



Title Insurance Aspects of Florida's Construction Lien Law

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Overview- Title Prospective

- The commencement of a construction project presents many title issues due to the lien rights of parties supplying labor, services or materials to improve the subject property that could result in claims on the title insurance policy.
- These challenges involve the propriety and priority of claim of liens over the rights of a purchaser or a mortgage lender.
- The Florida Statutes provide for numerous types of liens but this program is limited to the liens against real property arising out of construction improvements created under Chapter 713 Part I, known as the “Construction Lien Law”.

Role of Title Insurance

- The subject matter of title insurance is the clarity of title to real property.
- Owner's/Leasehold policy of title insurance insures the title is “marketable”.
- A Loan policy of title insurance insures appropriate priority the lien of the lender.
- Coverage includes court costs, attorney fees and expenses incurred in defense of an insured matter.

Public Records Search

- An examination is made of the public records to evaluate matters applicable to property, identify ownership and encumbrances and verify real property taxes are paid.

Review of Title

- A title insurance commitment consists of three schedules.
- Schedule A identifies the insured parties, coverage amount, form of policy, current title holder and legal description of the property.
- Schedule BI lists items that must be recorded and processes.
- Schedule BII identifies the matters of record that if not cleared will remain on the title to the property and encumber the interest of the owner or the lien of the lender.
- Policy insures against a loss or damage suffered as a result of a matter not disclosed and listed on Schedule BII of the title commitment once the policy is issued.

Where to Find Construction Issues

- Found in the specific requirements on Schedule BI of the commitment.
- Examples include instructions for addressing outstanding Notice of Commencements, Lis Pendens, Claim of Liens and Code Enforcement liens/Notice of Violations.
- Schedule BI may require securing curative documentation or list processes to evaluate or remedy matters in order to exclude them as exceptions.

Notice of Commencement

- The Owner or the owner's authorized agent shall file a NOC per Sec. 713.13, F.S., prior to commencing to improve any real property.
- The NOC is not a lien, cloud or encumbrance on the property (Sec. 713.13(3), F.S.).
- The NOC establishes a point of reference to which valid claim of liens filed against the property relate back for the purpose of establishing lien priority (Sec. 713.07, F.S.).
- The NOC provides information necessary for persons to perfect their lien rights.

Notice of Commencement cont.

- The NOC is valid for a period of 1 year (or longer if specified) (Sec. 713.13(6), F.S.).
- The NOC is void if work is not commenced within 90 days from its recording (Sec. 713.13(2), F.S.).
- The NOC must include notice of any private construction bond.

NOC Drafting Considerations

- Attach or insert a complete and accurate legal description of the job site.
- Use accurate names and addresses of parties.
- Define the scope of work covered by NOC.
- Always utilize the additional NOC paragraphs.

Termination of Notice of Commencement

- Owner may terminate a NOC in accordance with Sec. 713.132, F.S.
- Construction must be complete or ceased before completion and all lienors have been paid (Sec. 713.132(3), F.S.).
- Effective 30 days after the date it is recorded or longer if so stated (Sec. 713.132(4), F.S.).
- Effective only if notice of its filing served on lienors in privity and those filing a Notice to Owner.

Use and Purpose of Notice of Termination

- A NOT will shorten the 1-year duration of a NOC.
- NOT is used to restore priority of a mortgage loan if NOC recorded prior to mortgage.
- A NOT is used to restore priority when prior mortgage extensively modified, resulting in a novation and loss of priority.

Title Considerations- Work Complete

- Sec. 627.7842(1) (c), F.S., provides that no title insurance policy shall except from coverage any lien for services, labor or materials furnished which is imposed by law and not shown by the public records, if at closing the seller signs an affidavit swearing that no improvements have been made within the past 90 days for which payment has not been made in full.
- Be cautious to verify the actual date on which services, labor or materials last furnished on the job site.

Work Complete- Less Than 90 Days Ago

- No statutory procedure for insuring title over potential liens within 90 days after work completion with recorded NOC.
- Fund developed guidelines to minimize the risk of unfiled claims.
- Evaluate and weigh factors and devise a custom strategy to address potential lienors.
- Additional documentation required per T.N. 21.03.01.

Fund Requirements - TN 21.03.01

An Owner's affidavit attesting to:

- a. the names and addresses of all persons serving notice to owner;
- b. that owner made a personal inspection of the property;
- c. the names and addresses of all persons in privity of contract with the owner;
- d. that all improvements described in the NOC are complete; and
- e. that all persons are paid in full.

Fund Requirements- TN 21.03.01 cont.

An affidavit signed by the contractor attesting that:

- a. the contractor is paid in full;
- b. all improvements described in the NOC are complete;
- c. all persons providing labor, services or materials to the job have been paid in full; and
- d. the lien of the contractor is unconditionally waived.

Fund Requirements- TN 21.03.01 cont.

In large projects involving high dollar expenditures, additional information must be reviewed and supplied:

- a. Certified list of the parties supplying labor, services and materials to the contractor pursuant to Sec. 713.165, F.S.
- b. Progress payment report containing contract values and payment schedule to subcontractors and suppliers.
- c. Copies of lien waivers from all subcontractors and suppliers pursuant to Sec. 713.20(5), F.S.
- d. Owner and/or its principals must deliver an Indemnity Agreement.

Restoration of Priority- Work Not Complete

- Used with open NOC and active construction.
- Used when NOC is recorded ahead of the construction mortgage to be insured, or when a mortgage originally recorded ahead of the NOC is sought to be extensively modified, creating a novation and loss of priority.
- Fund Members may rely on the process prescribed in Sec. 713.07(4), F.S. relating to payment to the lienors pursuant to the procedures in Sec. 713.06(4), F.S. with some additional requirements.

Restoration of Priority- TN 21.03.03

- Construction on the project must cease.
- Owner must make diligent inquiry to obtain the identity of potential lienors and parties giving notice to owner.
- Owner must pay contractor and subcontractor in full to the time construction ceased and obtain lien waivers.
- Owner must attest work ceased and all parties paid in full.

Restoration of Priority- TN 21.03.03 cont.

- Before construction resumes, the mortgage, mortgage modification, deed or other interest sought to be restored to priority must be recorded.
- New NOC for the recommenced construction must be recorded and replace one at job site.
- A Contractor's Final Payment Affidavit and Lien Waiver must be provided.
- The owner must execute an Indemnity Agreement in favor of the underwriter.

Restoration of Priority- TN 21.03.03 cont.

- Notice of Termination per Sec. 713.132, F.S. maybe required.
- NOT is recorded prior to new or modified mortgage.
- NOT is completed under oath and recorded along with a copy of the Contractor's Final Payment Affidavit and Lien Waiver.
- Service of notice on the contractor and any lienor providing a notice to owner is required.
- Detail review of construction agreements and financial information of owner and contractor maybe required.

Claim of Liens

- Claims of Lien affect the marketability of title.
- All claims of lien are valid for title purposes as coverage includes the duty to defend.
- Claim of Liens must be addressed on or before closing.

Claim of Liens- Sec. 713.08 F.S.

- Claim of Lien must be recorded in the official records for the county in which the improvements are located in order to be valid.
- Contractor must be licensed in Florida to perfect a valid a lien. (See Sec. 713.02(7), F.S.)
- Statutory form must be completed accurately and filed within 90 days after final furnishing of labor, services or material.
- Claim of lien must be served on the owner either before recording or within 15 days of filing.

Special Rules- Licensed Professionals

- Sec. 713.03, F.S. states architects, designers, engineers and surveyors who provide services to a specific parcel have a lien.
- Lien is valid even if the improvements are not constructed.
- Lienor not required to serve a notice to owner.
- Lienor not required to serve a final payment affidavit on owner.
- The priority of this lienor's lien is effective at the time of recording.
(See Sec. 713.07(1), F.S.)

Special Rules- Site Contractors

- Sec. 713.04, F.S. provides contractors who perform services or furnish materials to make property suitable as the site for the construction of improvements are entitled to a lien.
- No notice of commencement is required for this type of work.
- Contractor not required to serve a notice to owner.
- The priority of this lienor's lien is effective at the time of recording. (See Sec. 713.07(1), F.S.)

Special Rules- Tenant Improvements

- Sec. 713.10, F.S. provides the lien of a contractor extends to, and only to, the interest of the tenant in the property as of the commencement of the work.
- If work was performed with an agreement with lessor then the lessor's property interest is also subject to potential liens.
- Must investigate these facts before ignoring these potential liens.

Special Rules- Tenant Improvements cont.

- Sec. 713.10, F.S. contains safe harbor for excluding potential liens.
- Lease must expressly provide that the interest of the lessor is not subject to liens for tenant contracted improvements.
- Notice of the lease provision must be given to the contractor prior to recording the NOC, either directly or by recording notice.
- Pitfalls. Contractor requests for information from owner.

Duration of Liens- Sec. 713.22 F.S.

- Lien expires 1 year from the date it is recorded or validly amended if suit not filed.
- The filing of an action to enforce the lien prior to end of 1 year will extend the lien provided a lis pendens is filed.
- The owner can shorten the duration of the lien to 60 days by recording a notice of contest of lien.
- The clerk serves the notice of contest of lien on the lienor who must then initiate suit to enforce the lien within 60 days from service or the lien is extinguished automatically.

Discharge of Liens- Sec. 713.21 F.S.

- Execute and recording a satisfaction or release of lien.
- Failure to enforce the lien within the one-year period results in automatic discharge of the lien.
- Failure of the lienor to respond or show cause within 20 days to suit filed by interested party will result in the court entering the cancellation of the lien.
- Recording of a final judgment showing a final determination of the action will discharge the lien.

Other Options

- Escrow of Funds.
- Use of Bonds or Transfer to Security process.
 - a. Private Bonds.
 - b. Conditional Payment Bonds.
 - c. Transfer to Security.

Private Bonds – Sec. 713.23 F.S.

- Notice of this type of bond is recorded as an attachment to the notice of commencement.
- Liens of parties in privity with contractor named in the bond are transferred to the bond with the same effect of Sec. 713.24, F.S. by contractor recording Notice of Bond.
- Bond does not cover liens by the contractor and others in privity with owner.
- Fund will rely on use of this type of bond to transfer the lien.

Conditional Payment Bonds- Sec. 713.245 F.S.

- Notice of this type of bond is recorded as an attachment to the notice of commencement.
- Payment by the surety is conditioned on full payment to contractor for the work claimed.
- Only Liens of parties in privity with the contractor are transferred to the bond by the contractor recording a Notice of Bond and a Certificate of Payment.
- All prerequisites for the transfer of the lien as specified in Sec. 713.245, F.S., must have been fulfilled in a timely manner or the lien will remain on the property and will not transfer to the bond.

Transfer to Security- Sec. 713.24 F.S.

- Any interested person having an interest in the land or the contract under which the lien is claimed may transfer a lien from the real property.
- Either by depositing a sum of money or filing a bond.
- Clerk records a certificate showing the transfer of the lien from the real property to the security or bond and shall send a certificate of transfer to the lienor.
- Property is released from the claimed lien upon filing of the certificate of transfer.

Final Notes

- Review title thoroughly, identify construction related requirements and exceptions. Alert the owner as to requirements that require their participation to address as part of the closing process.
- Be involved in the preparation of the notice of commencement to ensure complete and accurate information is inserted.
- Account for payment to all possible lienors providing labor, services or materials to the insured property.
- Use Restoration of Priority and termination on active projects.

Final Notes cont.

- From a title insurer's prospective, ALL FILED CLAIM OF LIENS ARE VALID.
- Duration of liens can be reduced by filing Notice of Contest.
- Liens can be discharged by payment, expiration or suit to show cause.
- Liens can be transferred by use of bonds and the transfer process.





Thank You!
for attending