

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Regulated Industries Committee

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BILL: CS/SB 2036

SPONSOR: Regulated Industries Committee and Senator Posey

SUBJECT: Liens on Commercial Real Estate

DATE: April 13, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The committee substitute (CS) creates parts III and IV of ch. 475, F.S., to create the “Commercial Real Estate Sales Lien Act” and the “Commercial Real Estate Leasing Commission Lien Act,” respectively.

The Commercial Real Estate Sales Lien Act creates a lien for a broker’s commission upon the real estate owner’s net proceeds from the disposition of commercial real estate. This lien does not attach to the any interest in the real property.

The “Commercial Real Estate Leasing Commission Lien Act,” creates a lien for a broker’s commission upon the real estate owner’s interest in commercial real estate for any commission earned by the broker pursuant to a brokerage agreement with respect to a lease on commercial real estate.

The CS requires that the broker disclose the lien at or before the owner executes the brokerage agreement for sale or lease of commercial real estate. The broker may not enforce a lien for a commission unless the disclosure is made. The bill provides the form for the sales and leasing commission disclosures.

The broker is also required to provide the owner of the commercial real estate with a notice that states the amount of the claimed sales or leasing commission. This notice must be signed and sworn to or affirmed by the broker under penalty of perjury before a notary public. The bill also specifies the information that must be contained in the notice and the statements that must be provided in the notice. The bill also provides a form for the required commission notice.

The Commercial Real Estate Sales Commission Lien Act also provides:

- That the broker may record the commission notice in the county or counties where the commercial real estate is located.
- A notice of a real estate sales commission expires one year after the date of recording, unless a one-year extension is filed within the last sixty days before expiration.
- The closing agent must reserve from the owner's net proceeds an amount equal to the commission claimed by the broker in the commission notice.
- The closing agent is required to seek adjudication of the rights of the parties with respect to disputed proceeds held in escrow, and may reserve any costs incurred, including attorney's fees.
- The broker or owner may file a civil action in the county or circuit court if there is a dispute over the commission.
- A prevailing party of such a court action is entitled to costs and reasonable attorneys' fees of the owner and the closing agent.
- A buyer's broker is not entitled to a lien against the owner's net proceeds, unless a contract provides for a buyer's broker to receive a fee.

The Commercial Real Estate Leasing Commission Lien Act also provides:

- If the commission is to be paid in installments, the lien notice is valid only to the extent that any commission remains unpaid to the broker.
- A lien expires two years after recording unless the broker commences a foreclosure action.
- If the broker claims an automatic renewal commission, then the lien notice expires ten years after recording unless the broker commences a foreclosure action, but may be extended for successive 10-year periods. However, an owner may attempt to shorten the time by filing a notice of contest of a broker's lien.
- A broker may enforce a lien for a leasing commission through a foreclosure suit in the same manner as if the lien notice were a mortgage recorded against the commercial real estate.
- If an owner disputes the commission, then the owner may file a civil action to discharge the lien.
- The prevailing party in a foreclosure or civil action is entitled to costs and reasonable attorney's fees.
- A lien that has been recorded may be transferred to a security by filing a sum with the clerk of the court or filing a bond with the clerk in an amount equal to the amount claimed and a certain sum to cover attorneys' fees.
- An owner may also subordinate, with or without the broker's consent, a lien claimed by the broker for an automatic renewal commission in favor of the holder of a subsequent mortgage.

This CS would take effect October 1, 2005.

This bill creates the following sections of the Florida Statutes: 475.700, 475.701, 475.703, 475.705, 475.707, 475.709, 475.711, 475.713, 475.715, 475.717, 475.719, 475.800, 475.801, 475.803, 475.805, 475.807, 475.809, 475.811, and 475.813.

This bill substantially amends section 475.42, Florida Statutes.

## II. Present Situation:

### Statutory Authority for Real Estate Brokers

Chapter 475, F.S., governs licensed real estate brokers. A broker is defined as a person who for compensation or consideration performs a variety of activities, to include appraisals, auctions, sales, exchanges, buying, renting or leasing real property of others or their interests relating to the real property.<sup>1</sup> The Florida Real Estate Commission (commission)<sup>2</sup> within the Department of Business and Professional Regulation (department) regulates the practice of real estate, including real estate broker.

### Property Liens

A broker is authorized to place a lien on property only where provided by written contract.<sup>3</sup> Florida law authorizes construction and mechanic liens on property. Section 255.071, F.S., provides for certain construction liens on public property. In the course of completion of a public project, a failure to pay undisputed obligations for labor, services or materials within 30 days entitles the provider to certain remedies.<sup>4</sup> Remedies for a failure to pay include such other legal or equitable remedies as may be appropriate in accordance with the requirements of law.<sup>5</sup>

Section 255.071, F.S., has been construed to authorize judgments on property for the undisputed contract obligation.<sup>6</sup> Similar authority exists for construction liens on private property, under ch. 713, F.S. Section 713.346, F.S., extends these rights to subcontractors, sub-subcontractors, material providers and other suppliers. Other liens exist, such as for mechanic's liens,<sup>7</sup> liens on personal property,<sup>8</sup> liens on labor in raising crops,<sup>9</sup> and liens for labor on vessels.<sup>10</sup>

Lien laws generally exist to protect persons who have provided labor and materials for the improvement of real property.<sup>11</sup> This is based on the theory that the property owner should not receive an unjust enrichment, through an improvement in property, and an attendant increase in value, without full compensation.<sup>12</sup>

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<sup>1</sup> s. 475.01(1)(a), F.S.

<sup>2</sup> s. 475.02(1), F.S.

<sup>3</sup> s. 475.42(1)(j), F.S.

<sup>4</sup> s. 255.071(2), F.S.

<sup>5</sup> s. 255.071(4)(d), F.S.

<sup>6</sup> See Andrew Feldman, *Pay Now Or Pay More Later: The Current State of the Law on Undisputed Construction Obligations*, Fla. Bar Journal, 28 (October 2003).

<sup>7</sup> s. 713.56, F.S.

<sup>8</sup> s. 713.58, F.S.

<sup>9</sup> s. 713.59, F.S.

<sup>10</sup> s. 713.60, F.S.

<sup>11</sup> Daniel R. Vega, *"Here Comes the Money": A Subcontractor's and Material Supplier's Guide To Perfecting Construction Lien and Bond Rights Under Florida Law*, Fla. Bar Journal, 22 (October 2002).

<sup>12</sup> H. Hugh McConnell, *Distinguishing Quantum Meruit and Unjust Enrichment in the Construction Setting*, Fla. Bar Journal.

### III. Effect of Proposed Changes:

The committee substitute (CS) creates parts III and IV of ch. 475, F.S., to create the “Commercial Real Estate Sales Lien Act” and the “Commercial Real Estate Leasing Commission Lien Act,” respectively.

#### **Commercial Real Estate Sales Lien Act**

**Section 1** creates part III of ch. 475, F.S., consisting of ss. 475.700 through 475.719, F.S., which may be cited as the “Commercial Real Estate Sales Lien Act.”

Section 475.703, F.S., creates a lien for a broker’s commission upon the real estate owner’s net proceeds from the disposition of commercial real estate. This lien does not attach to any interest in the real property.

The bill defines commercial real estate to mean all real property, except:

- Property that is improved with one to four single-family residential units;
- Property that is unimproved and the maximum permitted development is one to four single-family residential units;
- Property that is improved with single-family residential units such as condominiums, townhouses, timeshares, mobile homes, or houses in a subdivision that may be conveyed on a unit-by-unit basis.

Only the broker can enforce this lien. The lien cannot be waived before the commission is earned, and only the broker can waive the lien.

#### **Disclosure of Sales Commission Lien**

Section 475.703, F.S., requires that the broker disclose the lien at or before the owner executes the brokerage agreement. The broker may not enforce a lien for a commission unless disclosure is made. The disclosure must be in substantially the following form:

The Florida Commercial Real Estate Sales Commission Lien Act provides that when a broker has earned a commission by performing licensed services under a brokerage agreement with you, the broker may claim a lien against your net sales proceeds for the broker’s commission. The broker’s lien rights under the Act cannot be waived before the commission is earned.

#### **Sales Commission Lien Notice**

Section 475.705, F.S., requires that the broker give the owner a written commission notice for a commission claimed. This notice must be signed and sworn to or affirmed by the broker under penalty of perjury before a notary public. The bill also specifies the information that must be contained in the notice and the statements that must be provided in the notice, including a statement that the notice has been delivered to the owner, and a statement that the broker has read the commission notice and believes the commission claim to be true and correct. The commission must also provide a statement that, if the owner disputes the claimed commission, he or she must give the closing agent notice of the dispute within five days of the closing. The bill also provides a form for the required commission notice.

The broker must deliver a copy of the commission notice, within 30 days of earning the commission and at least one day before closing, to the owner and the closing agent. Failure to deliver these copies of the commission notice within the prescribed time period renders the commission lien unenforceable, unless the broker failed to deliver the required notice solely because the owner entered into a contract for disposition of the real estate without the broker's knowledge.

### **Recording of the Sales Commission Lien Notice**

Sections 475.705 and 475.707, F.S., permit, but do not require, the broker to record the commission notice in the county or counties where the commercial real estate is located. The recorded lien takes priority, i.e., is effective, on the date it is recorded and does not relate back to the date of the brokerage agreement. Section 475.707, F.S., provides that this lien is only effective to the owner named in the notice, and is ineffective to any subsequent dispositions of that commercial real estate. Any prior recorded liens would take precedence.<sup>13</sup>

A commission notice expires one year after the date of recording, unless the brokerage agreement remains effective and the broker files an extension notice in the same public records within the last sixty days before expiration. Such an extension is good for one additional year.

### **Duties of the Closing Agent**

Section 475.709, F.S., provides the duties of the closing agent with respect to the broker's claimed commission and the broker's commission notice, including applicable time frames. If a closing agent has notice of a commission notice, the closing agent must reserve from the owner's net proceeds an amount equal to the commission claimed by the broker in the commission notice. The closing agent may require additional information from the owner regarding any other brokers who may be entitled to a commission. If the owner's net proceeds are insufficient to cover the broker's commission, the closing agent must notify the broker and the owner. If there is a dispute over the commission, the closing agent must place any disputed funds in the registry of the court.

The bill provides that the closing agent is not liable to any person in any civil action taken by the closing agent to comply with the provisions of this bill. The closing agent is also not required to serve for more than five days after a closing as an escrow agent or stakeholder for monies disputed by the owner or broker.

### **Interpleader or Other Proceedings**

Section 475.711, F.S., requires the closing agent, by interpleader action or other legal proceeding,<sup>14</sup> to seek adjudication of the rights of the parties with respect to disputed proceeds held in escrow. The closing agent may reserve for his or herself any costs incurred to commence or to appear in any such an action and or proceeding, including attorney's fees.<sup>15</sup>

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<sup>13</sup> See also s. 475.715, F.S., in section 1 of the CS.

<sup>14</sup> See rule 1.240, Florida Rules of Civil Procedure. An interpleader action protects the plaintiff from double or multiple liability for a single claim. In an interpleader action, the plaintiff files a law suit against two or more defendants who have a claim to the same property or thing that is being held by the plaintiff, e.g., a broker's commission held in escrow. The defendant's then determine between themselves in the law suit who is entitled to the property or thing.

<sup>15</sup> See also s. 475.713, F.S., amended by the CS.

**Civil Action**

Section 475.713, F.S., provides that if a broker has delivered a commission notice to an owner and there is a dispute over the commission, the broker or owner may file a civil action in the county or circuit court having jurisdiction. An owner who files an action may move the court to issue an order to show cause to the broker as to why the commission claim should not be dismissed. The bill sets forth a procedure, including deadlines, for the court and the parties to follow in such a court action. A prevailing party of such a court action is entitled to costs and reasonable attorneys' fees of the owner and the closing agent, and the amount of any costs, recording charges, and service charges of the clerk of the court.

**Service of Notice**

Section 475.717, F.S., provides that any notice required to be delivered under part III of ch. 475, F.S., may be served by service of process or by registered or certified mail, return receipt requested, or by personal or electronic delivery in the form of a receipt or other paper or electronic acknowledgment by the party to whom the notice is delivered. Delivery is effective at the time of service or 3 days following deposit in the mail.

**Buyer's Broker**

Section 475.719, F.S., provides that a buyer's broker is not entitled to a lien against the owner's net proceeds, but if a contract provides for a buyer's broker to receive a fee, then a buyer's broker may give notice to the closing agent or any other party of the broker's right to such fee. The bill defines a buyer's broker as a broker that is entitled to receive a payment from the buyer of the commercial real estate of any fee or other compensation for licensed services, as specified in a written contract between the buyer and the broker.

**Commercial Real Estate Leasing Commission Lien Act**

**Section 2** creates part IV of ch. 475, F.S., consisting of ss. 475.800 through 475.813, F.S., which may be cited as the "Commercial Real Estate Leasing Commission Lien Act."

Section 475.803, F.S., creates a lien for a broker's commission upon the real estate owner's interest in commercial real estate for any commission earned by the broker pursuant to a brokerage agreement with respect to a lease on commercial real estate.

If the landlord is obligated to pay the commission, the lien attaches to the landlord's interest in the commercial real estate, but not to the tenant's leasehold estate. If the tenant is obligated to pay the commission, the lien attaches to the tenant's interest in the commercial real estate, but not to the landlord's interest.

**Disclosure of Leasing Commission Lien**

Section 475.803, F.S., requires that the broker disclose the leasing commission lien at or before the owner executes the brokerage agreement. The broker may not enforce a lien for a leasing commission unless disclosure is made. The disclosure must be in substantially the following form:

The Florida Commercial Real Estate Leasing Commission Lien Act provides that when a broker has earned a commission by performing licensed services under a

brokerage agreement with you, the broker may claim a lien against your interest in the property for the broker's commission. The broker's lien rights under the Act cannot be waived before the commission is earned.

The bill defines commercial real estate to mean all real property, except:

- Property that is improved with one to four single-family residential units;
- Property that is unimproved and the maximum permitted development is one to four single-family residential units;
- Property that is improved with single-family residential units such as condominiums, townhouses, timeshares, mobile homes, or houses in a subdivision that may be conveyed on a unit-by-unit basis.

Only the broker can enforce this lien. The lien cannot be waived before the commission is earned, and only the broker can waive the lien.

#### **Leasing Commission Lien Notice**

Section 475.805, F.S., requires that the broker give the owner a written commission notice. This notice must be signed and sworn to or affirmed by the broker under penalty of perjury before a notary public.

The bill also specifies the information that must be contained in the notice and the statements that must be provided in the notice, including a statement that the broker has read the commission notice and believes the commission claim to be true and correct, and a statement whether the person obligated to pay the commission is the tenant or the landlord. The notice must identify the name of the person owning the fee simple interest in the commercial real estate, if other than the owner obligated to pay the commission. The notice must also state the amount of the claimed commission. The bill also provides a form for the required commission notice.

#### **Recording of the Leasing Commission Lien Notice**

Sections 475.807, F.S., permits, but does not require, the broker to record the commission notice in the county or counties where the commercial real estate is located. The recorded lien takes priority, i.e., is effective, on the date it is recorded and does not relate back to the date of the brokerage agreement.

To be effective, a leasing commission lien notice must be recorded no later than 90 days before the tenant takes possession of the leased property or the date on which the person obligated to pay the commission records a deed or assignment to transfer their interest in the subject property, whichever is earlier. A lien that is not recorded in accordance with the requirements of this section cannot be enforced.

If the commission is to be paid in installments, the lien notice is valid only to the extent that any commission remains unpaid to the broker. A lien expires two years after recording unless the broker commences a foreclosure action. If the broker claims an automatic renewal commission, then the lien notice expires ten years after recording unless the broker commences a foreclosure action. The bill permits the broker to extend the lien for successive 10-year periods, but an owner

may attempt to shorten the time by filing a notice of contest of a broker's lien. The bill provides the form for a notice of contest.

### **Foreclosure and Civil Action**

Section 475.809, F.S., provides that a broker may enforce a lien for a leasing commission through a foreclosure suit in the same manner as if the lien notice were a mortgage recorded against the commercial real estate of the owner obligated to pay the claimed commission. A foreclosure action must be commenced before the notice expires.

If an owner disputes the commission, then the owner may file a civil action to discharge the lien. The prevailing party in a foreclosure or civil action is entitled to costs and reasonable attorney's fees.

### **Transfer of Lien to Security**

Section 475.811, F.S., provides that a lien that has been recorded may be transferred by any person having an interest in the commercial real estate to a security by filing a sum with the clerk of the court or filing a bond with the clerk in an amount equal to the amount claimed and a certain sum to cover attorneys' fees. The security may be in the form of money deposited in the clerk's office or a bond.

The clerk of the court is required to record a certificate showing the transfer and must mail a copy by registered or certified mail to the broker named in the lien. The bill authorizes the clerk of the court to assess a service charge in an amount up to \$15.00, and up to \$7.50 for each additional lien.

### **Subordination of Lien**

Section 475.813, F.S., provides that a broker may agree to subordinate a leasing commission lien in favor of the holder of any mortgage or other lien against the owner's interest in the commercial real estate that is subject of the broker's lien. An owner may also subordinate, with or without the broker's consent, a lien claimed by the broker for an automatic renewal commission in favor of the holder of a subsequent mortgage encumbering the owner's interest in the commercial real estate.

This section also provides that if the mortgage is made by the owner in favor of a person unrelated to the owner, a broker's leasing commission lien is subordinate to any mortgage that has at any time secured any purchase money indebtedness.

**Section 3** amends s. 475.42(1)(j), F.S., which relates to discipline of real estate brokers and sales associates, to permit licensed real estate brokers and sales associates to record these liens without violating the prohibition in this section against encumbering title to real estate to coerce payment of money to the broker, sales associate, or other person.

**Section 4** provides an effective date of October 1, 2005.



**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

Section 475.811, F.S., authorizes the clerk of the county or circuit court with jurisdiction to assess a service charge in an amount up to \$15.00, and up to \$7.50 for each additional lien to record and mail a certificate showing the transfer a lien to a security.

## B. Private Sector Impact:

A broker of commercial real estate would have an additional method to enforce a contract for a commission.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



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

None.

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

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