

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL 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: The Professional Staff of the Committee on Judiciary

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BILL: SB 908

INTRODUCER: Senator Steube

SUBJECT: Construction Bonds

DATE: January 25, 2018

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	CA	_____
3.	_____	_____	RC	_____

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**I. Summary:**

SB 908 amends several statutes relating to the notice requirements for asserting a claim against a payment bond in a construction project. Under Florida law, contractors, subcontractors, and others providing work and materials on construction projects may help secure or guarantee payment either by filing a lien against the owner's property (when privately owned) or by making a claim against a payment bond (public or private projects). When there is a payment bond, a private property owner may avoid liens.

In order to make a claim against a payment bond, the contractors, subcontractors and others must comply with two sets of notice requirements: (1) file a notice to the owner or contractor within 45 days of first furnishing work or materials; and (2) serve a notice of nonpayment within 90 days of finally furnishing work or materials on the project to the contractor and surety.

The bill seeks to make the notice requirements for seeking payment under a bond consistent for both public and private construction projects. For public projects, subcontractors and others must wait for 45 days before serving a notice of nonpayment on the general contractor and surety. The bill creates the same requirement for serving a notice of nonpayment for private projects.

Concerning the form of the notice of nonpayment for private and public projects, the bill requires that a claimant provide more details concerning work or materials and amounts due, and that the claimant attach supporting documentation to the notice of nonpayment. The bill also requires that the notice of nonpayment be verified under oath or affirmation, under penalty of perjury.

The bill provides that fraud in the notice of nonpayment (for example, willfully exaggerating costs) is a complete defense to payment under the bond, and that the prevailing party will be entitled to attorney's fees. Attorney's fees are also authorized by the bill for general contractors who bring suit to enforce payment under a subcontractor's bond.

## II. Present Situation:

### Overview: Securing Payment for Construction Projects

Under Florida law, there are generally two ways a contractor,<sup>1</sup> subcontractor,<sup>2</sup> sub-subcontractor,<sup>3</sup> materialman,<sup>4</sup> or laborer<sup>5</sup> may help secure or guarantee payment for work performed on a construction project.<sup>6</sup> The first is by filing a lien against the owner's<sup>7</sup> property. Liens may only be filed against private property.<sup>8</sup> If the lien is perfected, the lienholder<sup>9</sup> may foreclose on the property and be paid out of the proceeds from the sale of the property.<sup>10</sup> In the case of subcontractors, sub-subcontractors, and materialmen, they can file a lien only after providing timely notice to the owner, advising the owner that they were hired by the general contractor and did work or provided materials for the owner's property.<sup>11</sup>

The second way of helping to secure or guarantee payment for work on a construction project is by filing a claim against a payment bond. A "payment bond" is "[a] bond given by a surety to cover any amounts that, because of the general contractor's default, are not paid to a

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<sup>1</sup> Section 713.01(8), F.S. ("Contractor" means a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term "contractor" includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by s. 489.103(16).").

<sup>2</sup> Section 713.01(28), F.S. ("Subcontractor" means a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.").

<sup>3</sup> Section 713.01 (29), F.S. ("Sub-subcontractor" means a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in s. 443.101.").

<sup>4</sup> Section 713.01(20), F.S. ("Materialman" means any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof.").

<sup>5</sup> Section 713.01(16), F.S. ("Laborer" means any person other than an architect, landscape architect, engineer, surveyor and mapper, and the like who, under properly authorized contract, personally performs on the site of the improvement labor or services for improving real property and does not furnish materials or labor service of others.").

<sup>6</sup> Chapter 713, F.S., is Florida's "Construction Lien Law." s. 713.001, F.S.

<sup>7</sup> Section 713.01(23), F.S. ("Owner" means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property.").

<sup>8</sup> *Id.* (providing that the term "owner" does not include "any political subdivision, agency, or department of the state, a municipality, or other governmental entity.").

<sup>9</sup> Section 713.01(18), F.S. (defining "lienor" to include contractors, subcontractors, sub-subcontractors, materialmen, and laborers, as well as a professional lienor under s. 713.03, F.S.). Contractors, subcontractors and sub-subcontractors must also be licensed. Section 713.02 (7), F.S. ("Notwithstanding any other provision of this part, no lien shall exist in favor of any contractor, subcontractor, or sub-subcontractor who is unlicensed as provided in s. 489.128 or s. 489.532.").

<sup>10</sup> See generally *Halls Ceramic Tile, Inc. v. Tiede-Zoeller Tile Corp.*, 522 So. 2d 111, 112 (Fla. 5th DCA 1988) (determining forum in case where "bonds were posted to exempt the land from foreclosure of mechanics liens").

<sup>11</sup> Section 713.06(2)(a) & (c), F.S. (requiring that the "notice to owner" be served within 45 days after beginning work, and requiring that the notice advise the property owner how to avoid liens, by obtaining a written release from the contractor for all subcontractors who served a notice to owner.).

subcontractor or materials supplier.”<sup>12</sup> In Florida, a surety issuing a contract bond,<sup>13</sup> such as a payment bond, is treated as an insurer and regulated by the Insurance Code.<sup>14</sup>

Generally, a payment bond “serves two purposes: it assures the owner a lien-free project, and it induces suppliers and subcontractors to accept work on the project, perhaps at a lower price, because of the assurance that they will be paid.”<sup>15</sup> Private real property owners are exempt from liens when there is payment bond in place.<sup>16</sup> And for public projects, payment bonds are generally required.<sup>17</sup>

### Construction Bonds

“Federal, state, and local governmental agencies, as well as an increasing number of private project owners, require general contractors to obtain surety bonds before they commence work on construction projects.”<sup>18</sup> Three types of surety bonds are generally “used on construction projects: (1) bid bonds, (2) payment bonds, and (3) performance bonds[.]”<sup>19</sup>

- A bid bond is issued by a surety to guarantee that a bidder on a construction project “has submitted its bid in good faith and, if awarded the contract, will execute the contract at the bid price and provide the required payment and performance bonds.”<sup>20</sup>
- A payment bond is issued by the surety to guarantee that the general contractor “or principal will pay certain subcontractors, suppliers, and materialmen associated with the project.”<sup>21</sup>
- A performance bond is issued by the surety to guarantee that the general contractor or “principal will complete the work required under the bonded contract.”<sup>22</sup>

“Since no additional charge is generally made for a payment bond when a performance bond is being purchased, the two are usually issued simultaneously.”<sup>23</sup>

Additionally, a “common-law bond” is a performance bond that “exceeds the requirements of a statutory performance bond because it provides additional coverage for construction

<sup>12</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>13</sup> *Id.* (defining “surety” as “someone who is primarily liable for paying another’s debt or performing another’s obligation”).

<sup>14</sup> *See* Section 624.606(1)(a), F.S. (“‘Surety insurance’ includes: (a) A contract bond, including a bid, payment, or maintenance bond, or a performance bond, which guarantees the execution of a contract other than a contract of indebtedness or other monetary obligation[.]”). *See also* BLACK’S LAW DICTIONARY (10th ed. 2014) (“Although a surety is similar to an insurer, one important difference is that a surety often receives no compensation for assuming liability. A surety differs from a guarantor, who is liable to the creditor only if the debtor does not meet the duties owed to the creditor; the surety is directly liable.”).

<sup>15</sup> *Id.* (quoting Grant S. Nelson, *Real Estate Finance Law* § 12.2, at 881 (3d ed. 1994)). *See also* n. 9.

<sup>16</sup> Section 713.02(6), F.S.

<sup>17</sup> *See* s. 255.05, F.S., *infra*.

<sup>18</sup> Etcheverry, Edward, *Rights and Liabilities of Sureties*, Florida Construction Law and Practice, ch. 8, s. 8.4 (8th ed. 2016)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing *City of Wildwood v. Gibbs & Register, Inc.*, 694 So. 2d 763 (Fla. 5th DCA 1997)).

<sup>21</sup> *Id.* (citing *Coastal Caisson Drill Co. v. American Casualty Co. of Reading, Pennsylvania*, 523 So. 2d 791 (Fla. 2d DCA 1988), *approved* 542 So. 2d 957 (Fla. 1989)).

<sup>22</sup> *Id.* (citing *See American Home Assurance Co. v. Larkin General Hospital, Ltd.*, 593 So. 2d 195 (Fla. 1992)).

<sup>23</sup> BLACK’S LAW DICTIONARY (10th ed. 2014) (quoting Grant S. Nelson, *Real Estate Finance Law* § 12.2, at 881 (3d ed. 1994)).

projects.”<sup>24</sup> “Whether a contractor’s bond is considered a common-law or statutory bond is relevant in determining the applicable statute of limitations.”<sup>25</sup>

Generally, the beneficiary of the surety bond or “obligee” is the property owner or “owner of the construction project.”<sup>26</sup> Additionally, a “dual obligee” may be named in the bond and usually includes the owner and the “construction lender or a party having some other financial interest in the construction project.”<sup>27</sup>

In addition, “to shift risk, general contractors may require their subcontractors to obtain surety bonds.”<sup>28</sup> When there is a subcontractor surety bond, the general contractor will be the obligee or beneficiary.<sup>29</sup> When there is a dual obligee on a subcontractor bond, “the dual obligee is usually the owner.”<sup>30</sup>

### **Sections 713.23, F.S.: Payment Bonds**

Under Florida law, in order for a private real property owner to be exempt from a lien, the general contractor must furnish a payment bond prior to commencement that:

- At minimum, is equal in amount to the original contract price;
- Is executed by an authorized surety insurer;
- Requires the contractor to promptly pay for labor, services, and materials of all lienors under the construction contract; and
- Is attached to the notice of commencement when it is recorded.<sup>31</sup>

A copy of the payment bond must be provided to any potential lienor demanding it.<sup>32</sup>

### **Notice Requirements**

To maintain a claim against the bond, sub-subcontractors and materialmen (except laborers) who were not directly hired by the contractor must:

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<sup>24</sup> *Id.*

<sup>25</sup> 7 FLA. JUR 2D BONDS § 20 (“In this regard, although a suit on a common-law performance bond is subject to the five-year limitation period in the statutory provision governing actions on a contract, obligation, or liability founded on a written instrument, an action on a bond that required to exempt an owner under the Mechanic’s Lien Law may not be instituted against the contractor or the surety on the bond after one year from the performance of the labor or completion of the delivery of the materials and supplies, and a similar limitation applies with regard to actions on the bonds of public contractors.”).

<sup>26</sup> Etcheverry, Edward, *Rights and Liabilities of Sureties*, Florida Construction Law and Practice, ch. 8, s. 8.5 (8th ed. 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* “With project owners and general contractors becoming more risk averse, bonding subcontracts has become more prevalent than ever. Decades ago, many sureties viewed bonding subcontractors as more risky than bonding prime contractors. Today, most sureties do an excellent job of mitigating their exposure to the unique risks within the subcontract market. As a result, there is increased surety appetite and capacity to bond subcontractors.” Marla McIntyre, *Subcontractor Bonding: What General Contractors and Subcontractors Need to Know*, Construction Executive Risk Management newsletters, <http://enewsletters.constructionexec.com/riskmanagement/2015/04/subcontractor-bonding-what-general-contractors-and-subcontractors-need-to-know/> (last visited Jan. 23, 2018).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Section 713.23 (1)(a), F.S.

<sup>32</sup> Section 713.23 (1)(b), F.S.

- Provide the contractor or the owner with a written notice that the lienor intends to look to the bond for protection within 45 days of commencing work;<sup>33</sup> and
- As a condition precedent to any recovery under the bond, serve a written notice of nonpayment to the contractor and surety which must:
  - Specify the performance of the labor or delivery of the materials or supplies that has not been paid;
  - Specify the amount unpaid; and
  - Be served no later than 90 days after concluding to furnish labor, services, or materials.<sup>34</sup>

### **Sections 713.245, F.S.: Conditional Payment Bonds**

A conditional payment bond is a bond that limits the surety's responsibility to pay lienors to the time when the general contractor is contractually obligated to pay lienors; that is, when the general contractor has been paid by the owner.<sup>35</sup> A conditional bond is only permitted, however, when it complies with the following conditions:

- The bond is both listed as a conditional payment bond in the notice of commencement and recorded with the notice of commencement;
- The bond's title uses the words "conditional payment bond"; and
- The bond's cover page contains the following statement in at least 10-point font:

THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.<sup>36</sup>

### **Section 255.05: Bonds for Public Buildings and Works**

Section 255.05, F.S. requires that a person entering into a "formal contract" with the state or local government or another public authority to construct a public building or complete some other public works project (such as work on roads) that is worth more than \$200,000.<sup>37</sup>

<sup>33</sup> Section 713.23(1)(c), F.S. (requiring that sub-subcontractors and materialmen provide the contractor with a written notice "that the lienor will look to the contractor's bond for protection on work" within 45 days of beginning to work or furnishing materials; or when a copy of the bond is not attached to the notice of commencement, provide the contractor with the written notice up to 45 days after the lienor is served with a copy of the bond. A notice to owner within 45 days of beginning to work or furnishing materials under s. 713.06, F.S. is also sufficient.).

<sup>34</sup> Section 713.23(1)(d), F.S. ("The time period for serving a written notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor . . . The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph.").

<sup>35</sup> Section 713.245(1), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> Section 255.05(1)(d), F.S. (providing that Department of Management Services may permit state agencies the authority to waive bond requirements for contracts worth between \$100,000 and \$200,000; and providing that local government and other public authorities have discretion whether to waive the bond requirements if the project is worth between \$100,000 and \$200,000). *See also* s. 255.05(1)(f), F.S. (requiring Department of Management Services to adopt rules regarding all contracts worth \$200,000 or less when there is no bond and the state may be directly liable for payment).

- Obtain a payment bond with an authorized surety insurer equal to the contract price;<sup>38</sup>
- Obtain a performance bond with an authorized surety insurer;
- Execute and record both bonds “in the public records of the county where the improvement is located[;]”<sup>39</sup> and
- Provide a certified copy of the bonds to the public body commissioning the project before beginning work. Under Florida law, a contractor cannot be paid until the contractor has provided a certified copy of the bonds.<sup>40</sup>

Unlike private projects, for public projects, subcontractors and other sub-subcontractors furnishing labor, materials, and other services “may not involve the public authority,” i.e., the *owner*, in any cause of action for unpaid expenses. Rather, the cause of action the subcontractors and sub-subcontractors have for unpaid expenses is against the contractor and the surety only.<sup>41</sup>

***Notice Requirements***

Once a subcontractor or sub-subcontractor has completed work on a public project, it may “elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced.”<sup>42</sup> To make this election, the subcontractor or sub-subcontractor must record a “NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND”<sup>43</sup> and file suit to enforce the claim within 60 days after serving the notice.<sup>44</sup> If suit is not filed within 60 days, the notice is automatically extinguished.<sup>45</sup>

To maintain a claim against the bond, sub-subcontractors and materialmen (except laborers) who were not directly hired by the contractor must:

- Provide the contractor with “a written notice that he or she intends to look to the bond for protection” within 45 days of commencing work.<sup>46</sup>
- Deliver a written notice of nonpayment to the contractor and surety which must:

<sup>38</sup> Section 255.05(1)(g)1., F.S. (noting exception when contract price is over \$250 million and bond not reasonably available, requiring that bond must be set at largest price available but not less than \$250 million).

<sup>39</sup> Section 255.05(1), F.S.

<sup>40</sup> Section 255.05(1)(b), F.S.

<sup>41</sup> Section 255.05(1)(c), F.S.

<sup>42</sup> Section 255.05(2)(a)1., F.S.

<sup>43</sup> Section 255.05(2)(a)1., F.S. provides the following statutory form:

NOTICE OF CONTEST OF CLAIM 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)

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Section 255.05(2)(a)2., F.S. (notice may be provided either before or after commencing work so long as it is provided within 45 days).

- Specify the “performance of the labor or delivery of the materials or supplies and of the nonpayment[;]”<sup>47</sup>
- Specify any portion of any amount claimed for retainage;<sup>48</sup>
- Serve notice no earlier than 45 days after beginning to furnish labor, services, or materials; and
- Serve notice no later than 90 days after concluding to furnish labor, services, or materials.<sup>49</sup>

If a sub-subcontractor must file a lawsuit to enforce a claim against a payment bond, the party is entitled to attorney’s fees.<sup>50</sup>

### **Attorney’s Fees Under the Insurance Code**

Surety insurers<sup>51</sup> that issue construction bonds are governed by the Insurance Code.<sup>52</sup> Under the Code, owners, subcontractors, laborers, or materialmen are deemed insureds or beneficiaries of a construction bond.<sup>53</sup> If an insured or beneficiary must bring a lawsuit against a surety insurer to force payment under the construction bond and prevails, the insured or beneficiary is entitled to attorney’s fees under the Code.<sup>54</sup>

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

**Sections 1 and 4:** The bill amends s. 255.05(2)(a), F.S., governing public construction projects, and s. 713.23, F.S., governing payment bonds in materially the same manner. The bill amends each section to require that a claimant serve a *verified* written notice of nonpayment. A verified document is one that is signed under oath or affirmation that the facts stated are true “under penalties of perjury.”<sup>55</sup>

The bill also requires that:

- The notice of nonpayment provide a detailed explanation of the services performed or materials furnished, the amount paid to date, and the amount to become due; and
- The claimant attach documents to substantiate the amount claimed as unpaid, including invoices, pay request, etc.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The time periods for filing a notice of nonpayment and filing a lawsuit are “measured from the last day of furnishing labor, services, or materials by the claimant[.]” *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Section 624.606(1)(a), F.S.

<sup>52</sup> Section 624.01, F.S. (defining that the “Insurance Code,” which includes chapter 627, F.S.).

<sup>53</sup> Section 627.756(1), F.S.

<sup>54</sup> *Id.* (“Section 627.428 applies to suits brought by owners, subcontractors, laborers, and materialmen against a surety insurer under payment or performance bonds written by the insurer under the laws of this state to indemnify against pecuniary loss by breach of a building or construction contract. Owners, subcontractors, laborers, and materialmen shall be deemed to be insureds or beneficiaries for the purposes of this section.”); s. 627.428(1), F.S. (permitting attorney’s fees to a prevailing insured or beneficiary).

<sup>55</sup> Section 92.525, F.S.

Additionally, the bill creates a new “notice of nonpayment” form in section 1 and amends an existing form in section 4 to incorporate the new detail and verification requirements.

The bill also addresses fraud in the notice of nonpayment, providing as follows:

- A claimant who serves a fraudulent notice of nonpayment loses any rights to payment under the bond.
- A notice is fraudulent if the claimant:
  - Willfully exaggerates the amount due;
  - Willfully includes a claim for work not performed; or
  - Is so grossly negligent in preparing the notice of nonpayment that it amounts to willful exaggeration.
- However, a notice is not fraudulent if it contains minor mistakes or good faith disputes as to the unpaid amount.
- The prevailing party is entitled to attorney’s fees if the claimant’s claim is challenged as fraudulent.

In section 4, the bill also adds to s. 713.23, F.S., that a lienor cannot serve a notice of nonpayment any earlier than 45 days after beginning work on a construction project. The 45-day requirement may prevent confusion and delay caused by a subcontractor that serves a notice of nonpayment on a property owner before the contractor has received or had a chance to pay the subcontractor’s invoice.

The overall effect of the foregoing changes is to bring consistency between ss. 255.05(2)(a) and 713.23, F.S., the requirements for making a claim against a bond for public and private construction contracts.

**Section 2:** The bill amends s. 627.756(1), F.S. of the Insurance Code to extend the ability to collect attorney’s fees against an insurer under s. 627.428(1), F.S., to contractors by also deeming them an insured or beneficiary. This change will apply when a contractor successfully enforces a claim against the bond of a subcontractor that has breached a contract with the contractor.

**Section 3:** The bill reenacts s. 627.428(1), F.S., which provides that insureds and beneficiaries who are forced to bring suit against an insurer and prevail are entitled to attorney’s fees.

**Section 5:** The bill amends s. 713.245, F.S., governing conditional payment bonds to permit a contractor to record a notice identifying the bond as a conditional bond and attaching the bond *before* filing a notice of commencement. The bill clarifies that the conditional payment bond will not be transformed into either a common law bond or a regular payment bond.

**Section 6:** The bill provides that it will apply only to payment bonds issued on or after October 1, 2018.

**Section 7:** The effective date of the bill is October 1, 2018.



**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

By requiring that notices of nonpayment be made under oath and contain more specificity and documentation, payment disputes and litigation may be reduced. However, making a surety liable for attorney fees and costs in an action by a contractor against a subcontractor may result in additional litigation.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

The bill substantially amends ss. 255.05, 627.756, 713.23, and 713.245, F.S.  
The bill reenacts section 627.428, Florida Statutes.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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

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