would otherwise
118 apply to the subject real property, the governmental entity and
119 the property owner shall jointly file an action in the circuit
120 court where the real property is located for approval of the
121 settlement agreement by the court to ensure that the relief
122 granted protects the public interest served by the statute at
123 issue and is the appropriate relief necessary to prevent the
124 governmental regulatory effort from inordinately burdening the
125 real property.

126 3. When a residential property owner submits a claim under
127 this section which is based on a governmental entity's
128 application of a regulation or ordinance to more than one
129 residential parcel, and the governmental entity reaches a
130 settlement of such claim or the property owner secures a
131 judgment declaring an inordinate burden under paragraph (6) (a),
132 there shall be a presumption, rebuttable only by clear and
133 convincing evidence, that similarly situated residential
134 parcels, as evaluated on a parcel-by-parcel basis, have been
135 inordinately burdened and are entitled to equivalent terms of
136 settlement or a judicial determination of an inordinate burden.
137 In such cases, the similarly situated residential property
138 owners must submit the appraisal specified in paragraph (a) not
139 less than 120 days before a trial on the merits of the damages
140 portion of the proceedings pursuant to paragraph (6) (b). During
141 the 90-day-notice period of such claims, the governmental entity
142 is encouraged to negotiate terms of settlement consistent with
143 settlement agreements for similarly situated residential
144 parcels.

145
146 This paragraph applies to any settlement reached between a
147 property owner and a governmental entity regardless of when the
148 settlement agreement was entered so long as the agreement fully
149 resolves all claims asserted under this section.

150 (5) (a) During the 90-day-notice period ~~or the 150-day-~~

151 ~~notice period~~, unless a settlement offer is accepted by the
152 property owner, each of the governmental entities provided
153 notice pursuant to subsection (4) ~~paragraph (4)(a)~~ shall issue a
154 written statement of allowable uses identifying the allowable
155 uses to which the subject property may be put. The failure of
156 the governmental entity to issue a statement of allowable uses
157 during the ~~applicable~~ 90-day-notice period ~~or 150-day-notice~~
158 ~~period~~ shall be deemed a denial for purposes of allowing a
159 property owner to file an action in the circuit court under this
160 section. If a written statement of allowable uses is issued, it
161 constitutes the last prerequisite to judicial review for the
162 purposes of the judicial proceeding created by this section,
163 notwithstanding the availability of other administrative
164 remedies.

165 (b) If the property owner rejects the settlement offer and
166 the statement of allowable uses of the governmental entity or
167 entities, the property owner may file a claim for compensation
168 in the circuit court, a copy of which shall be served
169 contemporaneously on the head of each of the governmental
170 entities that made a settlement offer and a statement of
171 allowable uses that was rejected by the property owner. Actions
172 under this section shall be brought only in the county where the
173 real property is located.

174 (6) (a) The circuit court shall determine whether an
175 existing use of the real property or a vested right to a

176 specific use of the real property existed and, if so, whether,
177 considering the settlement offer and statement of allowable
178 uses, the governmental entity or entities have inordinately
179 burdened the real property. If the actions of more than one
180 governmental entity, considering any settlement offers and
181 statement of allowable uses, are responsible for the action that
182 imposed the inordinate burden on the real property of the
183 property owner, the court shall determine the percentage of
184 responsibility each such governmental entity bears with respect
185 to the inordinate burden. A governmental entity may take an
186 interlocutory appeal of the court's determination that the
187 action of the governmental entity has resulted in an inordinate
188 burden. An interlocutory appeal does not automatically stay the
189 proceedings; however, the court may stay the proceedings during
190 the pendency of the interlocutory appeal. If the governmental
191 entity does not prevail in the interlocutory appeal, the court
192 shall award to the prevailing property owner the costs and a
193 reasonable attorney fee incurred by the property owner in the
194 interlocutory appeal.

195 (b) Following its determination of the percentage of
196 responsibility of each governmental entity, and following the
197 resolution of any interlocutory appeal, the court shall impanel
198 a jury to determine the total amount of compensation to the
199 property owner for the loss in value due to the inordinate
200 burden to the real property. The property owner retains the

201 option to forego a jury and elect to have the court determine
202 the award of compensation. The award of compensation shall be
203 determined by calculating the difference in the fair market
204 value of the real property, as it existed at the time of the
205 governmental action at issue, as though the owner had the
206 ability to attain the reasonable investment-backed expectation
207 or was not left with uses that are unreasonable, whichever the
208 case may be, and the fair market value of the real property, as
209 it existed at the time of the governmental action at issue, as
210 inordinately burdened, considering the settlement offer together
211 with the statement of allowable uses, of the governmental entity
212 or entities. ~~In determining the award of compensation,~~
213 ~~consideration may not be given to business damages relative to~~
214 ~~any development, activity, or use that the action of the~~
215 ~~governmental entity or entities, considering the settlement~~
216 ~~offer together with the statement of allowable uses has~~
217 ~~restricted, limited, or prohibited.~~ The award of compensation
218 shall include a reasonable award of prejudgment interest from
219 the date the claim was presented to the governmental entity or
220 entities as provided in subsection (4).

221 (c)1. In any action filed pursuant to this section, the
222 property owner is entitled to recover reasonable costs and
223 attorney fees incurred by the property owner, from the
224 governmental entity or entities, according to their
225 proportionate share as determined by the court, from the date of

226 | the claim with the governmental entity pursuant to paragraph
227 | (4) (a) filing of the circuit court action, if the property owner
228 | prevails in the action and ~~the court determines that the~~
229 | ~~settlement offer, including the statement of allowable uses, of~~
230 | ~~the governmental entity or entities did not constitute a bona~~
231 | ~~fide offer to the property owner which reasonably would have~~
232 | ~~resolved the claim, based upon the knowledge available to the~~
233 | ~~governmental entity or entities and the property owner during~~
234 | ~~the 90-day-notice period or the 150-day-notice period.~~

235 | ~~2. In any action filed pursuant to this section, the~~
236 | ~~governmental entity or entities are entitled to recover~~
237 | ~~reasonable costs and attorney fees incurred by the governmental~~
238 | ~~entity or entities from the date of the filing of the circuit~~
239 | ~~court action, if the governmental entity or entities prevail in~~
240 | ~~the action and the court determines that the property owner did~~
241 | ~~not accept a bona fide settlement offer, including the statement~~
242 | ~~of allowable uses, which reasonably would have resolved the~~
243 | ~~claim fairly to the property owner if the settlement offer had~~
244 | ~~been accepted by the property owner, based upon the knowledge~~
245 | ~~available to the governmental entity or entities and the~~
246 | ~~property owner during the 90-day-notice period or the 150-day-~~
247 | ~~notice period.~~

248 | ~~2.3.~~ The determination of total reasonable costs and
249 | attorney fees pursuant to this paragraph shall be made by the
250 | court and not by the jury. Any proposed settlement offer or any

251 | proposed decision, except for the final written settlement offer
 252 | or the final written statement of allowable uses, and any
 253 | negotiations or rejections in regard to the formulation ~~either~~
 254 | of the settlement offer or the statement of allowable uses, are
 255 | inadmissible in the subsequent proceeding established by this
 256 | section except for the purposes of the determination pursuant to
 257 | this paragraph.

258 | (d) Within 15 days after the execution of any settlement
 259 | pursuant to this section, or the issuance of any judgment
 260 | pursuant to this section, the governmental entity shall provide
 261 | a copy of the settlement or judgment to the Department of Legal
 262 | Affairs.

263 | (11) A cause of action may not be commenced under this
 264 | section if the claim is presented more than 1 year after a law
 265 | or regulation is first applied by the governmental entity to the
 266 | property at issue.

267 | (a) For purposes of determining when this 1-year claim
 268 | period accrues:

269 | 1.a. A law or regulation is first applied upon enactment
 270 | and notice as provided for in this sub-subparagraph ~~subparagraph~~
 271 | if the impact of the law or regulation on the real property is
 272 | clear and unequivocal in its terms and notice is provided by
 273 | mail to the affected property owner or registered agent at the
 274 | address referenced in the jurisdiction's most current ad valorem
 275 | tax records. The fact that the law or regulation could be

276 modified, varied, or altered under any other process or
277 procedure does not preclude the impact of the law or regulation
278 on a property from being clear or unequivocal pursuant to this
279 sub-subparagraph ~~subparagraph~~. Any notice under this sub-
280 subparagraph ~~subparagraph~~ shall be provided after the enactment
281 of the law or regulation and shall inform the property owner or
282 registered agent that the law or regulation may impact the
283 property owner's existing property rights and that the property
284 owner may have only 1 year from receipt of the notice to pursue
285 any rights established under this section.

286 b. If the notice required in sub-subparagraph a. is not
287 provided to the property owner, the property owner may at any
288 time after enactment notify the governmental entity in writing
289 that the property owner deems the impact of the law or
290 regulation on the property owner's real property to be clear and
291 unequivocal in its terms and, as such, restrictive of uses
292 allowed on the property before the enactment. Within 45 days
293 after receipt of a notice under this sub-subparagraph, the
294 governmental entity in receipt of the notice must respond in
295 writing to state whether the law or regulation is applicable to
296 the real property in question and provide a description of the
297 limitations imposed on the property by the law or regulation. If
298 the governmental entity concludes that the law or regulation is
299 applicable by imposing new limitations on the uses of the
300 property, the property owner is not required to formally pursue

301 an application for a development order, development permit, or
302 building permit as such will be deemed a waste of resources and
303 shall not be a prerequisite to bringing a claim pursuant to
304 paragraph (4) (a). However, any such claim must be filed within 1
305 year after the date of the property owner's receipt of the
306 notice from the governmental entity of the limitations on use
307 imposed on the real property.

308 2. Otherwise, the law or regulation is first applied to
309 the property when there is a formal denial of a written request
310 for development or variance.

311 Section 2. Paragraphs (c) through (e) of subsection (1) of
312 section 70.45, Florida Statutes, are redesignated as paragraphs
313 (d) through (f), respectively, a new paragraph (c) is added to
314 that subsection, and subsections (2), (4), and (5) of that
315 section are amended, to read:

316 70.45 Governmental exactions.—

317 (1) As used in this section, the term:

318 (c) "Imposed" or "imposition" as it relates to a
319 prohibited exaction or condition of approval refers to the time
320 at which the property owner must comply with the prohibited
321 exaction or condition of approval.

322 (2) In addition to other remedies available in law or
323 equity, a property owner may bring an action in a court of
324 competent jurisdiction under this section to declare a
325 prohibited exaction invalid and recover damages caused by a

326 prohibited exaction. Such action may not be brought until a
327 prohibited exaction is actually imposed or required in writing
328 as a final condition of approval for the requested use of real
329 property. The right to bring an action under this section may
330 not be waived. This section does not apply to impact fees
331 adopted under s. 163.31801 or non-ad valorem assessments as
332 defined in s. 197.3632.

333 (4) For each claim filed under this section, the
334 governmental entity has the burden of proving that the
335 challenged exaction has an essential nexus to a legitimate
336 public purpose and is roughly proportionate to the impacts of
337 the proposed use that the governmental entity is seeking to
338 avoid, minimize, or mitigate. The property owner has the burden
339 of proving damages that result from a prohibited exaction.

340 (5) The court may award attorney fees and costs to the
341 prevailing party; however, if the court determines that the
342 challenged exaction which is the subject of the claim lacks an
343 essential nexus to a legitimate public purpose, the court shall
344 award attorney fees and costs to the property owner.

345 Section 3. Subsection (4) of section 337.25, Florida
346 Statutes, is amended to read:

347 337.25 Acquisition, lease, and disposal of real and
348 personal property.—

349 (4) The department may convey, in the name of the state,
350 any land, building, or other property, real or personal, which

351 was acquired under subsection (1) and which the department has
352 determined is not needed for the construction, operation, and
353 maintenance of a transportation facility. When such a
354 determination has been made, property may be disposed of through
355 negotiations, sealed competitive bids, auctions, or any other
356 means the department deems to be in its best interest, with due
357 advertisement for property valued by the department at greater
358 than \$10,000. A sale may not occur at a price less than the
359 department's current estimate of value, except as provided in
360 paragraphs (a)-(d). The department may afford a right of first
361 refusal to the local government or other political subdivision
362 in the jurisdiction in which the parcel is situated, except in a
363 conveyance transacted under paragraph (a), paragraph (c), or
364 paragraph (e). Notwithstanding any provision of this section to
365 the contrary, before any conveyance under this subsection may be
366 made, except a conveyance under paragraph (a) or paragraph (c),
367 the department shall first afford a right of first refusal to
368 the previous property owner for the department's current
369 estimate of value of the property. The right of first refusal
370 shall be made in writing and sent to the previous owner via
371 certified mail or hand delivery, effective upon receipt. The
372 right of first refusal shall provide the previous owner with a
373 minimum of 15 days to exercise the right in writing and sent to
374 the originator of the offer via certified mail or hand delivery,
375 effective upon dispatch. The previous owner shall have a minimum

376 of 60 days after exercising its right of first refusal to close.
377 If the previous owner does not exercise its right of first
378 refusal, the department may not deviate in any material respect
379 from the offer made to the previous owner unless it first
380 provides the previous owner with the right of first refusal
381 under the new terms. The same procedure shall apply to any
382 subsequent iterations of the sale terms.

383 (a) If the property has been donated to the state for
384 transportation purposes and a transportation facility has not
385 been constructed for at least 5 years, plans have not been
386 prepared for the construction of such facility, and the property
387 is not located in a transportation corridor, the governmental
388 entity may authorize reconveyance of the donated property for no
389 consideration to the original donor or the donor's heirs,
390 successors, assigns, or representatives.

391 (b) If the property is to be used for a public purpose,
392 the property may be conveyed without consideration to a
393 governmental entity.

394 (c) If the property was originally acquired specifically
395 to provide replacement housing for persons displaced by
396 transportation projects, the department may negotiate for the
397 sale of such property as replacement housing. As compensation,
398 the state shall receive at least its investment in such property
399 or the department's current estimate of value, whichever is
400 lower. It is expressly intended that this benefit be extended

401 only to persons actually displaced by the project. Dispositions
402 to any other person must be for at least the department's
403 current estimate of value.

404 (d) If the department determines that the property
405 requires significant costs to be incurred or that continued
406 ownership of the property exposes the department to significant
407 liability risks, the department may use the projected
408 maintenance costs over the next 10 years to offset the
409 property's value in establishing a value for disposal of the
410 property, even if that value is zero.

411 (e) If, at the discretion of the department, a sale to a
412 person other than an abutting property owner would be
413 inequitable, the property may be sold to the abutting owner for
414 the department's current estimate of value.

415 Section 4. This act shall take effect July 1, 2020.

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	_____	(Y/N)
ADOPTED AS AMENDED	_____	(Y/N)
ADOPTED W/O OBJECTION	_____	(Y/N)
FAILED TO ADOPT	_____	(Y/N)
WITHDRAWN	_____	(Y/N)
OTHER		

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Grant, J. offered the following:

Amendment (with title amendment)

Between lines 344 and 345, insert:

6 Section 3. Subsections (2), (3), and (4), paragraph (b) of
 7 subsection (5), paragraphs (a), (b), and (c) of subsection (6),
 8 subsections (8), (10), (11), (12), and (13), paragraph (a) of
 9 subsection (15), paragraph (a) of subsection (16), and
 10 subsections (17), (18), (19), (20), (21), (24), (25), (26),
 11 (28), and (30) of section 70.51, Florida Statutes, are amended
 12 to read:

13 70.51 Land use and environmental dispute resolution.—

14 (2) As used in this section, the term:

15 (a) "Comprehensive plan amendment" means a governmental
 16 action subject to s. 163.3181(4).

Amendment No.

17 ~~(b)(a)~~ "Development order" means any order, or notice of
18 proposed state or regional governmental agency action, which is
19 or will have the effect of granting, denying, or granting with
20 conditions an application for a development permit, and includes
21 the rezoning of a specific parcel. ~~Actions by the state or a~~
22 ~~local government on comprehensive plan amendments are not~~
23 ~~development orders.~~

24 ~~(c)(b)~~ "Development permit" means any building permit,
25 zoning permit, subdivision approval, certification, special
26 exception, variance, or any other similar action of local
27 government, as well as any permit authorized to be issued under
28 state law by state, regional, or local government which has the
29 effect of authorizing the development of real property
30 including, but not limited to, programs implementing chapters
31 125, 161, 163, 166, 187, 258, 372, 373, 378, 380, and 403.

32 (d) "Enforcement action" means any civil or administrative
33 action by a governmental entity intended to enforce any law,
34 ordinance, regulation, rule, or policy related to the
35 development or use of real property. The term includes, but is
36 not limited to, any action taken under chapter 162, such as a
37 notice of violation, order, or placement of a lien, or the
38 service of a notice of violation or an order to correct a
39 condition, or an equivalent action, by a state agency.

40 ~~(e)(f)~~ "Governmental entity" includes an agency of the
41 state, a regional or a local government created by the State

Amendment No.

42 Constitution or by general or special act, any county or
43 municipality, or any other entity that independently exercises
44 governmental authority. The term does not include the United
45 States or any of its agencies.

46 ~~(f)~~~~(g)~~ "Land" or "real property" means land and includes
47 any appurtenances and improvements to the land, including any
48 other relevant real property in which the owner had a relevant
49 interest.

50 ~~(g)~~~~(d)~~ "Owner" means a person with a legal or equitable
51 interest in real property who filed an application for a
52 development permit for the property at the state, regional, or
53 local level and who received a development order, who filed a
54 comprehensive plan amendment, or who holds legal title to or who
55 has a legal or equitable interest in real property that is
56 subject, or is otherwise a person subject to, to an enforcement
57 action of a governmental entity.

58 ~~(h)~~~~(e)~~ "~~Proposed~~ Use of the property" means the proposal
59 filed by the owner to develop his or her real property or the
60 actual use of the property giving rise to an enforcement action.

61 ~~(i)~~~~(e)~~ "Special magistrate" means a person selected by the
62 parties to perform the duties prescribed in this section. The
63 special magistrate must be a resident of the state and possess
64 experience and expertise in mediation and at least one of the
65 following disciplines and a working familiarity with the others:
66 land use and environmental permitting, land planning, land

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

67 economics, local and state government organization and powers,
68 and the law governing the same. A special magistrate is not
69 required to be a certified mediator.

70 (3) Any owner who believes that a development order,
71 either separately or in conjunction with other development
72 orders, a comprehensive plan amendment, or an enforcement action
73 of a governmental entity⁷ is unreasonable or unfairly burdens
74 the use of the owner's real property⁷ may apply within 30 days
75 after receipt of the order or notice of the governmental action
76 for relief under this section.

77 (4) To initiate a proceeding under this section, an owner
78 must file a request for relief with the elected or appointed
79 head of the governmental entity that issued the development
80 order or orders, denied the comprehensive plan amendment, or
81 ~~that~~ initiated the enforcement action. Filing may be by
82 electronic mail to the official email address of the head of the
83 governmental entity, by hand delivery to such person, or by
84 United States mail to such person at his or her official
85 address. Formal service of process is not required for such
86 filing. The process shall be considered initiated as of the date
87 the petition is filed with the head of the governmental entity
88 pursuant to this subsection. The head of the governmental entity
89 may not charge the owner for the request for relief and must
90 forward the request for relief to the special magistrate who is

Amendment No.

91 mutually agreed upon by the owner and the governmental entity
92 within 10 days after receipt of the request.

93 (5) The governmental entity with whom a request has been
94 filed shall also serve a copy of the request for relief by
95 United States mail or by hand delivery to:

96 (b) Any substantially affected party who submitted oral or
97 written testimony, sworn or unsworn, of a substantive nature
98 which stated with particularity objections to or support for any
99 development order, comprehensive plan amendment, ~~at issue~~ or
100 enforcement action at issue. Notice under this paragraph is
101 required only if that party indicated a desire to receive notice
102 of any subsequent special magistrate proceedings occurring on
103 the development order, comprehensive plan amendment, or
104 enforcement action. Each governmental entity must maintain in
105 its files relating to each particular development order,
106 comprehensive plan amendment, or enforcement action ~~orders~~ a
107 mailing list of persons who have presented oral or written
108 testimony and who have requested notice.

109 (6) The request for relief must contain:

110 (a) A brief statement of the owner's ~~proposed~~ use of the
111 property.

112 (b) A summary of the development order or comprehensive
113 plan amendment or a description of the enforcement action. A
114 copy of the development order or comprehensive plan amendment or

Amendment No.

115 the documentation of an enforcement action at issue must be
116 attached to the request.

117 (c) A brief statement of the impact of the development
118 order, denial of the comprehensive plan amendment, or
119 enforcement action on the ability of the owner to achieve the
120 ~~proposed~~ use of the property.

121 (8) The special magistrate has the sole authority to
122 determine whether a request for relief is complete and was
123 timely filed and may conduct a hearing on whether the request
124 for relief should be dismissed for failing to include the
125 information required in subsection (6). If the special
126 magistrate dismisses the case, the special magistrate shall
127 allow the owner to amend the request and refile. Failure to file
128 an adequate amended request within the time specified shall
129 result in a dismissal with prejudice as to this proceeding. A
130 property owner who is successful in a suit to require a
131 governmental entity to participate in a proceeding under this
132 section shall be awarded attorney fees and costs.

133 (10) (a) Before initiating a special magistrate proceeding
134 to review a local development order, comprehensive plan
135 amendment, or local enforcement action, the owner must exhaust
136 all nonjudicial local government administrative appeals if the
137 appeals take no longer than 4 months. Once nonjudicial local
138 administrative appeals are exhausted and the development order,
139 comprehensive plan amendment, or enforcement action is final, or

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

140 within 4 months after issuance of the development order, denial
141 of the comprehensive plan amendment, or notice of the
142 enforcement action if the owner has pursued local administrative
143 appeals even if the appeals have not been concluded, the owner
144 may initiate a proceeding under this section. Initiation of a
145 proceeding tolls the rendition or effectiveness of the
146 development order, denial of the comprehensive plan amendment,
147 ~~time for seeking judicial review of a local government~~
148 ~~development order~~ or enforcement action until the special
149 magistrate's recommendation is acted upon by the local
150 government. Election by the owner to file for judicial review of
151 a local government development order, comprehensive plan
152 amendment, or enforcement action before ~~prior to~~ initiating a
153 proceeding under this section waives any right to a special
154 magistrate proceeding.

155 (b) If an owner requests special magistrate relief from a
156 development order, comprehensive plan amendment, or enforcement
157 action issued by a state or regional agency, the time for
158 challenging agency action under ss. 120.569 and 120.57 is tolled
159 until the agency acts upon the recommendation of the special
160 magistrate or the proceeding is terminated by the owner. If an
161 owner chooses to bring a proceeding under ss. 120.569 and 120.57
162 before initiating a special magistrate proceeding, then the
163 owner waives any right to a special magistrate proceeding unless
164 all parties consent to proceeding to mediation.

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

165 (11) The initial party to the proceeding is the
166 governmental entity that issues the development order or
167 comprehensive plan amendment to the owner or that is taking the
168 enforcement action. In those instances when the development
169 order, comprehensive plan amendment, or enforcement action is
170 the culmination of a process involving more than one
171 governmental entity or when a complete resolution of all
172 relevant issues would require the active participation of more
173 than one governmental entity, the special magistrate may, upon
174 application of a party, join those governmental entities as
175 parties to the proceeding if it will assist in effecting the
176 purposes of this section, and those governmental entities so
177 joined shall actively participate in the procedure.

178 (12) Within 21 days after the date of notice provided
179 under subsection (5) ~~receipt of the request for relief~~, any
180 owner of land contiguous to the owner's property and any
181 substantially affected person who submitted oral or written
182 testimony, sworn or unsworn, of a substantive nature which
183 stated with particularity objections to or support for the
184 development order, comprehensive plan amendment, or enforcement
185 action at issue may make a written request to participate in the
186 hearing by transmitting such request to the official who signed
187 the notice proceeding. Those persons may be permitted to
188 participate in the hearing but shall not be granted party or
189 intervenor status. The participation of such persons is limited

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

190 to addressing issues raised regarding alternatives, variances,
191 and other types of adjustment to the development order,
192 comprehensive plan amendment, or enforcement action which may
193 impact their substantial interests, including denial of the
194 development order or comprehensive plan amendment or application
195 of an enforcement action.

196 (13) Each party must make efforts to assure that those
197 persons qualified by training or experience necessary to address
198 issues raised by the request or by the special magistrate and
199 further qualified to address alternatives, variances, and other
200 types of modifications to the development order, comprehensive
201 plan amendment, or enforcement action are present at the
202 hearing.

203 (15) (a) The special magistrate shall hold a hearing within
204 60 ~~45~~ days after his or her receipt of the request for relief
205 unless a different date is agreed to by all the parties. The
206 hearing must be held in the county in which the property is
207 located.

208 (16) (a) Five days after the date on which the special
209 magistrate is selected, or 21 days after the date on which the
210 petition is served ~~Fifteen days following the filing of a~~
211 ~~request for relief, whichever is earlier,~~ the governmental
212 entity that issued the development order or comprehensive plan
213 amendment or that is taking the enforcement action shall file a
214 response to the request for relief with the special magistrate

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

215 together with a copy to the owner. The response must set forth
216 in reasonable detail the position of the governmental entity
217 regarding the matters alleged by the owner. The response must
218 include a brief statement explaining the public purpose of the
219 regulations on which the development order, comprehensive plan
220 amendment, or enforcement action is based.

221 (17) In all respects, the hearing must be informal and
222 open to the public and does not require the use of an attorney.
223 The hearing must operate at the direction and under the
224 supervision of the special magistrate. The object of the hearing
225 is to focus attention on the impact of the governmental action
226 giving rise to the request for relief and to explore
227 alternatives to the development order, comprehensive plan
228 amendment, or enforcement action and other regulatory efforts by
229 the governmental entities in order to recommend relief, when
230 appropriate, to the owner.

231 (a) The first responsibility of the special magistrate is
232 to facilitate a resolution of the conflict between the owner and
233 governmental entities to the end that some modification of the
234 owner's ~~proposed~~ use of the property or adjustment in the
235 development order, comprehensive plan amendment, or enforcement
236 action or regulatory efforts by one or more of the governmental
237 parties may be reached. Accordingly, the special magistrate
238 shall act as a facilitator or mediator between the parties in an
239 effort to effect a mutually acceptable solution. The parties

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

240 shall be represented at the mediation by persons with authority
241 to bind their respective parties to a solution, or by persons
242 with authority to recommend a solution directly to the persons
243 with authority to bind their respective parties to a solution.
244 The mediation shall be conducted according to ss. 44.401-44.406.

245 (b) If an acceptable solution is not reached by the
246 parties after the special magistrate's attempt at mediation, the
247 special magistrate shall consider the facts and circumstances
248 set forth in the request for relief and any responses and any
249 other information produced at the hearing in order to determine
250 whether the action by the governmental entity or entities is
251 unreasonable or unfairly burdens the real property.

252 (c) In conducting the hearing, the special magistrate may
253 hear from all parties and witnesses that are necessary to an
254 understanding of the matter. The special magistrate shall weigh
255 all information offered at the hearing.

256 (18) The circumstances to be examined in determining
257 whether the development order, comprehensive plan amendment, or
258 enforcement action, or the development order, comprehensive plan
259 amendment, or enforcement action in conjunction with regulatory
260 efforts of other governmental parties, is unreasonable or
261 unfairly burdens use of the property may include, but are not
262 limited to:

263 (a) The history of the real property, including when it
264 was purchased, how much was purchased, where it is located, the

Amendment No.

265 nature of the title, the composition of the property, and how it
266 was initially used.

267 (b) The history or development and use of the real
268 property, including what was developed on the property and by
269 whom, if it was subdivided and how and to whom it was sold,
270 whether plats were filed or recorded, and whether infrastructure
271 and other public services or improvements may have been
272 dedicated to the public.

273 (c) The history of environmental protection and land use
274 controls and other regulations, including how and when the land
275 was classified, how use was proscribed, and what changes in
276 classifications occurred.

277 (d) The present nature and extent of the real property,
278 including its natural and altered characteristics.

279 (e) The reasonable expectations of the owner at the time
280 of acquisition, or immediately before ~~prior to~~ the
281 implementation of the regulation at issue, whichever is later,
282 under the regulations then in effect and under common law.

283 (f) The public purpose sought to be achieved by the
284 development order, comprehensive plan amendment, or enforcement
285 action, including the nature and magnitude of the problem
286 addressed by the underlying regulations on which the development
287 order, comprehensive plan amendment, or enforcement action is
288 based; whether the development order, comprehensive plan
289 amendment, or enforcement action is necessary to the achievement

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

290 of the public purpose; and whether there are alternative
291 development orders, comprehensive plan amendments, or
292 enforcement action conditions that would achieve the public
293 purpose and allow for reduced restrictions on the use of the
294 property.

295 (g) Uses authorized for and restrictions placed on similar
296 property.

297 (h) Whether the governmental entity attempted to resolve
298 the dispute in good faith, including, but not limited to,
299 adhering to the deadlines provided in this section.

300 (i) ~~(h)~~ Any other information determined relevant by the
301 special magistrate.

302 (19) Within 14 days after the conclusion of the hearing,
303 or when the parties propose a settlement agreement for entry by
304 the special magistrate pursuant to subsection (22), the special
305 magistrate shall prepare and file with all parties a written
306 recommendation.

307 (a) If the special magistrate finds and concludes that the
308 development order at issue, or the development order,
309 comprehensive plan amendment, or enforcement action in
310 combination with the actions or regulations of other
311 governmental entities, is not unreasonable or does not unfairly
312 burden the use of the owner's property, the special magistrate
313 must recommend that the development order, comprehensive plan
314 amendment, or enforcement action remain undisturbed and the

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

315 proceeding shall end, subject to the owner's retention of all
316 other available remedies.

317 (b) If the special magistrate finds and concludes that the
318 development order, comprehensive plan amendment, or enforcement
319 action, or the development order, comprehensive plan amendment,
320 or enforcement action in combination with the actions or
321 regulations of other governmental entities, is unreasonable or
322 unfairly burdens use of the owner's property, the special
323 magistrate, with the owner's consent to proceed, may recommend
324 one or more alternatives that protect the public interest served
325 by the development order, comprehensive plan amendment, or
326 enforcement action and regulations at issue but allow for
327 reduced restraints on the use of the owner's real property,
328 including, but not limited to:

329 1. An adjustment of land development or permit standards
330 or other provisions controlling the development or use of land.

331 2. Increases or modifications in the density, intensity,
332 or use of areas of development.

333 3. The transfer of development rights.

334 4. Land swaps or exchanges.

335 5. Mitigation, including payments in lieu of onsite
336 mitigation.

337 6. Location on the least sensitive portion of the
338 property.

Amendment No.

339 7. Conditioning the amount of development or use
340 permitted.

341 8. A requirement that issues be addressed on a more
342 comprehensive basis than a single ~~proposed~~ use or development.

343 9. Rehearing or reconsideration and issuance of the
344 development order, comprehensive plan amendment, or enforcement
345 action with or without modifications or additional stipulations,
346 or a variance, special exception, or other extraordinary relief,
347 including withdrawal of the enforcement action.

348 10. Purchase of the real property, or an interest therein,
349 by an appropriate governmental entity.

350 (c) If the parties reach a proposed settlement agreement
351 at any time before the special magistrate enters a
352 recommendation, which agreement may remain subject to approval
353 by the governmental entity, the parties may request that the
354 special magistrate transmit the settlement agreement to the
355 governmental entity as the special magistrate's findings and
356 recommendation for consideration and approval by the
357 governmental entity, and the special magistrate need not include
358 the findings or conclusions set forth in paragraph (a) or
359 paragraph (b) ~~This subsection does not prohibit the owner and~~
360 ~~governmental entity from entering into an agreement as to the~~
361 ~~permissible use of the property prior to the special magistrate~~
362 ~~entering a recommendation. An agreement for a permissible use~~
363 ~~must be incorporated in the special magistrate's recommendation.~~

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

364 (d) This section provides legislative authority for the
365 governmental entity or tribunal to rehear and reconsider its
366 prior action on a development order, comprehensive plan
367 amendment, or enforcement action pursuant to, and in
368 consideration of, a special magistrate's recommendation
369 regardless of whether existing statutes, rules, ordinances, or
370 regulations provide for such a procedure. Any such rehearing or
371 reconsideration shall be at a public hearing noticed and
372 otherwise conducted in the same manner as the original hearing.
373 The tribunal shall treat the special magistrate's findings, or a
374 settlement agreement, as evidence for modification of its prior
375 development order, comprehensive plan amendment, or enforcement
376 action, and shall provide an opportunity for any person who
377 participated in the original hearing or the special magistrate's
378 proceeding to provide additional evidence and testimony. The
379 tribunal's action on the special magistrate's recommendation
380 shall then become the final order on the development order,
381 comprehensive plan amendment, or enforcement action.

382 (20) The special magistrate's recommendation and findings
383 are ~~is~~ a public record under chapter 119. However, actions or
384 statements of all participants to the special magistrate
385 mediation ~~proceeding~~ are evidence of an offer to compromise and
386 inadmissible in any proceeding, judicial or administrative.

387 (21) Within 45 days after receipt of the special
388 magistrate's recommendation, the governmental entity responsible

Amendment No.

389 for the development order, comprehensive plan amendment, or
390 enforcement action and other governmental entities participating
391 in the proceeding must consult among themselves and each
392 governmental entity must:

393 (a) Accept or modify the recommendation of the special
394 magistrate, including any proposed settlement agreement, as
395 submitted and proceed to implement it by development agreement,
396 when appropriate, by rehearing or reconsidering the development
397 order or enforcement action, or by other method, in the ordinary
398 course and consistent with the rules and procedures of that
399 governmental entity. However, the decision of the governmental
400 entity to accept the recommendation of the special magistrate
401 with respect to rehearing or reconsidering the prior development
402 order or enforcement action or granting a modification,
403 variance, or special exception to the application of statutes,
404 rules, regulations, or ordinances as they would otherwise apply
405 to the subject property does not require an owner to duplicate
406 previous processes in which the owner has participated in order
407 to effectuate the granting of the modification, variance, or
408 special exception;

409 ~~(b) Modify the recommendation as submitted by the special~~
410 ~~magistrate and proceed to implement it by development agreement,~~
411 ~~when appropriate, or by other method, in the ordinary course and~~
412 ~~consistent with the rules and procedures of that governmental~~
413 ~~entity; or~~

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

414 ~~(b)(e)~~ Reject the recommendation as submitted by the
415 special magistrate. Failure to act within 45 days is a rejection
416 unless the period is extended by agreement of the owner and
417 issuer of the development order, comprehensive plan amendment,
418 or enforcement action.

419 (24) The procedure created by this section is not itself,
420 nor does it create, a judicial cause of action. Once the
421 governmental entity acts on the special magistrate's
422 recommendation, the owner may pursue whatever administrative or
423 judicial remedies are applicable ~~elect to file suit in a court~~
424 ~~of competent jurisdiction~~. Invoking the procedures of this
425 section is not a condition precedent to filing a civil action.

426 (25) Regardless of the action the governmental entity
427 takes on the special magistrate's findings and recommendation, a
428 recommendation that the development order, comprehensive plan
429 amendment, or enforcement action, or the development order,
430 comprehensive plan amendment, or enforcement action in
431 combination with other governmental regulatory actions, is
432 unreasonable or unfairly burdens use of the owner's real
433 property may serve as an indication of sufficient hardship to
434 support waivers of or modification, variances, or special
435 exceptions to the application of statutes, rules, regulations,
436 or ordinances to the subject property, whether as a part of the
437 implementation of the recommendation, in a subsequent
438 application, or in an administrative or judicial challenge to

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

439 the action of the governmental entity. However, the special
440 magistrate's findings and recommendations are not preclusive to
441 any issue or defense in any subsequent administrative or
442 judicial proceeding.

443 (26) A special magistrate's findings and recommendation
444 under this section constitutes data in support of, and a support
445 document for, a comprehensive plan or comprehensive plan
446 amendment, but is not, in and of itself, dispositive of a
447 determination of compliance with chapter 163.

448 (28) Each governmental entity may establish procedural
449 guidelines to govern the conduct of proceedings authorized by
450 this section, which must include, but are not limited to,
451 payment of special magistrate fees and expenses, including the
452 costs of providing notice and effecting service of the request
453 for relief under this section, which shall be borne equally by
454 the governmental entities and the owner. Such guidelines may not
455 modify the requirements and relief provided by this section in
456 any way.

457 (30) In order to encourage the resolution of disputes, and
458 regardless of whether the parties are engaged in pending
459 litigation presently before a court or administrative agency, a
460 governmental entity may conduct meetings following the
461 procedures in s. 286.011(8) at any time after the governmental
462 entity responds in writing to a request for relief to discuss
463 settlement strategies, but shall not take action on a proposed

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

464 ~~settlement agreement except at a noticed public meeting This~~
465 ~~section applies only to development orders issued, modified, or~~
466 ~~amended, or to enforcement actions issued, on or after October~~
467 ~~1, 1995.~~

468 Section 4. Subsection (4) of section 163.3181, Florida
469 Statutes, is amended to read:

470 163.3181 Public participation in the comprehensive
471 planning process; intent; alternative dispute resolution.-

472 (4) If a local government denies an owner's request for an
473 amendment to the comprehensive plan which is applicable to the
474 property of the owner, the owner may initiate a dispute
475 resolution proceeding under s. 70.51 ~~the local government must~~
476 ~~afford an opportunity to the owner for informal mediation or~~
477 ~~other alternative dispute resolution. The costs of the mediation~~
478 ~~or other alternative dispute resolution shall be borne equally~~
479 ~~by the local government and the owner. If the owner requests~~
480 ~~mediation, the time for bringing a judicial action is tolled~~
481 ~~until the completion of the mediation or 120 days, whichever is~~
482 ~~earlier.~~

483 -----
484
485 **T I T L E A M E N D M E N T**

486 Remove line 17 and insert:

487 declare prohibited exactions invalid; amending s. 70.51,
488 F.S.; providing and revising definitions; providing for

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

489 resolution of disputes concerning comprehensive plan
490 amendments under the Florida Land Use and Environmental
491 Dispute Resolution Act; revising requirements for
492 initiating a proceeding under the act; providing for an
493 award of attorney fees and costs to property owners who
494 successfully bring actions to compel a governmental entity
495 to participate in certain proceedings; revising provisions
496 concerning tolling of certain administrative proceedings;
497 revising the time periods for a governmental entity to
498 respond to a request for relief; requiring mediations to be
499 conducted according to specified provisions; requiring the
500 governmental entity's conduct in dispute resolution to be
501 considered in determining whether regulatory efforts were
502 unreasonable or unfairly burdened use of the property;
503 revising the deadline for a magistrate to prepare and file
504 a written recommendation; revising provisions concerning
505 settlement agreements; specifying that a governmental
506 entity has authority to rehear and reconsider certain
507 actions pursuant to a special magistrate's recommendation;
508 providing requirements for such rehearing and
509 reconsideration; revising provisions concerning other
510 remedies that may be pursued by a property owner; providing
511 requirements for guidelines adopted by governmental
512 entities for dispute resolution proceedings; specifying
513 that certain settlement discussions are confidential;

512513 - h0519-line344.docx

Published On: 1/15/2020 6:44:42 PM

Amendment No.

514 requiring that actions on proposed settlements be taken at
515 open meetings; deleting obsolete language; amending s.
516 163.3181, F.S.; conforming provisions to changes made by
517 the act; amending s.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 567 Correction of Errors in Deeds

SPONSOR(S): Altman

TIED BILLS: **IDEN./SIM. BILLS:** SB 886

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Mawn	Luczynski
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A deed is a written instrument conveying land from one party (“grantor”) to another recorded in the public records of the county where the land lies. Deed errors are common, often coming to light when a title company discovers, during a sale of real property, that the seller took possession of the property under an erroneous deed. While some errors are harmless, others are fatal to the conveyance and require corrective action.

A legal description error is one such fatal error, creating a lack of marketable title that could prevent future sale of the property as title insurance companies refuse to insure title to the prospective buyer. However, an erroneous deed may not be re-recorded with the new, correct legal description attached to it, or with information added to the legal description after execution. Instead, Florida law provides that, to correct a legal description error, a corrective deed may be executed by the intended owner and the original grantor and recorded in the public record. A corrective deed need not restate all material portions of the deed being corrected where such portions lack errors, as corrective deeds and non-erroneous portions of original deeds are construed together. Additionally, a court can reform a deed when, due to a mutual mistake, the deed as written does not accurately express the true intention or agreement of the parties and the original grantor refused to correct the deed.

Correcting an erroneous deed can be costly and time-consuming, as such action requires either tracking down the original grantor and getting the grantor to file a corrective deed or bringing a lawsuit in court for deed reformation. However, approximately 40 percent of legal description errors encountered by title insurance companies involve a single error regarding or omission of:

- A lot or block identification in a recorded platted lot;
- One unit, building, or phase identification of a condominium or cooperative; or
- One directional designation or numerical fraction of a tract of land described as a fractional portion of a section, township, or range.

HB 567:

- Defines scrivener’s error to mean a single error or omission in a property’s legal description falling into one of the three categories of deed errors listed above.
- Creates a curative notice to correct a single scrivener’s error in a deed, specifies the form for such notice, and provides that such notice clears any cloud or encumbrance created by the erroneous deed on any property the grantor and grantee did not intend to convey in the erroneous deed.
- Provides that if a party files a curative notice in the specified form, and meets the conditions for filing a curative notice, the erroneous deed conveys title to the property as though there had been no error.

The bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A deed is a written instrument conveying land from one party (“grantor”) to another recorded in the public records of the county in which the land lies.¹ Errors in deeds are common,² often coming to light when a title company discovers, during a title search conducted for the sale of real property, that the seller took possession of the property from the original grantor under an erroneous deed.³ While some errors are harmless,⁴ others are fatal to the conveyance and require corrective action.⁵

A legal description⁶ error is one such fatal error, creating a lack of marketable title⁷ that could prevent sale of the property as title insurance companies refuse to insure title to the prospective buyer.⁸ However, a defective deed may not be re-recorded with the new, correct legal description attached to it, or with information added to the legal description after execution.⁹ Instead, Florida common law provides that, to correct a legal description error, a corrective deed may be executed by the original grantor and the intended owner and recorded in the public record.¹⁰ A corrective deed need not restate all material portions of the deed being corrected where such portions lack errors, as corrective deeds and non-erroneous portions of original deeds are “construed together.”¹¹

Additionally, a court has the authority to reform a deed when, due to a mutual mistake,¹² the deed as written does not accurately express the true intention or agreement of the parties.¹³ Claims for deed reformation are subject to a 20-year statute of limitations,¹⁴ and the complaint must allege that the plaintiff demanded a corrective deed from the respondent,¹⁵ or to otherwise conform the deed to the parties’ understanding, but the respondent refused.¹⁶ In the same pleading, a party may seek to quiet title to him or herself to reflect the intended ownership of the parcel.¹⁷

Correcting an erroneous deed can be costly and time-consuming, as such action requires either tracking down the original grantor and getting the grantor to file a corrective deed or bringing a lawsuit in court for deed reformation. However, approximately 40 percent of legal description errors encountered by title insurance companies involve a single error about or omission of:

- A lot or block identification in a recorded platted lot;

¹ Black’s Law Dictionary (11th ed. 2019).

² Data from one title insurance company shows that of the 6,835 claims opened from January 1, 2014, to December 3, 2019, involving Florida properties, 1,901 claims alleged deed errors. See email from Beth A. Vecchioli, Senior Director of Government Consulting, Carlton Fields, Errors in Deeds Bills (Jan. 8, 2020).

³ See Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper* (June 1, 2019).

⁴ A harmless error will not prevent passage of title or the deed’s legal recordation and may be ignored. An example of a harmless error includes the lack of a date, or an incorrect date, in a deed. The Florida Bar, *Five Tips Every Real Estate Practitioner Should Know About Defective Deeds*, <https://www.floridabar.org/the-florida-bar-journal/five-tips-every-real-estate-practitioner-should-know-about-defective-deeds/> (last visited Jan. 14, 2020).

⁵ See The Florida Bar, *supra* note 4.

⁶ A legal description is a real property description by government survey, metes and bounds, or lot numbers of a recorded plat, which must be complete enough that a particular piece of land can be located and identified. In Florida, every parcel must be ascertained by legal description and cannot rely on property address. Black’s Law Dictionary (6th ed. 1991).

⁷ Marketable title is title free from encumbrances and any reasonable doubt as to its validity, so that a reasonably intelligent person would be willing to accept it. Black’s Law Dictionary, 670 (6th ed. 1991).

⁸ See Email from Martha J. Edenfield, Attorney, Dean, Mead & Dunbar, Fwd: Deed Answers (Nov. 27, 2019).

⁹ *Connelly v. Smith*, 97 So. 2d 865 (Fla. 3d DCA 1957).

¹⁰ *Golden v. Hayes*, 277 So. 2d 816 (Fla. 1st DCA 1988).

¹¹ *Id.*

¹² A mutual mistake occurs when the parties agree to one thing and then, due to either a scrivener’s error or inadvertence, express something different in the deed. *Circle Mortgage Corp. v. Kline*, 645 So. 2d 75, 78 (Fla. 4th DCA 1994).

¹³ *Providence Square Ass’n., Inc. v. Biancardi*, 507 So. 2d 1366, 1369 (Fla. 1987).

¹⁴ S. 95.231, F.S.; *Inglis v. First Union Nat. Bank*, 797 So. 2d 26 (Fla. 1st DCA 2001).

¹⁵ The respondent in a deed reformation action is the other party to the deed.

¹⁶ 8 Fla. Pl. & Pr. Forms § 63:9.

¹⁷ *Rigby v. Liles*, 505 So. 2d 598, 599 (Fla. 1st DCA 1987); See also s. 65.021, F.S.

- One unit, building, or phase identification of a condominium or cooperative; or
- One directional designation or numerical fraction of a tract of land described as a fractional portion of a section, township, or range.¹⁸

Effect of Proposed Changes

HB 567 creates a curative notice process, simplifying the mechanism for correcting a single scrivener's error in a deed other than a quitclaim deed ("erroneous deed").¹⁹ For the purposes of the bill, a scrivener's error is a single error or omission in the legal description of the real property the deed intends to convey ("intended property") in no more than one of the following categories:

- A lot or block identification of a recorded platted lot;²⁰
- The unit, building or phrase identifications of a condominium or cooperative unit; or
- A directional designation or numerical fraction of a tract of land described as a fractional portion of a section township or range.

Specifically, if the person who obtained possession of a property under an erroneous deed records a curative notice in the official records of the county in which the intended property lies, the erroneous deed, and each subsequent deed with an identical scrivener's error, conveys title to the intended property as though there had been no error. Thus, the curative notice corrects an erroneous deed and creates marketable, insurable title to the intended property, allowing the property to be sold free and clear of defects without the need to file a corrective deed or bring a deed reformation action. However, a curative notice must be in substantially the same form as set out in the bill and is only permissible if:

- The grantor of the first erroneous deed held record title to the intended property at the time of the first erroneous deed's execution;
- Within 5 years before the erroneous deed's recording, the grantor held title to no other real property in the same subdivision, condominium, or cooperative development or section, township, and range described in the erroneous deed;
- The intended property is not described only by a metes and bounds legal description;
- The recorded corrective notice evidences the grantor's conveyance of the intended real property; and
- The deed only has a single scrivener's error.²¹

Further, the bill authorizes the clerk of the circuit court where the intended property lies to accept and record a curative notice as evidence of the original grantor's intent to convey the intended property by the erroneous deed and provides that the curative notice remedy is not exclusive, meaning that all existing rights and remedies for correcting an erroneous deed remain available to the parties.²²

The bill provides an effective date of upon becoming law.

B. SECTION DIRECTORY:

Section 1: Creates s. 694.18, F.S., relating to curative procedure for certain description errors in deeds.

Section 2: Provides an effective date of upon becoming law.

¹⁸ See Edenfield, *supra* note 8.

¹⁹ Through a quitclaim deed, a grantor conveys his or her present interest, if any, in a given parcel of real property to a grantee without representing, covenanting, or warranting that the title is good. Legal Information Institute, *Quitclaim Deed*, https://www.law.cornell.edu/wex/quitclaim_deed (last visited Jan. 14, 2020); see also, e.g., *Spreckles v. Brown*, 212 U.S. 2018 (1909).

²⁰ However, the transposition of the lot and block identifications is one error.

²¹ Where a deed contains multiple scrivener's errors, a party must still file a corrective deed or bring a deed reformation action.

²² That is, the parties may file a corrective deed or a party may bring a deed reformation action.

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:

By filing a curative notice, a property owner may be able to clear title to property conveyed by an erroneous deed without incurring the expense associated with deed reformation.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 146-149 of the bill state that the clerk of the circuit court “may” accept and record curative notices “as evidence of the intent of the grantor in the erroneous deed . . .” This appears to provide the clerks with discretion to accept or reject a curative notice and may create a duty for the clerks to evaluate whether the curative notice is evidence of a grantor’s intent. An amendment to revise the recording provision to state that the clerks “shall” accept and record the curative notice may be appropriate.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to correction of errors in deeds;
 3 creating s. 694.18, F.S.; providing definitions;
 4 providing that a deed that contains a single
 5 scrivener's error in the description of real property
 6 may convey title despite such an error if certain
 7 requirements are met, including the filing of a
 8 curative notice; specifying the form of such notice;
 9 providing for the recording of such a notice;
 10 providing for operation of the notice; providing
 11 construction; providing an effective date.

12
 13 Be It Enacted by the Legislature of the State of Florida:

14
 15 Section 1. Section 694.18, Florida Statutes, is created to
 16 read:

17 694.18 Curative procedure for certain description errors
 18 in deeds.—

19 (1) DEFINITIONS.—As used in this section, the term:

20 (a) "Erroneous deed" means any deed, other than a
 21 quitclaim deed, containing a scrivener's error.

22 (b) "Intended real property" means the real property
 23 vested in the grantor and intended to be conveyed by the grantor
 24 in the erroneous deed.

25 (c) "Scrivener's error" means a single error or omission

26 in the legal description of the intended real property in no
27 more than one of the following categories:

28 1. An error or omission in no more than one of the lot or
29 block identifications of a recorded platted lot; however, the
30 transposition of the lot and block identifications is considered
31 one error.

32 2. An error or omission in no more than one of the unit,
33 building, or phase identifications of a condominium or
34 cooperative unit.

35 3. An error or omission in no more than one directional
36 designation or numerical fraction of a tract of land that is
37 described as a fractional portion of a section, township, or
38 range; however, an error or omission in the directional
39 description and numerical fraction of the same section,
40 township, or range is considered one error.

41 (2) CONVEYANCE OF TITLE.—As limited by paragraphs (3) (a)–
42 (c) and if the requirement in paragraph (3) (d) is met, the
43 erroneous deed conveys title to the intended real property as if
44 there had been no scrivener's error, and, likewise, each
45 subsequent erroneous deed containing the identical scrivener's
46 error conveys title to the intended real property as if there
47 had been no such identical scrivener's error.

48 (3) APPLICABILITY.—Subsection (2) applies only if:

49 (a) Record title to the intended real property was held by
50 the grantor of the first erroneous deed at the time the first

51 erroneous deed was executed.

52 (b) Within the 5 years preceding the recording of the
53 erroneous deed, the grantor of any erroneous deed held title to
54 no other real property in either:

55 1. The same subdivision, condominium, or cooperative
56 development; or

57 2. The same section, township, and range, described in the
58 erroneous deed.

59 (c) The intended real property is not described
60 exclusively by a metes and bounds legal description.

61 (d) A curative notice in substantially the same form as
62 set forth in subsection (4) is recorded in the official records
63 of the county in which the intended real property is located,
64 evidencing the intended real property to be conveyed by the
65 grantor.

66 (e) This section only applies to a deed containing a
67 single scrivener's error and will not correct multiple errors in
68 the legal description of the intended real property.

69 (4) CURATIVE NOTICE.—A curative notice must be in
70 substantially the following form:

71
72 Curative Notice Per Section 694.18, Florida Statutes
73 Scrivener's Error in Legal Description

74 The undersigned does hereby swear and affirm:

75 1. The deed which transferred title from

76 _____, to _____, dated
 77 _____, and recorded on
 78 in Official Records _____, Page _____, and/or Instrument No.
 79 _____, of the Official Records of
 80 County, Florida (herein after referred to as "first
 81 erroneous deed"), contained the following erroneous legal
 82 description:
 83 [insert incorrect legal description]
 84
 85 [insert and repeat paragraph 2 to include each subsequent
 86 erroneous deed in the chain of title containing the same
 87 erroneous legal description:
 88 2. The deed transferring title from _____
 89 to _____ and recorded on _____ in
 90 Official Records _____, Page _____, and/or Instrument No.
 91 _____ , of the Official Records of _____
 92 County, Florida, contains the same erroneous legal
 93 description described in the first erroneous deed.]
 94 3. I have examined the Official Records of the county
 95 in which the intended real property is located and have
 96 determined that the Deed dated _____, and
 97 recorded on _____ in Official Records Book
 98 _____, Page _____ and/or Instrument Number
 99 _____, Official Records of _____
 100 _____ County, Florida, establishes that record

101 title to the intended real property was held by the grantor
 102 of the first erroneous deed at the time the first erroneous
 103 deed was executed.

104 4. The undersigned has examined or caused to be
 105 examined the Official Records of _____, County, Florida and
 106 certifies that:

107 a. Record title to the intended real property was
 108 held by the grantor of the first erroneous deed, _____,
 109 at the time that deed was executed.

110 b. None of the grantor of the first erroneous deed or
 111 the grantors of any subsequent erroneous deeds listed above
 112 held record title to any property other than the intended
 113 real property in the same

114 1. Subdivision, condominium or cooperative; or
 115 2. Section, township, and range, if described in this
 116 manner, at any time within 5 years before the date that the
 117 erroneous deed was executed.

118 c. The intended real property is not described by a
 119 metes and bounds legal description.

120 5. This notice is made to establish that the real
 121 property described as:

122 [insert legal description of the intended real
 123 property]
 124 (hereinafter referred to as the "intended real property")
 125 was the real property that was to have been conveyed in the

126 first erroneous deed [and all subsequent erroneous deeds].

127

128

129

Signature: _____

130

131

Printed Name: _____

132

133

STATE OF FLORIDA

134

COUNTY OF

135

Sworn to (or affirmed) and subscribed before me this

136

day of _____, _____ (year) _____, by _____ (name of person

137

making statement) _____.

138

(Signature of Notary Public - State of Florida)

139

(Print, Type, or Stamp Commissioned Name of Notary

140

Public)

141

Personally Known _____ OR Produced

142

Identification _____

143

Type of Identification Produced

144

145

146

(5) RECORDING.—The clerk of the circuit court where the

147

intended real property is located may accept and record a

148

corrective notice in the form described in subsection (4) as

149

evidence of the intent of the grantor in the erroneous deed to

150

convey the intended real property to the grantee in the

151 erroneous deed.

152 (6) OPERATION OF NOTICE.—A curative notice recorded
153 pursuant to this section operates as a correction of the first
154 erroneous deed and all subsequent erroneous deed containing the
155 same scrivener's error described in the curative notice, and
156 releases any cloud or encumbrance which any of the erroneous
157 deeds may have created as to any property other than the
158 intended real property. The correction relates back to the date
159 of recordation of the first erroneous deed.

160 (7) REMEDIES NOT EXCUSIVE.—The remedies under this section
161 are not exclusive and do not abrogate any right or remedy under
162 the laws of this state other than this section.

163 Section 2. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 567 (2020)

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	<u> </u>	(Y/N)
ADOPTED AS AMENDED	<u> </u>	(Y/N)
ADOPTED W/O OBJECTION	<u> </u>	(Y/N)
FAILED TO ADOPT	<u> </u>	(Y/N)
WITHDRAWN	<u> </u>	(Y/N)
OTHER	<u> </u>	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative Altman offered the following:

3

4 **Amendment**

5 Remove lines 147-148 and insert:

6 intended real property is located shall accept and record a
7 curative notice in the form described in subsection (4) as

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 741 Asbestos Trust Claims
SPONSOR(S): Leek
TIED BILLS: **IDEN./SIM. BILLS:** SB 1582

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Mawn	Luczynski
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Asbestos is the name given to six naturally-occurring fibrous minerals resistant to chemical, thermal, and electricity damage historically used in construction, manufacturing, and fireproofing. When handled, asbestos separates into microscopic particles, exposure to which causes cancer and other diseases, including lung cancer, mesothelioma, and asbestosis, which can take 20 to 40 years to develop following initial exposure.

Lawsuits against asbestos manufacturers and distributors began in the 1970s, and by the 1990s, these corporations began filing for reorganization under Chapter 11 of the United States Bankruptcy Code in the hopes of escaping, or transferring, their asbestos injury liability. In 1994, Congress enacted 11 U.S.C. § 524(g) to create a comprehensive, statutory mechanism for addressing asbestos liabilities in bankruptcy reorganization proceedings. This section authorizes bankruptcy courts to transfer a debtor corporation's asbestos liability to a trust, allowing the debtor to reorganize and operate free from present and future asbestos liability claims. Where liability for an asbestos injury comes from both a trust and a solvent corporation, an injured person may sue the solvent corporation to recover its share of the harm, and a court may offset the judgment by the amount of trust payments the plaintiff received for the same injury. However, where a plaintiff files a trust claim after obtaining a judgment in a civil action alleging the same injury, a court loses its ability to offset the judgment against the solvent defendant. Plaintiffs use this loophole to increase their compensation for a single injury.

HB 741:

- Defines the terms "asbestos trust," "trust claims material," and "trust governance documents."
- Requires a plaintiff to:
 - Provide a sworn statement verifying that he or she conducted an investigation of all asbestos trust claims and filed all asbestos trust claims he or she is eligible to file.
 - Identify all asbestos trust claims the plaintiff filed and provide all trust claim material.
- Allows a court, upon defendant's motion, to stay an asbestos action if the plaintiff did not file an asbestos trust claim he or she was eligible to file.
- Allows a defendant to seek discovery directly from an asbestos trust and requires the plaintiff to provide all necessary permissions for the release of trust claim material and governance documents.
- Provides that trust claim material and governance documents are presumed to be relevant and authentic, admissible in evidence, and not subject to claims of privilege.
- Requires a trial court, on a defendant's motion, to adjust the judgment in an asbestos action by the amount of any subsequent asbestos trust payments made to the plaintiff if the plaintiff makes an asbestos trust claim after obtaining a judgment in the asbestos action.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0741.CJS

DATE: 1/14/2020

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Asbestos

Asbestos is the commercial name given to six naturally-occurring fibrous minerals resistant to chemical, thermal, and electricity damage historically used in consumer goods including textiles, paper, toys, brake pads, shoes, and home appliances, and by the construction and ship-building industries as roofing, flooring, wallboard, insulation, and fireproofing.¹ When handled, asbestos separates into microscopic, circulating particles, exposure² to which causes cancer and other diseases, including lung cancer, mesothelioma,³ and asbestosis,⁴ which can take 20 to 40 years to develop following initial exposure.⁵

As early as the 1930s, many asbestos industry executives knew of the occupational hazard asbestos exposure posed.⁶ However, given the prolonged latency period of asbestos-related diseases and that the average working-class American of the day would not expect to live past 60 years of age, the executives did not give the risks serious attention.⁷ Further, given the legal standards of the day,⁸ the executives had little reason to contemplate corporate liability for harms occurring decades into the future, and thus did not advertise what they knew.⁹

By 1970, however, published medical evidence conclusively showed that some workers exposed to asbestos would, over time, contract asbestosis, lung cancer, or mesothelioma and be increasingly disabled by these conditions.¹⁰ After 1973, asbestos use declined sharply as knowledge of the exposure risks spread and the new Occupational Safety and Health Administration (“OSHA”)¹¹ called for its removal. Despite the decline in use, a leading epidemiological study found that, by 1979, at least 27.5 million Americans had suffered asbestos exposure.¹²

¹ United States Department of Health and Human Services (HHS), Centers for Disease Control and Prevention, *Asbestos*, <https://www.cdc.gov/niosh/topics/asbestos/default.html> (last visited Jan. 6, 2020).

² Asbestos exposure can be occupational or non-occupational. Non-occupational exposure includes domestic exposure, common in family members of a person occupationally exposed. See Nonhlanhla Tlotleng, et al., *The Significance of Non-Occupational Asbestos Exposure in Women with Mesothelioma*, *Respirology Case Reports*, Vol. 7 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6246071/> (last visited Jan. 6, 2020).

³ Mesothelioma is an aggressive cancer occurring in the thin tissue layer covering the majority of the internal organs, known as the mesothelium. Mesothelioma most often affects the tissue surrounding the lungs. See Mayo Clinic, *Mesothelioma*, <https://www.mayoclinic.org/diseases-conditions/mesothelioma/symptoms-causes/syc-20375022> (last visited Jan. 6, 2020).

⁴ Asbestosis is a chronic lung disease caused by inhaling asbestos fibers characterized by lung tissue scarring and shortness of breath. As asbestosis progresses, lung tissue scarring prevents lungs from contracting and expanding normally. See Mayo Clinic, *Asbestosis*, <https://www.mayoclinic.org/diseases-conditions/asbestosis/symptoms-causes/syc-20354637> (last visited Jan. 6, 2020).

⁵ HHS, *supra* note 1.

⁶ Paul D. Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, *The Review of Litigation*, Vol. 26 (2007), https://scholarship.law.duke.edu/cqi/viewcontent.cgi?article=2343&context=faculty_scholarship (last visited Jan. 6, 2020).

⁷ *Id.*

⁸ Tort law was not yet recognized as the primary means of discouraging management from consciously taking employee health and safety risks, and courts interpreted applicable statutes of limitation as starting to run when the harm occurred. It was only after 1960 that tort law began to predominantly govern the relationship between employees and corporations, and courts began to interpret statutes of limitation to start running only when the victim discovers the harm. *Id.*

⁹ Carrington, *supra* note 6.

¹⁰ *Id.*

¹¹ Congress created OSHA with the Occupational Safety and Health Act of 1970 to ensure safe working conditions for American workers by setting and enforcing workplace standards and providing training, outreach, education, and assistance. See United States Department of Labor, Occupational Safety and Health Administration, *About OSHA*, <https://www.osha.gov/aboutosha> (last visited Jan. 6, 2020).

¹² See Carrington, *supra* note 6, citing William Nicholson, et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality 1980-2030*, 3 *Am. Jur. Indus. Med.* 259 (1982).

Asbestos Litigation

In 1972, an insulation worker disabled by asbestosis and mesothelioma sued his employer, a building materials manufacturer, for failing to warn him of asbestos exposure risks.¹³ The evidence showed that the defendant knew of the risks but had not informed the plaintiff, and the jury awarded the plaintiff a \$68,000 verdict, finding the defendant strictly liable on the basis of s. 402A of the Restatement (Second) of Torts.¹⁴ The Fifth Circuit affirmed the trial court's opinion, finding that the defendant's failure to give "adequate warnings of the known or knowable dangers involved [in asbestos exposure]" made asbestos an "unreasonably dangerous" product.¹⁵

Asbestos injury lawsuits proliferated over the next two decades, with most cases filed before 1982 brought against the Johns-Manville Corporation ("Manville").¹⁶ The available evidence showed that Manville knew of the asbestos exposure risks and withheld that knowledge from its employees.¹⁷ Facing billions of dollars in present and future liabilities to tens of thousands of person injured by Manville products, in 1982, Manville filed for reorganization under Chapter 11¹⁸ of the United States Bankruptcy Code.¹⁹ The bankruptcy filing automatically stayed all pending asbestos injury lawsuits filed against Manville, but the bankruptcy court still faced the unique challenge of balancing Manville's right to reorganize free from liabilities with the right of an unknown number of future victims injured by Manville's products to receive compensation for their injuries.²⁰ The bankruptcy court's solution was novel: the court transferred Manville's asbestos injury liabilities to a specially-created trust ("Manville Trust"), allowing Manville to reorganize and operate free from all asbestos liability. No longer could a Manville victim sue the company for compensation for his or her injury; instead, a victim had to file a claim with the Manville Trust according to procedures set out in trust governance documents.

Asbestos Bankruptcy Trusts

A dramatic surge in asbestos manufacturing corporations filing for bankruptcy followed the creation of the Manville Trust, but bankruptcy courts lacked express statutory authority for the trust scheme.²¹ In 1994, Congress enacted 11 U.S.C. § 524(g) to create a comprehensive, statutory mechanism for addressing asbestos liabilities in bankruptcy reorganization proceedings.²² This section authorizes bankruptcy courts to transfer a debtor corporation's asbestos liability to an independent trust funded by the reorganized company, allowing the reorganized company to operate free from present and future asbestos liability claims.²³ Since 1994, over 60 such asbestos bankruptcy trusts have been established, paying over \$17.5 billion on millions of asbestos injury claims.²⁴

¹³ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

¹⁴ *Id.*; Restatement (Second) Of Torts § 402A (1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer...").

¹⁵ *Borel*, *supra* note 13.

¹⁶ Between 1925 and 1981, Manville, an asbestos miner and fabricator, dominated the United States asbestos industry, producing most of the asbestos used in the United States. Mark Kunkler, *The Manville Corporation Bankruptcy: An Abuse of the Judicial Process?*, 11 Pepp. L. Rev. 1 (1984), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1922&context=plr> (last visited Jan. 6, 2020).

¹⁷ Kunkler, *supra* note 16.

¹⁸ A case filed under Chapter 11, known as a reorganization, is primarily used by corporations to reorganize their finances and get a fresh start. A reorganizing business must ensure that it is capable of meeting all future financial obligations. See United States Courts, *Chapter 11- Bankruptcy Basics*, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited Jan. 6, 2020).

¹⁹ Opinion issued in context of main bankruptcy case: *In re Johns-Manville Corp.* 60 B.R. 842 (S.D.N.Y. 1986); See also Kunkler, *supra* note 16.

²⁰ Kunkler, *supra* note 16.

²¹ Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, Rand Institute for Civil Justice, https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf (last visited Jan. 6, 2020).

²² United States Department of Justice, Office of Public Affairs, *Justice Department Files Statement of Interest in New Asbestos Trust Proposal* (Sept. 13, 2018), <https://www.justice.gov/opa/pr/justice-department-files-statement-interest-new-asbestos-trust-proposal> (last visited Jan. 6, 2020).

²³ See Dixon, *supra* note 21.

²⁴ *Id.*

Generally, a claimant seeking compensation from an asbestos trust must file a claim form with an injury statement and information establishing asbestos exposure linked to the trust's predecessor.²⁵ A claimant must also submit asbestos exposure evidence, such as employment and social security records, deposition testimony, and medical reports or records supporting a diagnosis of the specific disease claimed.²⁶ A trust claim is then reviewed by a trust committee and paid when the claimant meets exposure requirements and suffers from an asbestos-related injury linked to such exposure.²⁷ Payment schedules established by each trust determine the amount of compensation a claimant will receive for a specific medical condition, and claimants may make claims from multiple trusts for a single injury as each trust operates independently.²⁸

Florida Law

Initiating a Lawsuit

Florida's Asbestos and Silica Compensation Fairness Act²⁹ ("the Act") allows the filing of an asbestos lawsuit against a solvent defendant in the state if the plaintiff is domiciled in Florida³⁰ or the asbestos exposure that substantially contributed to the exposed person's³¹ physical impairment³² occurred in the state.³³ The statute of limitations³⁴ to file an asbestos lawsuit does not begin to run until the exposed person discovers, or through exercising reasonable diligence should have discovered, his or her asbestos-related physical impairment.³⁵ An asbestos lawsuit alleging a non-cancerous injury is a separate cause of action from an asbestos lawsuit alleging asbestos-related cancer, and settlement of a non-cancerous asbestos injury claim may not require as a condition of settlement the release of any future asbestos-related cancer claim, meaning that a plaintiff who sued for a non-cancerous injury could sue the same defendant again should he or she develop asbestos-related cancer in the future.³⁶

Discovery

A plaintiff bringing an asbestos lawsuit must include a written report and supporting test results with the complaint constituting prima facie evidence³⁷ of the exposed person's asbestos-related impairment.³⁸ The defendant has an opportunity to challenge the evidence's adequacy, and the court must dismiss the asbestos lawsuit without prejudice³⁹ if the plaintiff fails to make the required prima facie showing.⁴⁰ In addition to the written report, a plaintiff must file a sworn information form containing:

²⁵ Mark A. Behrens, *Asbestos Trust Transparency*, 81 Fordham. L Rev. 107 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5540&context=flr> (last visited Jan. 6, 2020).

²⁶ *Id.*

²⁷ See Dixon, *supra* note 21.

²⁸ *Id.*; See Behrens, *supra* note 25.

²⁹ Ch. 774, Part II, F.S.

³⁰ A person domiciled in Florida has his or her true, principal, and permanent home in this state. Such a person physically lives in the state, regards it as home, and intends to return even if currently residing elsewhere. See Legal Information Institute, *Domicile*, <https://www.law.cornell.edu/wex/domicile> (last visited Jan. 6, 2020).

³¹ "Exposed person" means a person whose asbestos exposure is the basis for an asbestos lawsuit or trust claim. S. 774.203(13), F.S.

³² Physical impairment, to which asbestos exposure was a substantial contributing factor, is an essential element of an asbestos lawsuit. A prima facie showing of physical impairment must include evidence verifying that a qualified physician took the exposed person's detailed occupational and exposure history, including identification of all of the exposed person's principal employment places and exposures to airborne contaminants, and a detailed medical and smoking history, including a thorough review of the exposed person's past and present medical problems and their most likely cause. S. 774.204(2)(a) and (b), F.S.

³³ S. 774.205(1), F.S.

³⁴ A statute of limitations bars the filing of a civil or criminal cause of action after a certain period of time following an injury or offense. See Legal Information Institute, *Statute of Limitations*, https://www.law.cornell.edu/wex/statute_of_limitations (last visited Jan. 6, 2020).

³⁵ S. 774.206(1), F.S.

³⁶ S. 774.206(2), F.S.

³⁷ Prima facie evidence is evidence sufficient to establish a fact or raise a presumption unless disproved or rebutted. See Legal Information Institute, *Prima Facie*, https://www.law.cornell.edu/wex/prima_facie (last visited Jan. 6, 2020).

³⁸ S. 774.205(2), F.S.

³⁹ When a case is dismissed without prejudice, the plaintiff is free to file another lawsuit based on the same grounds. See Legal Information Institute, *Dismissal Without Prejudice*, https://www.law.cornell.edu/wex/dismissal_without_prejudice (last visited Jan. 6, 2020).

⁴⁰ S. 774.205(1), F.S.

- The claimant's name, date of birth, and marital status;⁴¹
- The name, address, date of birth, and marital status of each index person;⁴²
- The specific exposure locations;⁴³
- The alleged exposure's beginning and ending dates;⁴⁴
- The exposed person's occupation and employer name at the time of the alleged exposure;⁴⁵
- The specific asbestos-related condition alleged;⁴⁶ and
- Any supporting documentation related to the asbestos lawsuit.⁴⁷

A plaintiff is not currently required to file a sworn statement or other information form identifying the asbestos trust claims he or she filed or to indicate that he or she investigated all asbestos trust claims to determine his or her claim eligibility.⁴⁸ Further, a plaintiff is not required to provide the parties with documents submitted to or received from an asbestos trust or relating to trust compensation eligibility and claim payment levels, and a defendant cannot seek discovery directly from an asbestos trust.⁴⁹ This enables a plaintiff to suppress exposure evidence connected to trust claims not yet filed.

Motions to Stay

A trial court may stay⁵⁰ a civil action under its inherent case management powers.⁵¹ Whether a trial court grants a stay, or what conditions it imposes, is in the court's discretion.⁵² However, a court presiding over an asbestos lawsuit lacks the authority to require a plaintiff to file an asbestos trust claim, and thus lacks the authority to stay the asbestos lawsuit until the plaintiff files such a claim.⁵³

Judgments

Given the widespread use of asbestos prior to the 1970s, multiple corporations may have contributed to a person's asbestos exposure.⁵⁴ To ensure that damages awarded in an asbestos lawsuit are proportional to the defendant's fault, the Act requires a plaintiff to file a verified written report disclosing all collateral source payments received, and anticipated future payments, from settlements or judgments based on the same injury, and the court must allow judgment setoff based on this information.⁵⁵ However, where a plaintiff files a trust claim after obtaining a judgment, the court loses its ability to allow judgment setoff.⁵⁶

Some plaintiffs exploit this loophole by delaying trust claim filing and suppressing evidence of trust-related exposure, leading juries to find the defendant responsible for all or most of the plaintiff's injury and award a larger judgment, thereby increasing a plaintiff's compensation for a single injury and reducing the funds available for victims bringing future asbestos lawsuits against the defendant.⁵⁷ The *Garlock* bankruptcy proceeding highlighted this practice, demonstrating that some plaintiffs seek

⁴¹ S. 774.205(3)(a), F.S.

⁴² An index person is the person by which a plaintiff claims asbestos exposure if alleging such exposure through another's testimony or by other than direct or bystander exposure to a product. S. 774.205(3)(b), F.S.

⁴³ S. 774.205(3)(c), F.S.

⁴⁴ S. 774.205(3)(d), F.S.

⁴⁵ S. 774.205(3)(e), F.S.

⁴⁶ S. 774.205(3)(f), F.S.

⁴⁷ S. 774.205(3)(g), F.S.

⁴⁸ See generally Ch. 774, F.S.

⁴⁹ *Id.*

⁵⁰ A stay is a court ruling to stop or suspend a proceeding or trial for a specified time period. See Legal Information Institute, *Stay of Proceedings*, https://www.law.cornell.edu/wex/stay_of_proceedings (last visited Jan. 6, 2020).

⁵¹ *REWJB Gas Invs. V. Land O'Sun Realty, Ltd.*, 643 So. 2d 1107 (Fla. 4th DCA 1994).

⁵² *Id.*

⁵³ See generally Ch. 774, F.S.

⁵⁴ Carrington, *supra* note 6.

⁵⁵ S. 774.207(2), F.S.

⁵⁶ See generally Ch. 774, F.S.

⁵⁷ See Behrens, *supra* note 25.

compensation for 100 percent of their injuries in an asbestos lawsuit while subsequently seeking additional compensation from asbestos trusts for the same injury.⁵⁸

Other States

Since 2012, 16 states have passed asbestos trust claim transparency laws preventing a plaintiff from intentionally delaying the filing of a trust claim to obtain a larger verdict in an asbestos lawsuit and increase his or her compensation for a single injury:

State	Statute	Year Passed
Alabama	§§ 6-5-680 to 6-5-685	2019
Arizona	§ 12-782	2015
Iowa	§ 686A	2017
Kansas	§§ 60-4912 to 60.4918	2018
Michigan	§§ 600.3010 to 600.3016	2018
Mississippi	§ 11-67	2017
North Carolina	§§ 1A-1-26, 8C-4-415, and 1-75.12	2018
North Dakota	§ 32-46.1-6	2017
Ohio	§§ 2307.91 to 2307.98	2012
Oklahoma	§§ 76-81 to 76-89	2013
South Dakota	§ 21-66	2017
Tennessee	§ 29-34-6	2016
Texas	§§ 90.051-90.058	2015
Utah	§ 78B-6-20	2016
West Virginia	§ 55-7F	2015
Wisconsin	§ 802.025	2014

Effect of Proposed Changes

Definitions

HB 741 defines the term:

- “Asbestos trust” to mean a government- or court-approved trust created through an administrative or legal action or a court-approved bankruptcy and intended to provide compensation to claimants related to asbestos exposure health effects.
- “Trust claim material” to mean any document or information submitted to or received from an asbestos trust or related to trust claim settlement.
- “Trust governance documents” to mean any document relating to compensation eligibility and claim payment levels.

Discovery

The bill provides that, within 30 days after filing an asbestos lawsuit, a plaintiff must provide the parties with a sworn statement verifying that he or she conducted an asbestos trust claims investigation and has filed all asbestos trust claims he or she is eligible to file. Within that time, a plaintiff must also identify all asbestos trust claims the plaintiff filed and provide the parties with all trust claim material. Further, the bill requires a plaintiff to supplement his or her sworn information form and trust claim material within 30 days after filing another asbestos trust claim, supplementing an existing trust claim,

⁵⁸ Garlock was an asbestos gaskets manufacturer widely sued during the 2000s. During proceedings to determine Garlock’s liability for present and future asbestos injury claims following Garlock’s bankruptcy petition, the judge allowed Garlock full discovery to assess 15 prior, settled lawsuits. The evidence revealed that exposure evidence connected to trust liability had been withheld during each and every one of the 15 settled lawsuits. Opinion issued in the context of main bankruptcy case: *In re Garlock Sealing Technologies, LLC, et al.*, 504 B.R. 71 (Bankr. W.D. N.C. 2014).

or receiving additional trust claim material. This prevents a plaintiff from suppressing evidence pertinent to a liability determination in the asbestos lawsuit.

Additionally, the bill allows a defendant to seek discovery from an asbestos trust and prohibits a plaintiff from claiming privilege or confidentiality to prevent such discovery. The bill also requires a plaintiff to provide any necessary permissions the asbestos trust requires to release trust claim material and governance documents to the defendant. This provides the defendant with a check on the plaintiff's sworn statement and the trust claim material provided, ensuring that the defendant receives all information pertinent to a liability determination.

Evidence Admissibility and Privilege

The bill provides that trust claim material and trust governance documents, whether provided by a plaintiff or obtained from a trust, are:

- Presumed to be relevant and authentic;
- Admissible in evidence; and
- Not subject to claims of privilege.

This allows a jury to consider all trust claim materials and trust governance documents pertinent to a liability determination in an asbestos lawsuit.

Motions to Stay

If a defendant in an asbestos lawsuit reasonably believes that the plaintiff has not filed all asbestos trust claims he or she must file, the bill allows the defendant to move for an order requiring the plaintiff to file the additional asbestos trust claims. The bill requires a defendant to file such motion no later than 60 days before trial, preventing the defendant from using such a motion as an eleventh-hour delay tactic.

If the court determines that there is a sufficient basis for the plaintiff to file the identified asbestos trust claims, the bill requires the court to stay the asbestos lawsuit until the plaintiff files such claims and produces all related trust claims material. Further, the bill prohibits an asbestos action from proceeding to trial until at least 60 days after the plaintiff complies with the court's order. This ensures that all asbestos trust claims known to the parties that the plaintiff is eligible to file are filed prior to trial in the asbestos lawsuit.

Post-Judgment Trust Claims

The bill provides that if a plaintiff files an asbestos trust claim after obtaining a judgment in an asbestos lawsuit, and the asbestos trust existed at the time the plaintiff obtained the judgment, the trial court must, upon the defendant's motion, adjust the judgment by the amount of any subsequent asbestos trust payments made to the plaintiff for the late-filed claim. This prevents a plaintiff from delaying the filing of a trust claim to obtain a larger verdict in an asbestos action and increase his or her compensation for a single injury.

B. SECTION DIRECTORY:

Section 1: Amends s. 774.203, F.S., relating to definitions.

Section 2: Creates s. 774.2055, F.S., relating to asbestos trust claim disclosures.

Section 3: Provides an effective date of July 1, 2020.

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:

The bill continues to allow compensation of a plaintiff bringing an asbestos lawsuit, but may prevent a defendant from paying more than its share of the damages for the alleged injury. This leaves more funds available to compensate victims bringing future asbestos actions against the defendant.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

On lines 55-57, the bill provides that an asbestos lawsuit plaintiff must provide the parties with “all materials submitted to or received from a trust.” The bill’s definition of trust claim material includes “any final executed proof of claim and any other document or information submitted to or received from an asbestos trust...” Because the plaintiff’s obligation on lines 55-57 overlaps with the definition of trust claim material, it might be clearer to use the phrase “trust claim material” on lines 55-57 to avoid litigation over what exactly a plaintiff must provide.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

HB 741

2020

1 A bill to be entitled
2 An act relating to asbestos trust claims; amending s.
3 774.203, F.S.; defining terms related to asbestos
4 trusts; creating s. 774.2055, F.S.; requiring a
5 plaintiff to provide certain materials within a
6 specified period after filing an asbestos claim;
7 requiring the plaintiff to supplement such materials
8 within a specified period; authorizing a defendant to
9 seek discovery from an asbestos trust; prohibiting a
10 plaintiff from barring discovery or claiming privilege
11 or confidentiality; specifying the legal relevancy of
12 asbestos trust claims materials and trust governance
13 documents; requiring a trial court to adjust certain
14 judgments related to asbestos claims under specified
15 conditions; providing an effective date.

16
17 Be It Enacted by the Legislature of the State of Florida:
18

19 Section 1. Subsections (4) through (30) of section
20 774.203, Florida Statutes, are renumbered as subsections (5)
21 through (31), respectively, present subsections (31) and (32)
22 are renumbered as subsections (34) and (35), respectively, and
23 new subsections (4), (32), and (33) are added to that section to
24 read:

25 774.203 Definitions.—As used in this act, the term:

26 (4) "Asbestos trust" means a government-approved or court-
 27 approved trust, qualified settlement fund, compensation fund, or
 28 claims facility that is created as a result of an administrative
 29 or legal action or a court-approved bankruptcy, including a
 30 bankruptcy filed under 11 U.S.C. 524(g), 11 U.S.C. 1121(a), or
 31 other applicable provision of federal law, and is intended to
 32 provide compensation to claimants arising out of, based on, or
 33 related to the health effects of exposure to asbestos.

34 (32) "Trust claims material" means any final executed
 35 proof of claim and any other document or information submitted
 36 to or received from an asbestos trust, including a claim form or
 37 supplementary material, affidavit, deposition or trial
 38 testimony, work history, exposure allegation, medical or health
 39 record, or document reflecting the status of a claim against an
 40 asbestos trust and, if the trust claim has settled, any document
 41 relating to the settlement of the trust claim.

42 (33) "Trust governance document" means any document that
 43 relates to eligibility and payment levels, including a claims
 44 payment matrix, trust distribution procedure, or plan for
 45 reorganization of an asbestos trust.

46 Section 2. Section 774.2055, Florida Statutes, is created
 47 to read:

48 774.2055 Asbestos trust claims disclosures.—

49 (1) Within 30 days after filing an asbestos claim as
 50 defined in s. 774.203, a plaintiff must:

51 (a) Provide the parties with a sworn statement verifying
52 that an investigation of all asbestos trust claims has been
53 conducted and that all asbestos trust claims for which the
54 plaintiff is eligible have been filed; and

55 (b) Identify all asbestos trust claims filed by the
56 plaintiff and provide the parties with all materials submitted
57 to or received from an asbestos trust.

58 (2) A plaintiff must supplement the information and
59 materials required under subsection (1) within 30 days after the
60 plaintiff files an additional asbestos trust claim, supplements
61 an existing asbestos trust claim, or receives additional
62 information or materials related to an asbestos trust claim.

63 (3) (a) Not fewer than 60 days before trial of an asbestos
64 claim, if a defendant believes the plaintiff has not filed all
65 asbestos trust claims as required by subsections (1) and (2),
66 the defendant may move the court for an order to require the
67 plaintiff to file additional asbestos trust claims for which the
68 defendant believes the plaintiff is eligible to file.

69 (b) If the court determines that there is a sufficient
70 basis for the plaintiff to file an asbestos trust claim
71 identified by the defendant, the court shall stay the asbestos
72 claim until the plaintiff files the asbestos trust claim and
73 produces all related trust claims materials. An asbestos claim
74 may not proceed to trial until at least 60 days after the
75 plaintiff complies with the court's order.

76 (4) A defendant in an asbestos claim may seek discovery
77 from an asbestos trust. The plaintiff may not claim privilege or
78 confidentiality to bar discovery and shall provide any
79 expression of permission that may be required by the asbestos
80 trust to release the information and materials sought by the
81 defendant.

82 (5) Asbestos trust claims materials and trust governance
83 documents are presumed to be relevant and authentic and are
84 admissible in evidence. A claim of privilege does not apply to
85 asbestos trust claims materials or trust governance documents.

86 (6) If a plaintiff files an asbestos trust claim after the
87 plaintiff obtains a judgment in an asbestos claim and the
88 asbestos trust was in existence at the time of the judgment, the
89 trial court upon motion by a defendant must adjust the judgment
90 by the amount of any subsequent asbestos trust payments obtained
91 by the plaintiff.

92 Section 3. This act shall take effect July 1, 2020.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 741 (2020)

Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	<u> </u>	(Y/N)
ADOPTED AS AMENDED	<u> </u>	(Y/N)
ADOPTED W/O OBJECTION	<u> </u>	(Y/N)
FAILED TO ADOPT	<u> </u>	(Y/N)
WITHDRAWN	<u> </u>	(Y/N)
OTHER	<u> </u>	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative Leek offered the following:

3

4 **Amendment**

5 Remove lines 56-57 and insert:

6 plaintiff and provide the parties with all trust claims
7 material.

Civil Justice Subcommittee
Thursday, January 16, 2020
Workshop on Legal Advertising
Presenters

Elizabeth Tarbert

Elizabeth Clark Tarbert has been Ethics Counsel for The Florida Bar since 1997, providing oral and written ethics opinions to members of The Florida Bar and advising the Professional Ethics Committee, Standing Committee on Advertising, and Board Review Committee on Professional Ethics. She has also served as counsel to numerous special bar committees and several advertising task forces. She is a member of the ABA Standing Committee on Ethics and Professional Responsibility. She has been an Assistant Public Defender in both Dallas, Texas and with the Eighth Judicial Circuit in Gainesville, Florida. While at the Defense Contract Management District Mid-Atlantic, Defense Logistics Agency in Philadelphia, Pennsylvania, Ms. Tarbert worked in a special fraud remedies unit, assisting in the investigation and prosecution of government contractors. Ms. Tarbert graduated from the University of Florida College of Law with honors and holds a Bachelor of Arts degree in Sociology from the University of Florida. She frequently speaks on legal ethics and professional responsibility.

Elissa Gentry, PhD

Elissa Gentry is an assistant professor at Florida State University College of Law. She holds a JD and a PhD in law and economics from Vanderbilt University. Her research focuses on the intersection of health, risk and regulation, and law and economics. She previously served as a postdoctoral research fellow at the Institute for Advanced Studies in Toulouse, France, and a judicial clerk for the Honorable Jane Roth of the U.S. Court of Appeals, Third Circuit, in Philadelphia.

James W. Gustafson

James W. Gustafson, Jr. is a shareholder with Searcy Denney Scarola Barnhart & Shipley PA, a member of the firm's executive committee, and the managing partner of the firm's Tallahassee office.

Mr. Gustafson is a member of the International Academy of Trial Lawyers, a worldwide organization limited to just 500 attorneys by invitation only. He is an EAGLE Founder, and immediate past President of the Florida Justice Association. He is a sustaining member of The American Association for Justice, and served as chair of their Professional Negligence Section.

Board Certified in Civil Trial Law by the Florida Bar and the National Board of Trial Advocacy, Mr. Gustafson's practice is focused on product liability, tobacco litigation including fraud and conspiracy, trucking negligence, and other catastrophic injury and death cases.

THE FLORIDA BAR LAWYER ADVERTISING RULES

Prepared by The Florida Bar
Ethics and Advertising Department

Constitutional Law

- *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). U.S. Supreme Court held that commercial speech is protected by First Amendment and cannot be prohibited.

Constitutional Law

- *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Non-misleading commercial speech may be regulated only when there is a substantial government interest at stake, the regulation directly advances that interest, and the regulation is no more extensive than is necessary to serve that interest.

Constitutional Law

- *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Struck down ban on advertising of lawyer fees
- *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Struck down ban on illustrations
- *Shapiro v. Kentucky Bar Assoc'n*, 486 U.S. 466 (1988). Struck down ban on direct mail
- *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990). Struck down ban on advertising certification

Constitutional Law

- *The Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Upheld Florida's 30-day ban on direct mail solicitation in accident or disaster cases based on an extensive record of abuse filed by the bar.
- *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000). Required disclaimer found unconstitutional because the bar did not provide any empirical evidence that the public would be misled.

Application of Ad Rules – Rule 4-7.11

- All media, including newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, Internet banners, pop-ups, websites, social networking, and video sharing sites
- Florida bar members and out-of-state lawyers who advertise that they provide legal services in Florida

Required Content – Rule 4-7.12

- ⦿ Name of lawyer or law firm (firm name added 2013)
- ⦿ Bona fide office by city, town or county (county added 2013)
- ⦿ Disclosure that the lawyer will refer the case to another lawyer when applicable
- ⦿ Required information must appear in all languages used in the ad
- ⦿ Required information must be reasonably prominent and clearly legible if written and intelligible if spoken

Misleading Ads – Rule 4-7.13

- ⦿ Material statements that are factually or legally inaccurate
- ⦿ Omissions of information necessary to prevent misleading consumers
- ⦿ Predictions or guarantees of success or specific results
- ⦿ Past results that are not objectively verifiable or omit material information
- ⦿ Comparisons that cannot be objectively verified

Potentially Misleading Ads – Rule 4-7.14

- ⦿ Ads that have more than one interpretation, some of which are materially misleading
- ⦿ Accurate ads that may mislead a prospective client about a material matter
- ⦿ References to memberships, awards, and honors unless bona fide, recognized in the legal community, and selection is on objective criteria

Potentially Misleading Ads – Rule 4-7.14 (cont.)

- If an ad is potentially misleading, the lawyer can use it if the ad contains information or statements that adequately clarify the potentially misleading issue

Direct Contact With Prospective Clients – Rule 4-7.18

- ⦿ Direct in-person solicitation is prohibited unless the lawyer has a prior professional or family relationship with the prospective client
 - In person
 - By telephone
 - By Skype



Direct Written Solicitations– Rule 4-7.18(b)

- Direct written solicitations via mail and email may be sent, but must follow strict requirements, including being labeled as advertisements, containing information about the lawyer's background and experience



Qualifying Providers – Rule 4-7.22

⦿ Includes:

- Lawyer Referral Services
- Matching Services
- Group or pooled advertising programs with a common telephone number or URL
- Directories
- Tips or leads generators

Qualifying Providers – Rule 4-7.22 (cont.)

- Lawyers can't participate unless the service:
 - complies with lawyer advertising rules (including the prohibition against in person solicitation)
 - does not charge an improper fee that would be a division of fees (flat weekly, monthly or annual charge would be permissible – See Florida Ethics Opinion 18-1 for more info)
 - refers clients only to those authorized to practice law in Florida

Qualifying Providers (cont.)

- ⦿ Lawyers can't accept referrals unless the service:
 - does not require cross referrals
 - reports the names of all participating lawyers and persons authorized to act for the service to The Florida Bar annually
 - provides documentation of compliance to participating lawyers
 - responds in writing to any inquiry by bar counsel within 15 days

Qualifying Providers (cont.)

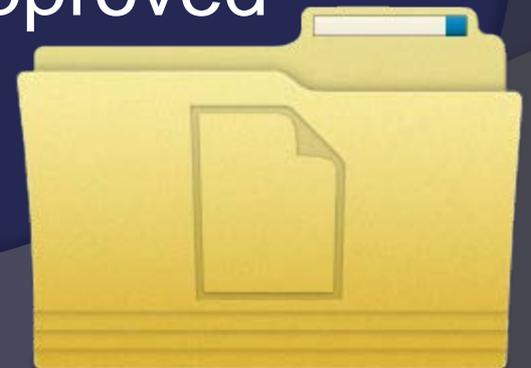
- ⦿ Lawyers can't accept referrals unless the service:
 - does not state or imply that the service is Florida Bar endorsed or approved (unless voluntary bar affiliated and approved under chapter 8)
 - uses its legal name or a registered fictitious name
 - discloses to consumers the bona fide office location of the lawyer to whom the consumer is referred at the time of referral
 - does not state or imply that it is a law firm or can directly provide legal services

Qualifying Providers

- ⦿ Participating lawyers:
 - must report to The Florida Bar within 15 days of agreeing to participate or stopping participation with a qualifying provider
 - are responsible for compliance by the qualifying provider if the lawyer:
 - does not use due diligence in determining compliance before joining
 - does not cease participation within 30 days of being notified by The Florida Bar that the qualifying provider is not in compliance

Filing Requirement – Rule 4-7.19

- ⦿ All ads required to be filed must be filed at least 20 days in advance – includes print, television, radio, direct mail, Internet
- ⦿ The Florida Bar has 15 days from receipt of complete filing to give opinion, otherwise the ad is deemed approved



Advertising Filings Statistics

<u>FY</u>	<u>New Ads</u>	<u>Revisions</u>	<u>Total</u>
16-17	3664	1000	4664
17-18	4,067	1,148	5215
18-19	4,467	1,216	5683

Filing Requirement (cont.)

- ⦿ Options on Receiving Notice of Noncompliance:
 - Appeal to the Standing Committee on Advertising (and ultimately the Board of Governors)
 - Revise and resubmit (No additional fee)
 - Use the original submission (at filer's own risk)

Filing Requirement (cont.)

- ⦿ Exemptions from Filing Requirement:
 - “Tombstone” ads – any media except direct mail/email where the information is limited to the “safe harbor” in Rule 4-7.16
 - Public service announcements
 - Listings in law lists or bar publications
 - Mailings sent only to existing and former clients and other lawyers
 - Information provided at the request of a prospective client

Filing Requirement (cont.)

- ⦿ Exemptions from Filing Requirement:
 - Professional announcement cards sent only to existing and former clients, other lawyers, relatives and close personal friends
 - Lawyer and law firm websites
 - Lawyer and law firm social media pages (SCA decision)
 - Videos posted on video sharing sites (SCA decision)

Prosecution of Ad Cases

- ⦿ Complaint-driven
- ⦿ Rare referrals from Standing Committee on Advertising or Board of Governors
- ⦿ One Lawyer Regulation Counsel handles all advertising complaints
- ⦿ Statewide Advertising Grievance Committee handles all advertising cases

Filing Complaints

- ⦿ Complaints must be filed in writing:
 - The Florida Bar
 - 651 E. Jefferson Street
 - Tallahassee, FL 32399-2300
- ⦿ Questions about ad complaints:
 - Shaneé Hinson, Advertising Counsel
 - (850) 561-5775
- ⦿ For information on filing a complaint:
 - <https://www.floridabar.org/public/acap/>

Consequences of Ad Violations

- ⦿ Late filing fee (\$250)
- ⦿ Forfeiture of attorney's fees
- ⦿ Discipline
 - Diversion
 - Minor Misconduct
 - Public Reprimand
 - Suspension
 - Disbarment

Ad Complaint Statistics

Fiscal Year	New Files
-------------	-----------

16-17	48
-------	----

17-18	64
-------	----

18-19	57
-------	----

Dispositions*

Fiscal Year

Disposition

16-17

1 License Revoked

17-18

1 Minor Misconduct

Note: Files closed with no public discipline are disposed after 1 year

Dispositions Fiscal Year 18-19

Number	Type of Disp.
5	Closed at Inquiry
17	Closed by Staff
3	Closed by Grievance Committee with Letter of Advice
1	Closed by Staff/Grievance Committee Chair

Sample Ad Discipline Cases

- *The Florida Bar v. Doe*, 634 So.2d 160 (Fla. 1994). Attorney admonished for running a paid article that was not filed for review.
- *The Florida Bar v. Willmott*, (2006). Public reprimand for advertising “FREE INITIAL CONSULTATION” but charging a \$100 consultation fee unless the attorney was retained.

Sample Ad Discipline Cases

- *The Florida Bar v. Pape & Chandler*, 918 So.2d 240 (Fla. 2005). Attorneys publicly reprimanded and ordered to attend advertising workshop after using 1-800-PITBULL and a picture of a pitbull in their television ads.
- *The Florida Bar v. More*, File 2009-90,019 (02S). Lawyer publicly reprimanded for television advertisement stating **You Can Save Your Home**

Sample Ad Discipline Cases

- *The Florida Bar v. Nordt*, Case No. SC10-2137 (Fla. Nov. 10, 2010). Lawyer publicly reprimanded for sending direct mail that appeared to be official notification to participate in a government program to reduce mortgages.
- *The Florida Bar v. Dopazo*, 232 So.3d 258 (Fla. Oct. 5, 2017). Lawyer suspended for 1 year for soliciting mother of child in a coma in the hospital.

Sample Ad Discipline Cases

- *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000); corr.op. 25 Fla. L. Weekly S460 (Fla. 2000). Attorney suspended for one year for direct solicitation of clients in wake of tornados.
- *The Florida Bar v. Barrett*, 897 So. 2d 1269 (Fla. 2005). Attorney disbarred for soliciting clients at a hospital through his "paralegal", an ordained minister.

Questions?

- ⦿ Advertising Review Process
 - Elizabeth Clark Tarbert, Ethics Counsel
 - (850) 561-5780
- ⦿ Advertising Complaints
 - Shaneé Hinson, Advertising Counsel
 - (850) 561-5775
- ⦿ The Florida Bar
 - 651 E. Jefferson Street
 - Tallahassee, FL 32399-2300

Elissa Philip Gentry,
JD/PhD

Drug Injury Advertising

Elissa Philip Gentry, JD/PhD

January 16, 2020

Drug Injury Advertisement

- Do drug injury advertisements distort consumer beliefs about drugs and cause them to discontinue beneficial treatments?
 1. Do drug injury advertisements affect risk perceptions?
 2. Do drug injury advertisements change consumer behavior?
 3. Are these reactions overreactions?

Do Drug Injury Advertisements Affect Risk Perceptions?

1. King and Tippett (2020) Study 2

- Drug injury advertisement increases perceived risks.
- Viewing both the drug injury advertisement and direct to consumer advertisement results in a lower increase.

2. Byl and Viscusi (2020)

- While participants perceive the drug injury advertisement to suggest a higher risk, they place lower weight on this source.

3. King and Tippett (2020) Study 1

- No difference in risk perceptions between deceptive and transparent ads.
- Educational prompts can reduce predicted likelihoods of developing side effects.

Do Drug Injury Advertisements Affect Risk Perceptions?

King and Tippett (2020) Study 2

Ad 1/Ad 2	Group 1	Group 2	Group 3	Group 4
Drug Injury Ad	Yes	No	No	Yes
Direct to Consumer Ad	No	Yes	No	Yes
Mean Risk Perception	5.56	4.37		5.07

Do Drug Injury Advertisements Affect Risk Perceptions? - Byl and Viscusi (2020)

	Risk Out of 100	Informational Content Relative to Prior
Drug Label	114.4**	0.10
Pharma Ad	17.1***	0.72*
Attorney Ad	51.1***	0.43
Pharma Ad (w Atty Ad)	6.6	0.54**
Attorney Ad (w Pharma Ad)	75.0***	0.28

Do Drug Injury Advertisements Affect Risk Perceptions? - King and Tippett Study 1

	Control	Educational (Profit) Instructions	Educational (Benefits) Instructions
Deceptive Ad	No Significant Differences		
Transparent Ad			

Do Drug Injury Advertisements Affect Behavior?

1. Byl and Viscusi (2020)

- Risk perceptions (affected by drug injury advertisements) reduce drug use in experiment by 10%.

2. King and Tippett (2020) Study 1

- Deceptive drug injury advertisement decreased reported likelihood of filling or refilling prescription.

3. King and Tippett (2020) Study 2

- Drug injury advertisement decreased reported likelihood of filling or refilling prescription.
- Drug injury advertisement also increased reported likelihood of discussing drug with doctor.

4. Tippett and Chen (2015)

- Failed to find negative connection between attorney advertising and drug prescription rates through observational data.

Do Drug Injury Advertisements Affect Behavior? - King and Tippett Study 1

	Control	Educational (Profit) Instructions	Educational (Benefits) Instructions
Deceptive Ad	Reports being Less Likely to (re)fill prescription		
Transparent Ad			

Do Drug Injury Advertisements Affect Behavior? - King and Tippett Study 2

- Drug injury advertisement increased reported likelihood of discussing drug with doctor.

Ad 1/Ad 2	Group 1	Group 2	Group 3	Group 4
Drug Injury Ad	Yes	No	No	Yes
Direct to Consumer Ad	No	Yes	No	Yes
Likelihood of Using Drug				

Do Drug Injury Advertisements Affect Behavior? - Byl and Viscusi

- 10 point increase in risk beliefs decrease use of hypothetical drug in game by average of 0.3 doses (average 3 doses per game)
- No independent effect of advertisements on number of doses

Do Drug Injury Advertisements Affect Behavior? - Tippett and Chen

- Uses observational data on Medicare prescription rates and advertising volume by month and geography
- For five of seven drugs, advertising is positively correlated with prescriptions
- Prescriptions are negatively correlated with other safety interventions
- Advertising is positively correlated with safety interventions

Reaction or Overreaction?

1. Are consumers initially overly optimistic?
2. Is it irrational to update beliefs in response to the attorney advertising?
 - Upon post-market surveillance, adverse events involving specific populations and/or indications emerge.
 - The issuance of a warning for a specific population may not mean the absence of a risk for other populations.
 - If the risk for Population A is correlated with a potential risk for Population B—and the risk for Population B is yet untested—it may be rational for a member of Population B to update risk beliefs based on a warning for Population A.
 - Problem: very little information conveyed about how these risks are related.

Evidence

- Most studies have not explored this
- King and Tippett Study 2
 - Spillover effect - even though the risk uncovered only applied to pregnant women, men responded (to some extent) to the warning.

Other Studies

- Several studies about patient beliefs about transvaginal mesh (TVM):
 - Koski et al. - participants who reported hearing about TVM through the television also more likely to choose “I don’t know” as their opinion of the product.
 - Tenggardjaja et al - patients at female pelvic medicine and reconstruction surgery clinic who used the television as an information source were more likely to correctly say that there were FDA announcements about TVM but incorrectly believe there was a recall.
 - Tippett et al. - observational exposure to advertising correlated with higher risk perceptions of TVM (but few control variables).
 - Brown et al. - survey of female patients at urology clinics found that awareness of class action and TV news reports was correlated with wanting to avoid future mesh surgery.

Other Studies

- Burton and Peacock (2016) - study sponsored by Janssen Pharmaceuticals reported 2 fatalities out of 31 adverse event reports after discontinuing Xarelto. Extreme caution in interpreting results.
 - No idea how many patients discontinued Xarelto and did not experience any adverse events.
 - FDA database disclaims any warranty for any causal relationship claimed.