

# FLORIDA CONSTRUCTION LIEN LAW: A PRACTICAL GUIDE

By Michael B. Bittner

The following article provides a concise summary of Florida's Construction Lien Law. Strict compliance with the statutory provisions is required to protect property owners from excess costs.

The Florida Construction Lien Law, Chapter 713, Florida Statutes, is a potential landmine for property owners, contractors, subcontractors and suppliers that seek to rely on and enforce its statutory provisions. The Construction Lien Law provides rights that did not exist at common law and therefore is purely statutory.<sup>1</sup> The purpose of the Florida Construction Lien Law "is to protect those who have provided labor and materials for the improvement of real property."<sup>2</sup> Generally, a lien may attach to real property for any money owed for labor, services or materials that improves the property.<sup>3</sup>

The basic purpose of the Construction Lien Law is to protect both property owners and contractors who enhance the owner's property.<sup>4</sup> First, it protects owners by requiring subcontractors to provide notice of possible liens to prevent double payment.<sup>5</sup> Second, it protects contractors, subcontractors, laborers and suppliers who furnish labor or materials by assuring full payment.<sup>6</sup>

The consequence of a mistake in applying the Construction Lien Law is shared by both property owners and contractors. Property owners, especially homeowners, are often unaware of the statutory process for construction liens, and as a result can end up paying twice to contractors and subcontractors for the same work. Contractors must strictly follow complex statutory requirements or their lien rights may be lost. The risk is significant, as the Construction Lien Law requires strict compliance with the statute.<sup>7</sup>

Application of the Florida Construction Lien law requires careful thought by both the owner and the contractor. The statute sets forth the duties and liabilities of the various parties. Notably, the statute establishes clear deadlines for the recording of a Notice of Commencement, serving Notices to Owner, and the recording and foreclosing on a Claim of Lien. In addition to specific forms and time requirements, the law also requires very specific methods of notification. Failure to precisely comply with any of these steps can invalidate a lien. This article will discuss certain basic issues relating to the operation and enforcement of the Florida Construction Lien Law.

## What Property Is Subject to Lien?

The Construction Lien Law applies to any private real property; however, public property is exempt from liens.<sup>8</sup> Real property is defined by statute as the "land that is improved and the improvement thereon, including fixtures."<sup>9</sup>

Private property owners concerned about clouds on title can exempt their property from liens by securing a lien bond in anticipation of construction.<sup>10</sup> The lien bond substitutes for the property as security for the payment of a potential lienor. If the project is bonded, the lienor has a claim against the bond for the value of the work and/or the materials provided to improve the property.

An owner may also transfer a lien after the lien is recorded, which is often done to relieve any cloud on the title of

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the property.<sup>11</sup> Florida's construction lien law permits for the transfer of a Claim of Lien from the property to a bond upon filing with the clerk of court a bond "in an amount equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for three years, plus \$1000 or 25 percent of the amount demanded in the claim of lien, whichever is greater."<sup>12</sup> If the lien is transferred to a bond before the lienor files suit to enforce the lien, the surety must also be named in the suit. The effect is that the bond creates an alternative source from which the claim of lien can be satisfied. The owner's property is released from the lien.<sup>13</sup>

### Who May File a Claim of Lien?

Under the Construction Lien Law, licensed contractors, subcontractors, sub-subcontractors, laborers, materialmen, and professional lienors (architects, landscape architects, interior designers, engineers, surveyors and mappers) are permitted to file a Claim of Lien.<sup>14</sup> A lien filed by an unlicensed contractor, subcontractor, or sub-subcontractor is not valid.<sup>15</sup> To file a valid lien, the person or entity must comply with the specific requirements for that category of lienor.

Lienors in privity of contract with the owner have a direct route to a lien, as the owner is obviously aware of the contractual relationship. If the contract includes the required statutory warning language, that language satisfies the statutory notice requirement.<sup>16</sup> At this point, the claimant can protect its lien rights by filing its Claim of Lien pursuant to the statute.

A lienor who is not in contractual privity with the owner must meet several additional requirements before perfecting its right to a construction lien against the property. The lienor must serve the owner with a Notice to Owner.<sup>17</sup> The purpose

of the Notice to Owner is to alert the owner to the lienor's presence on the job. The Notice to Owner must be in substantially the same form as the

language required by the statute.<sup>18</sup> It must be served in the manner provided by the statute.<sup>19</sup>

Filing a fraudulent lien or deliberately misstating certain information in support of a lien can result in severe penalties, including criminal penalties.<sup>20</sup>

### Timing under the Florida Construction Lien Law

The Construction Lien Law imposes very specific and time-sensitive requirements on both the property owner and potential lienor.

#### • Notice of Commencement

The Notice of Commencement is one of the first steps in the process that the lien law creates. It is a recorded statement that identifies the name and address of the owner, and further requires all persons that furnish labor and materials to serve a Notice to Owner.<sup>21</sup> The property owner prepares and signs the Notice of Commencement, and is responsible to post a certified copy at the site.<sup>22</sup> The Notice of Commencement is to be recorded before the improvement starts, but not sooner than 90 days prior to commencing the improvements.<sup>23</sup>

#### • Notice to Owner

A Notice to Owner is a document furnished by any person that does not have a direct contractual relationship with the owner of the property. This document advises the owner as to the identity of all persons that have furnished labor and material to improve the owner's property. The purpose of the Notice to Owner is to alert the owner to the lienor's presence on

the job so that the owner can protect itself from the risk of paying the contractor money which should go to an unpaid potential lienor who has previously provided work, labor, and/or materials. It is a prerequisite to perfecting a lien. All potential lienors not in privity with the owner, with the exception of laborers, must serve a Notice to Owner in order to perfect a lien.<sup>24</sup>

The lienor must serve a Notice to Owner within the earlier of 45 days of first materials delivered to the project or work performed on the project or before final payment is made by the owner in reliance on the final contractor's affidavit.<sup>25</sup> The Notice to Owner must either be served certified or registered mail return receipt requested or by actual delivery to the person to be served.<sup>26</sup> The Notice to owner must be sent in the form provided by section 713.06(2)(c), Florida Statutes. The owner must be served even if the owner is aware that the lienor is on the job and providing services and/or materials. If the lienor is not in privity with the general contractor, it must also serve the contractor with the Notice to Owner.<sup>27</sup> The Notice to Owner should also be served on any lender identified in the notice of commencement because the lender may be obligated to seek lien waivers from lienors as progress payments are made.

The owner can protect itself from paying twice for improvements to the property by requiring a contractor to furnish releases of lien from all persons that served Notices to Owner or alternatively, by requiring the general contractor to submit a partial payment affidavit. A partial payment affidavit will certify to the owner that all potential lienors have been paid to the extent payments have been made by the owner to contractor.

#### • Claim of Lien

A lienor who fails to recover a timely payment and who has complied with its Notice to Owner requirements may lien the owner's

property to obtain payment. To perfect its lien rights, the lienor must record a Claim of Lien in the public records of the county where the property is located within 90 days of the final furnishing of materials, labor, or work or at any time during performance.<sup>28</sup>

The Claim of Lien must also be in substantially the same form as that provided in Section 713.08(3), Florida Statutes. To record the Claim of Lien, the lien must be prepared, signed and notarized by the lienor.<sup>29</sup> Following recording, the Claim of Lien must be served by certified mail, return receipt requested, on all the applicable parties listed in the Notice of Commencement within 15 days of recording. If not timely served, "to the extent that the failure or delay is shown to have been prejudicial to any person entitled to rely on the service," the lien may be void.<sup>30</sup> Even if the owner fails to file the Notice of Commencement, the Claim of Lien must be served on the owner at all available addresses.<sup>31</sup>

The filing of a Claim of Lien also establishes priority. Where there is more than one lienor claiming under a direct contract, the owner or court must pay or allow the liens in the following order: (1) liens of all laborers; (2) liens of all persons other than the contractor; and lien of the contractor.<sup>32</sup> If the total amount is insufficient to pay all outstanding liens in full, each lien is to be allowed for its pro rata share of the total amount applicable to liens of that class.<sup>33</sup>

- **Request for List of Subcontractors and Suppliers**

The owner has the right to request from the contractor a written list of all subcontractors and suppliers who have a contract with the contractor to furnish materials or perform any services related to the owner's property.<sup>34</sup> The contractor is required to provide the list within 10 days of the request.<sup>35</sup>

- **Contractor's Final Payment Affidavit**

As a condition to the contractor being entitled to final payment, the contractor is required to give the owner an affidavit stating that all subcontractors, suppliers and laborers have been paid in full, or if not paid in full, stating all persons remaining unpaid and the amount unpaid to each.<sup>36</sup> As a matter of practice, the affidavit should be provided at the time the contractor requests final payment. The statute requires that the affidavit must be given at least five days before suit is filed to enforce the lien.<sup>37</sup> The contractor has no lien and cannot bring suit against the owner while in default of providing the final payment affidavit.<sup>38</sup>

The purpose of the Contractor's Final Payment Affidavit is to prevent the owner from paying for the same materials or services more than once.<sup>39</sup> The owner has the right to rely on the final payment affidavit, unless there are lienors giving notice who are not listed in the affidavit.<sup>40</sup>

- **Lienor Request to Owner for Sworn Statement of Account**

Prior to the time a lienor files an action to enforce its Claim of Lien, the owner subject to a Claim of Lien may request the lienor furnish a written statement of account in a form specified by statute.<sup>41</sup> A lienor is required to provide a sworn written statement within 30 days from the date the lienor received the request.<sup>42</sup> The refusal to provide the statement will deprive the lienor of lien rights.<sup>43</sup> The purpose of the request is so that the owner can determine the amount to pay the contractor, and to assess the exposure for any subcontractor working under the contractor.

### **Priority of Lien Rights**

Generally, the Construction Lien Law provides that all liens attach and take priority from the time of recording of the Notice of Commencement.<sup>44</sup> However, if a Notice of Commencement was not recorded, liens

attach and take priority at the time the Claim of Lien was recorded.<sup>45</sup>

The Florida Construction Lien Law provides a mechanism for priority of liens among various classes of lienors claiming under a direct contract.<sup>46</sup> The owner shall pay or allow such liens in the following order: (1) liens of all laborers; (2) liens of all persons other than the contractor; and (3) lien of the contractor.<sup>47</sup> In the event there are inadequate funds, all liens in a class of priority are allowed for their full amounts before any liens may be allowed to any subsequent class or priority.<sup>48</sup> If the funds are inadequate to permit all liens within that class to be allowed for their full amount, each lien is to be allowed for its pro rata share of the total amount applicable to liens of that class.<sup>49</sup> However, if the same labor, services, or materials shall be covered by liens of more than one class, such labor, services, or materials shall be allowed only in the earliest class by which they shall be covered.<sup>50</sup> If the same labor, services, or materials shall be covered by liens of two or more lienors of the same class, such labor, services, or materials shall be allowed only in the lien of the lienor farthest removed from the contractor.<sup>51</sup>

### **Manner of Serving Notices**

Section 713.18(1), Florida Statutes, provides that service of notices, claims of lien, affidavits, assignments and other instruments, unless otherwise specifically provided, are to be made by one of the following methods:

1. Actual delivery to the person to be served; if a partnership, to one of the partners; if a corporation, to an officer, director, managing agent, or business agent; or, if a limited liability company, to a member or manager;
2. By mailing it, postage prepaid, by registered or certified mail with evidence of delivery; or



3. By posting on the site of improvement if none of the other provided methods can be accomplished.

Care should be taken to confirm that the applicable statutory notice procedure is complied with.

### Filing Suit to Enforce Lien

After the Claim of Lien has been recorded, the lienor must commence an action to foreclose the lien and recover for the work performed within one year from the date the lien is recorded.<sup>52</sup> Otherwise, the lien becomes invalid. An owner has a right to file a Notice of Contest of Lien during the one-year period.<sup>53</sup> Upon the filing of a Notice of Contest of Lien, a lienor must file a lawsuit to enforce the lien within 60 days.<sup>54</sup>

### Attorneys' Fees

Importantly for both the owner and lienor, attorneys' fees will be awarded to the prevailing party in a legal action to enforce a lien or claim against a bond.<sup>55</sup> In many cases involving relatively low dollar amounts for the Claim of Lien, the attorneys' fees claim and be greater than the underlying claim.

### Non-lawyer Lien Form Preparation — Unlicensed Practice of Law?

Given the complexity and strict requirements of the Florida Construction Lien Law, it is unsurprising that there are many companies offering lienors services related to the preparation and filing of lien documents including the Notice to Owner and Claim of Lien. The question is whether such services constitute the unlicensed practice of law. While a non-lawyer can prepare a lien for itself, the notice companies may blur the lines between simply providing the applicable forms and providing legal counsel.

Section 713.08(2), Florida Statutes, expressly provides that the Claim of Lien "may be prepared by the lienor or the lienor's employee or

attorney...". Florida caselaw is clear that the "practice of law" includes the drafting or preparing of legal instruments.<sup>56</sup> However, there is little Florida caselaw providing direct guidance on this issue in the context of completing lien forms.

In *Florida Bar v. Carmel*, the Florida Supreme Court held that that conduct of respondent in advertising services of preparing, filing and releasing mechanic's and materialman's liens on property, in providing a 'kit' to customers with information on legal rights concerning mechanic's liens with advice on when, how and where to file and legal effect thereof and advising as to time for notice and other procedural law relating to mechanic's liens constituted the unauthorized practice of law.<sup>57</sup>

The regulation of the unlicensed practice of law serves the critical role of protecting the public from non-lawyers attempting to perform legal services.<sup>58</sup> These restrictions have withstood attack on First Amendment and equal protection grounds.<sup>59</sup>

### Conclusion

The Construction Lien Law requires careful analysis and consideration. The key is making sure that the owner and any lienor strictly follow the requirements of Chapter 713, Florida Statutes, including the deadlines established for recording the Notice of Commencement, serving Notices to Owner, and recording and foreclosing on a Claim of Lien. By following the Construction Lien Law, owners can be assured that upon completion of construction and payment of the contract price, the property will be free and clear of all liens, and lienors can be assured that they will be paid for their work.

<sup>1</sup> *Home Elec of Dade County, Inc. v. Gonas*, 547 So. 2d 109 (Fla. 1989).

<sup>2</sup> *WMS Construction Inc. v. Palm Springs Mile Associates, Ltd.*, 762 So. 2d 973, 974-75 (Fla. 3d DCA 2000); see also *Trump Endeavor 12, LLC v. Fernich, Inc.*, 216 So. 3d 704 (Fla. 3d DCA 2017).

<sup>3</sup> *Legault v. Suncoast Lawn Serv., Inc.*, 486 So. 2d 72 (Fla. 4th DCA 1986).

<sup>4</sup> *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 626 (Fla. 1995)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Snell v. Mott's Contracting Servs., Inc.*, 141 So. 3d 605 (Fla. 2d DCA 2014); *Sam Rodgers Properties, Inc. v. Chmura*, 61 So. 3d 432 (Fla. 2d DCA 2011), review dismissed, 77 So. 3d 646 (Fla. 2011), reinstatement denied, (Jan. 26, 2012) (because a construction lien is purely a creature of the statute, persons seeking its benefits must strictly comply with the requirements of the construction lien statute); *Gulfside Props. Corp. v. Chapman Corp.*, 737 So. 2d 604 (Fla. 1st DCA 1999).

<sup>8</sup> § 713.01(26), Fla. Stat. (2017).

<sup>9</sup> *Id.*

<sup>10</sup> Section 713.23, Florida Statutes (Payment Bond) and section 713.245, Florida Statutes (Conditional Payment Bond), provide the bonding mechanism.

<sup>11</sup> § 713.24, Fla. Stat. (2017).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> § 713.01(18), Fla. Stat. (2017).

<sup>15</sup> § 713.02(7), Fla. Stat. (2017).

<sup>16</sup> Section 713.015(1), Florida Statutes provides the following notice:

ACCORDING TO FLORIDA'S CONSTRUCTION LIEN LAW (SECTIONS 713.001-713.37, FLORIDA STATUTES), THOSE WHO WORK ON YOUR PROPERTY OR PROVIDE MATERIALS AND SERVICES AND ARE NOT PAID IN FULL HAVE A RIGHT TO ENFORCE THEIR CLAIM FOR PAYMENT AGAINST YOUR PROPERTY. THIS CLAIM IS KNOWN AS A CONSTRUCTION LIEN. IF YOUR CONTRACTOR OR A SUBCONTRACTOR FAILS TO PAY SUBCONTRACTORS, SUB-SUBCONTRACTORS, OR MATERIAL SUPPLIERS, THOSE PEOPLE WHO ARE OWED MONEY MAY LOOK TO YOUR PROPERTY FOR PAYMENT, EVEN IF YOU HAVE ALREADY PAID YOUR CONTRACTOR IN FULL. IF YOU FAIL TO PAY YOUR CONTRACTOR, YOUR CONTRACTOR MAY ALSO HAVE A LIEN ON YOUR PROPERTY. THIS MEANS IF A LIEN IS FILED YOUR PROPERTY COULD BE SOLD AGAINST YOUR WILL TO PAY FOR LABOR, MATERIALS, OR OTHER SERVICES THAT YOUR CONTRACTOR OR A SUBCONTRACTOR MAY HAVE FAILED TO PAY. TO PROTECT YOURSELF, YOU SHOULD STIPULATE IN THIS CONTRACT THAT BEFORE ANY PAYMENT IS MADE, YOUR CONTRACTOR IS REQUIRED TO PROVIDE YOU WITH A WRITTEN RELEASE OF LIEN FROM ANY PERSON OR COMPANY THAT HAS PROVIDED TO YOU A "NOTICE TO OWNER." FLORIDA'S CONSTRUCTION LIEN LAW IS COMPLEX, AND IT IS RECOMMENDED THAT YOU CONSULT AN ATTORNEY.

<sup>17</sup> § 713.06(2)(a), Fla. Stat. (2017).

<sup>18</sup> § 713.06(2)(c).

<sup>19</sup> § 713.06(2)(d).

<sup>20</sup> § 713.31 and § 713.345, Fla. Stat. (2017).

<sup>21</sup> § 713.13, Fla. Stat. (2017).

<sup>22</sup> *Id.*

<sup>23</sup> § 713.13(2).

<sup>24</sup> § 713.06(2)(a).

<sup>25</sup> *Id.*

<sup>26</sup> § 713.18, Fla. Stat. (2017).

<sup>27</sup> § 713.06(2)(a).

<sup>28</sup> § 713.08(5), Fla. Stat. (2017).

<sup>29</sup> § 713.08(5).

30 § 713.08(4)(c).  
 31 *Id.*  
 32 § 713.06(4)(a).  
 33 § 713.06(4)(b).  
 34 § 713.165(1), Fla. Stat. (2017).  
 35 *Id.*  
 36 § 713.06(3)(d)(1).  
 37 *Id.*  
 38 *Climatrol Corp. v. Kent*, 370 So. 2d 394 (Fla. 3d DCA 1979).  
 39 *McMahan Const. Co., Inc. v. Carol's Care Center, Inc.*, 460 So.  
 2d 1001 (Fla. 5th DCA 1984)  
 40 § 713.06(3).  
 41 § 713.16(3).  
 42 § 713.16(2).  
 43 *Id.*  
 44 § 713.07, Fla. Stat. (2017).  
 45 § 713.07(2).  
 46 § 713.06(4)(a).  
 47 *Id.*  
 48 § 713.06(4)(b).  
 49 *Id.*  
 50 *Id.*  
 51 *Id.*  
 52 § 713.22(1).  
 53 § 713.22(2).  
 54 *Id.*  
 55 § 713.29, Fla. Stat. (2017).  
 56 *The Florida Bar v. We the People Forms & Serv. Ctr. of Sarasota,*  
*Inc.*, 883 So.2d 1280 (Fla. 2004); *Sanz v. Fernandez*, 633 F.  
 Supp. 2d 1356 (S.D. Fla. 2009) (applying Florida law).  
 57 *The Florida Bar v. Carmel*, 287 So. 2d 305 (Fla. 1973).  
 58 *The Florida Bar v. Miravalle*, 761 So. 2d 1049 (Fla. 2000).  
 59 *The Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979).

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