

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.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/CS/SB 112

INTRODUCER: Criminal Justice Committee; Judiciary Committee; and Senator Dean

SUBJECT: Property Fraud

DATE: March 18, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Fav/CS
2.	Erickson	Cannon	CJ	Fav/CS
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|-----------------------------------------|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/CS/SB 112 creates the offense of filing or directing to file, with the intent to defraud or harass another, a document in an official record which contains materially false, fictitious, or fraudulent statements or representations that affect the owner’s interest in property described in the document. A person who commits the new offense commits a third-degree felony.¹ If a person commits this offense a second or subsequent time the person commits a second-degree felony.² The bill reclassifies the felony degree of these offenses under circumstances outlined in the bill. The bill also provides that a person who files a fraudulent construction lien is subject to penalties under the Construction Lien Law, not the newly-created offense in the bill.

The bill amends the law relating to criminal actions under color of law or through use of simulated legal process, to revise definitions. For purposes of that law, the bill defines the term, “public officer or employee.” The bill specifies additional civil remedies to grant relief to public officers or employees affected by the offense of filing of false statements or claims. The bill

¹ A third-degree felony is punishable by imprisonment of up to 5 years and the imposition of a fine of up to \$5,000.

² A second-degree felony is punishable by imprisonment of up to 15 years and the imposition of a fine of up to \$10,000.

ranks offenses created in the bill in the offense severity ranking chart of the Criminal Punishment Code for purposes of sentencing.

The bill creates section 817.535, Florida Statutes.

This bill amends sections 843.0855 and 921.0022, Florida Statutes.

II. Present Situation:

Fraud

Chapter 817, F.S., deals with a variety of fraudulent practices. Section 817.54, F.S., for example, states that a person commits a third-degree felony if he or she obtains a mortgage, mortgage note, or promissory note by false representation with the intent to defraud. Additionally, s. 817.155, F.S., makes it a third-degree felony to knowingly falsify any matter within the jurisdiction of the Department of State. The conduct subject to penalties appears to include filing fraudulent liens. Other provisions of law contain similar penalties specific to liens. Under s. 713.31(3), F.S., it is a third-degree felony to fraudulently file a construction lien. A construction lien is considered fraudulent if the person who filed the lien purposefully exaggerates the amount of the lien, includes work not performed, or compiles his or her claim with willful and gross negligence.³

In a 2011 federal case in Florida, the defendant filed false financial statements and liens against a number of federal officers who were involved in a separate criminal prosecution against him.⁴ Although the liens in this case were “fantastic, delusional and incredible,”⁵ with each claiming the amount owed was “\$48,489,000.00 plus interest, penalties, and fees,”⁶ the court found that the sham documents could still be damaging to the credit of the federal officers because they were recorded in official state and local registries.⁷ The court found that the liens were fraudulent and void, and enjoined the defendant from filing future liens against federal employees absent a commercial relationship and a contract authorizing the filing.⁸ The defendant was subsequently sentenced to 30 months in prison for the fraudulent filings.⁹

Fraudulent Recording of Deeds

Property owners who have wild deeds¹⁰ recorded on their property may pursue a suit to quiet title, “an equitable action that involves clearing title of an invalid charge against the title.”¹¹ In the alternative, property owners may sue for slander of title, a tort action for which damages may

³ Section 713.31(2)(a), F.S.

⁴ *United States v. Leitner*, 2011 WL 2532745, No. 3:10cv454/RS/CJK. (N.D. Fla. June 6, 2011).

⁵ *Id.* at *7.

⁶ *Id.* at *5.

⁷ *Id.* at *7.

⁸ *Id.* at *9.

⁹ See Marie Yeung, *Man Sentenced for False Liens in Florida*, The Epoch Times, Oct. 3, 2011, <http://www.theepochtimes.com/n2/united-states/man-sentenced-for-false-liens-in-florida-62333.html> (last visited Jan. 4, 2013).

¹⁰ A wild deed is a recorded deed that is not in the chain of title, usu. because a previous instrument connected to the chain of title has not been recorded. BLACK'S LAW DICTIONARY (9th ed. 2009).

¹¹ See 65 AM. JUR.2D *Quieting Title* s. 2 (2012).

be recovered.¹² The court may award costs as it considers equitable in a quiet title action, but such costs do not include attorney's fees.¹³ A tort claim is not actionable as slander of title if the defendant acted without malice and with the belief that he or she had a valid claim against the property and was entitled to record that claim.¹⁴

Florida Recording Statute

Florida has a recording statute which states:

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.¹⁵

Section 695.01, F.S., is a notice-recording statute and "Florida courts over time have described and applied Florida's recording statute in a manner that is consistent with a 'notice' type of recording statute."¹⁶ The recording system serves two purposes: it protects existing property owners and protects new buyers.¹⁷ The system does so by allowing access to any person such as a creditor, tax collector, or prospective purchaser to ascertain who owns the property and what encumbrances might exist to the title. Because these records are open for the public to rely on and have the potential to call into question the owner's clear title to the property, having accurate property records is vital. Clerks of court have very little control over which documents are recorded, because the law generally does not require that the clerk examine a document for its validity or accuracy.¹⁸

III. Effect of Proposed Changes:

The bill creates s. 817.535, F.S., which creates the offense of filing or directing to file, with the intent to defraud or harass another, a document in an official record which contains materially false, fictitious, or fraudulent statements or representations that affect the owner's interest in property described in the document. A person who commits the new offense commits a third-degree felony. If a person commits this offense a second or subsequent time, the person commits a second-degree felony. The bill reclassifies the felony degree of these offenses (increasing them by one felony degree) if:

¹² *Id.*

¹³ Section 86.081, F.S., and *see also* *Wiggins v. Wiggins*, 446 So. 2d 1078, 1079 (Fla. 1984).

¹⁴ *McAllister v. Breakers Seville Ass'n Inc.*, 981 So. 2d 566 (Fla. 4th DCA 2008).

¹⁵ Section 695.01(1), F.S.

¹⁶ *Argent Mortg. Co., LLC v. Wachovia Bank N.A.*, 52 So. 3d 796, 799 (Fla. 5th DCA 2010) (citation omitted).

¹⁷ John G. Sprankling, *UNDERSTANDING PROPERTY Law*, 394-95 (2000).

¹⁸ *Cf.* Sprankling, 395.

- The owner of the property is a public officer or employee.
- The offender is convicted of the crime while incarcerated or on probation.
- The owner of the property incurs financial loss as a result of the document being recorded in the official record.

The bill also provides that a person who fraudulently records a claim for a construction lien pursuant to part I of chapter 713, F.S., is subject to penalties under the Construction Lien Law, and not the offense created under the bill. If a person is convicted of the offense created in the bill, the court must issue an order declaring the document forming the basis of the conviction void and may enjoin the person convicted of the offense from filing any document in an official record without review and approval by a circuit or county judge. The court may order the document forming the basis of the conviction to be sealed from the official record and removed from any applicable electronic database.

The bill gives a cause of action to a person adversely affected by a document filed in an official record which contains a materially false, fictitious, or fraudulent statement or representation. A *notice of lis pendens*¹⁹ must be filed which specifically describes the document under challenge and the real or personal property affected by the document.

Upon a finding that the instrument contains a materially false, fictitious, or fraudulent statement or representation such that the instrument does not establish a legitimate property or lien interest in favor of another person:

- The court shall determine whether the entire instrument or certain parts thereof are null and void ab initio. If the court finds the instrument void in its entirety, it may order the instrument sealed from the official record and removed from any electronic database used for indexing or locating instruments in the official record. The court may also, permanently or for a period of time, enjoin the defendant who filed the instrument or who directed the filer to file an instrument, from filing or directing a person to file an instrument in the official records without prior review and approval for filing by a circuit or county court judge, provided that as to third parties who may have given value for an interest described or granted by any instrument filed in violation of the injunction, the instrument shall be deemed validly filed and provides constructive notice, notwithstanding any failure to comply with the terms of the injunction.
- The court shall award actual damages and punitive damages to the person adversely affected by the instrument, if the court finds that the violation of this section involved the intent to defraud or harass the person adversely affected by the instrument. The court may also levy a civil penalty of \$2,500 for each instrument determined to be in violation of the statute.
- The court may grant such other relief or remedy that the court determines is just and proper within its sound judicial discretion.

¹⁹ “The term *lis pendens* means a pending suit” Henry P. Trawick Jr., *Trawick’s Florida Practice and Procedure*, s. 8:25 (2007 ed.). “The notice must be recorded in the office of the clerk of the circuit court of the county where the property is located. [The notice of *lis pendens*] must contain the name of the court, the names of all of the parties, the time of institution of the action, a description of the property affected and a statement of the relief sought concerning the property.” *Id.* and s. 48.23(1), F.S.

The prevailing party in the civil cause of action created in the bill may recover costs and reasonable attorney fees.

The custodian of any official record must, upon payment of appropriate fees, provide a certified copy of the sealed document to the person who is adversely affected by the document for use in subsequent court proceedings or in addressing or correcting adverse effects on the person's credit or property rights. The custodian of any official record must, upon payment of appropriate fees, provide a certified copy of the sealed instrument to a federal, state, or local law enforcement agency. If feasible, the custodian of the official record where the document is recorded must record any court order finding that parts of the document or that the entire document is void. The bill requires the voided instrument be removed from electronic databases used for recording instruments in the public record, but be maintained so that the document may be reduced to paper form. The bill authorizes a government agency to provide legal representation to a public officer or employee if the document at issue appears to have been filed to defraud or harass the public officer or employee on account of the performance of that officer's or employee's official duties. If the public officer or employee is the prevailing party, the award of reasonable attorney fees must be paid to the government agency that provided the legal representation.

The bill provides that the requirements of the bill do not apply to the procedures for sealing or expunging criminal history records in ss. 943.0585 and 943.059, F.S.

The bill amends s. 843.0855, F.S., relating to criminal actions under color of law or through use of simulated legal process, to revise definitions. For purposes of s. 843.0855, F.S., the bill defines the term, "public officer or employee" to include, but not be limited to: a person elected or appointed to a state or federal office, including a person serving on an advisory body, board, commission, committee, council, or authority; an employee of a state, county, municipal, political subdivision, school district, educational institution, or special district agency or entity, including all judges, attorneys, law enforcement officers, deputy clerks of courts or marshals; a state or federal executive, legislative, or judicial officer, employee, or volunteer authorized to perform actions or services for any executive, legislative, or judicial office, agency, officer, or employee; a person who acts as a general or special magistrate, auditor, arbitrator, umpire, referee hearing officer, or consultant to any state or local governmental entity; and a person who is a candidate for public office or judicial position.

The bill provides it is a third-degree felony for a person to impersonate a public officer or employee or falsely, under the color of law, intimidate a public officer or employee.

The bill revises the offense severity ranking chart of the Criminal Punishment Code to provide the following rankings for offenses:

Level 7

- Filing false lien or other unauthorized document (s. 817.535(2)(a), F.S.).
- Impersonation of a public officer or employee. (s. 843.0855(2), F.S.)
- Unlawful simulation of legal process. (s. 843.0855(3), F.S.)
- Intimidation of a public officer or employee. (s. 843.0855(4), F.S.)

Level 8

- Second or subsequent offense of issuing or filing a false document. (s. 817.535(2)(b), F.S.)
- Filing of a false lien or other unauthorized document; property owner is public officer or employee. (s. 817.535(3)(a), F.S.)

Level 9

- Second or subsequent offense; issuing or filing false document; property owner is public officer or employee. (s. 817.535(3)(b), F.S.)

The bill takes effect October 1, 2013.

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:**

The bill requires that upon payment of the appropriate fee the custodian of any official record must provide a certified copy of the sealed instrument to the party who is adversely affected by the filing of a fraudulent record.

Additionally, the custodian of any official record must upon payment of appropriate fees, provide a certified copy of the sealed instrument to a federal, state, or local law enforcement agency.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator has not completed a judicial impact statement for the bill as amended.

The Criminal Justice Impact Conference (CJIC) provides the final, official estimate of the prison bed impact, if any, of legislation. The CJIC has not yet considered the impact of this bill on prison beds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Criminal Justice on March 18, 2013:

- Corrects descriptions of offenses and references to felony degree in provisions of the bill that rank offenses in the offense severity ranking chart of the Criminal Punishment Code.
- Rewords (but does not substantively change) provisions involving relief the court may provide for violations involving the filing of false instruments.
- Provides for a severability clause.

CS by Judiciary on March 6, 2013:

The committee substitute revises the elements of the offense of fraudulently filing a document in the official records. The committee substitute provides circumstances for which an enhanced punishment may be imposed for violating the offense created in the committee substitute. The committee substitute specifies additional civil remedies to grant relief to public officers or employees affected by the offense of filing of false statements or claims. The committee substitute ranks offenses created in the committee substitute in the severity ranking chart under the Criminal Punishment Code for purposes of sentencing.

- B. **Amendments:**

None.