

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional rulemaking power for the Secretary of State. This bill creates the Electronic Recording Commission. This bill may lead to decreased administrative burdens on government and on individuals regarding the recording of documents affecting land titles.

B. EFFECT OF PROPOSED CHANGES:

Background¹

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 114 years old, "provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL's work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state."² In 2004, the conference finalized and approved the Uniform Real Property Electronic Recording Act ("URPERA"). Currently, the act has been enacted in seven states and the District of Columbia, and is filed in the legislature of eleven more.³ The NCCUSL provided the following information regarding the proposed act:⁴

As a result of the enactments of the Uniform Electronic Transactions Act ("UETA")⁵ in most states, and the Electronic Signatures in Global National Commerce Act ("E-sign") at the federal level, it is now possible to have sale contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction. However, real estate transactions require another step not addressed by UETA or E-sign. Real estate transaction documents must be recorded on public records in order to protect the current interest in the real estate and clarify who owns title to the property.

Real estate records establish a chain of title which is based upon the originality and authenticity of the paper documents presented for recording. There must be an orderly conversion of recording offices in the United States for implementation of an electronic recording system. The essential starting point for this process is the URPERA.

URPERA modernizes real property law for the 21st Century. It is designed to help state administrative agencies meet the demands of the public for quick identification of title ownership. It should also streamline the real estate transaction at a benefit to consumers and every facet of the real estate industry.

There are currently certain barriers to using electronic communications to carry on real estate transactions. Currently many states have enacted in multiple "statute of fraud" requirements that inhibit the use of electronic communications. Statute of fraud requirements put total and express reliance

¹ The bulk of this analysis is specifically derived from "Uniform Real Property Electronic Recording Act" promulgated by the National Conference of Commissioners on Uniform State Laws in 2004, hereinafter referred to as "NCCUSL". The members of the Drafting Committee on the Uniform Real Property Electronic Recording Act were: David D. Biklen, Owen L. Anderson, Patrick C. Guillot, Carl H. Lisman, James J. White, W. Jackson Willoughby, Lee Yeakel, Arthur R. Gaudio, Fred H. Miller, Lani Liu Ewart, Dale Whitman, William H. Henning, and William J. Pierce.

² *Uniform Law Commissioners*, (Mar. 6, 2006) < <http://www.nccusl.org/Update/>>.

³ *A few facts about the Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006)

<http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp>. Florida is not included in this list.

⁴ *Summary, Uniform Real Property Electronic Recording Act*, (Mar. 6, 2006)

<http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-urpera.asp>.

⁵ Section 668.50, F.S.

upon paper documents and manual signatures to make transactions enforceable. These same requirements have also made it more difficult to develop electronic analogues to transactions in paper that are equally enforceable.

The first step to remedy the problem took place in 1999 when the Uniform Law Commissioners promulgated the UETA. This act adjusted statute of fraud provisions to include electronic "records" and "signatures" for the memorialization of all kinds of transactions, including basic transactions in real estate. It is possible to have sale contracts, mortgage instruments (in whatever form a jurisdiction uses) and promissory notes memorialized in electronic form with electronic signatures that will now be treated the equal of the same paper documents with manual signatures. This is the result of the wide-spread enactment of UETA and of the subsequent enactment of E-Sign by Congress.

Real estate transactions, however, require another step not addressed by either UETA or E-Sign. Real estate documents must be recorded on public records to be effective. Recording takes place in most states in a county office devoted to keeping these records. Recording protects current interests in real estate by clarifying who holds those interests. The chain of title leading to the current title-holder, meaning the historic record of documents relating to transactions for a specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interest in it. The real estate records establish this chain of title. State law governs these local recording offices, and there are requirements in the law of every state relating to the originality and authenticity of paper documents that are presented for recording. These are themselves "statute of fraud" provisions that must be specifically adjusted before electronic recording may take place. Neither UETA nor E-Sign address this issue.

The URPERA establishes that any requirement for originality, for a paper document or for a writing manually signed before it may be recorded, is satisfied by an electronic document and signature. This is essentially an extension of the principles of UETA and E-Sign to the specific requirements for recording documents relating to real estate transactions in any state. Second, it establishes what standards a recording office must follow and what it must do to make electronic recording effective. Third, URPERA establishes the board that sets state-wide standards and requires it to set uniform standards that must be implemented in every recording office.

Effect of Bill

This bill adopts the Uniform Real Property Electronic Recording Act ("URPERA"), with Florida modifications. The bill defines the following terms:⁶

- "Document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and eligible to be recorded in the Official Records, as defined in s. 28.222, and maintained by a county recorder.⁷⁸
- "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- "Electronic document" means a document that is received by a county recorder in an electronic form.
- "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document such that, when recorded, is assigned the same document number

⁶ The Uniform Act includes a definition of "person" that is not included in this bill. The term "person" is defined, applicable to all of the Florida Statutes, at s. 1.01(3), F.S.

⁷ Section 695.27(2)(a).

⁸ The bill uses the generic term "county recorder" to represent the clerks of the circuit court, who are the county recorder in most of the counties in Florida, and the other officials who are designated as the county recorder in select counties.

or consecutive page number immediately following such document and which is executed or adopted by a person with the intent to sign the document.

- "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, instrumentality, or any other legal or commercial entity.
- "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

This bill authorizes a clerk to accept and record electronic documents. Therefore, if a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section. This bill further provides that, if a law requires, as a condition for recording, that a document be signed or notarized, that the requirement is satisfied by an electronic signature or electronic notarization. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

This bill provides that the Secretary of State shall promulgate rules creating standards for electronic recording, and requires county recorders to follow those rules should a county recorder accept documents filed electronically. The county recorder may elect to receive electronic documents. The county recorder may store those electronic documents, or the information contained in them, and create an index of the documents or information. The county recorder may also transmit electronic documents and communications to the recording party or to other parties. The county recorder may archive the electronic documents or the information in them as well as the index in order to preserve and protect them. A county recorder may enter into agreements with other jurisdictions regarding electronic recording.

This bill does not require that persons engaging in real estate transactions use electronic documents in order to have their documents recorded. It merely permits the county recorder to accept electronic documents if they are presented electronically. The county recorder must continue to receive paper documents and include those documents in the same index with the electronic ones.

The Electronic Recording Commission created by this bill will develop standards to provide for the validity of electronic documents relating to real property and provide for the recording of electronic documents by the county recorders. These standards shall be adopted by the Secretary of State and published in the Florida Administrative Code. The Electronic Recording Commission will consist of nine members. The Commission shall consist of:

- Five members appointed by the Florida Association of Court Clerks & Comptrollers.
- One attorney appointed by the Real Property, Probate and Trust Law Section of the Florida Bar Association.
- Two members appointed by the Florida Land Title Association.
- One member appointed by the Florida Bankers Association.

The first meeting of the Electronic Recording Commission must be held within 60 days of the effective date. Thereafter, the council meets at the call of the chair, but at least annually. The members of the Electronic Recording Commission serve without compensation, and cannot claim per diem and travel expenses from the Secretary of State.

To keep the standards, technology and practices of county recorders in this state in harmony with the standards, technology, and practices of county recorders in other jurisdictions the Electronic Recording Commission, in adopting, amending, and repealing standards must consider:

- Standards and practices of other jurisdictions.
- The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.⁹
- The views of interested persons and governmental officials and entities.
- The needs of counties of varying size, population, and resources.
- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

In applying and construing s. 695.27, F.S., created by this bill, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Responding to the specific language of E-sign, this bill is designed to avoid preemption of state law under that federal legislation. This bill modifies, limits, and supersedes E-sign, 15 U.S.C. ss. 7001 et seq.,¹⁰ but this section does not modify, limit, or supersede s. 101(c) of that act,¹¹ 15 U.S.C. s. 7001(c),¹² or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).¹³

C. SECTION DIRECTORY:

Section 1. Creates s. 695.27, F.S.: adopts the Uniform Real Property Electronic Recording Act, with Florida modifications.

⁹ The Property Records Industry Association's mission is "to serve the property records industry by facilitating recordation and access to public property records, by formulating and disseminating model standards, systems and procedures while preserving the integrity of those records." *What is PRIA's Mission?*, (last visited Mar. 6, 2006) <<http://www.pria.us/index.html>>.

¹⁰ The federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., was enacted on June 30, 2000. Congress enacted the Act, "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. *Executive Summary*, (last visited Mar. 6, 2006) <<http://www.ftc.gov/os/2001/06/esign7.htm>>.

¹¹ In the Electronic Signatures in Global and National Commerce Act Congress:

imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.

Executive Summary, (last visited Mar. 6, 2006) <<http://www.ftc.gov/os/2001/06/esign7.htm>>.

¹² 15 U.S.C. s.7001(c) states that a consumer's consent to receive electronic records is valid only if the consumer has affirmatively consented and prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer's rights.

¹³ 15 U.S.C. s.7003(b) excludes from the Electronic Signatures in Global and National Commerce Act "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings" and notices of: cancellation of utility services; defaults or foreclosures or other such proceedings on a primary residence; cancellation or termination of health or life insurance; or recall of a product because of health or safety issues, or documents required to transport toxic or dangerous materials.

Section 2. Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Electronic recording of documents may significantly lower costs to government and to the private sector.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

Applicability of Municipality/County Mandates Provision: This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: None

B. RULE-MAKING AUTHORITY:

This bill creates additional rulemaking authority for the Secretary of State. It is anticipated that the Bureau of Archives would be assigned the responsibility for the rulemaking. An advisory body is created to assist in crafting the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

D. STATEMENT OF THE SPONSOR

No statement provided.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 15, 2007, 2007, the Committee on Tourism and Trade adopted a "strike-all" amendment by the bill sponsor that does the following:

- Rewords the definition of Electronic Signature
- Renames the Electronic Recording Commission the Electronic Recording Advisory Committee, with a 3 year sunset.
- Replaces language that would have had the Department of State (DOS) implementing rules developed by the commission and now states DOS will implement rules in consultation with the Committee.
- Provides that the Florida Association of Court Clerks and Comptrollers will provide administrative and technical support to the committee and DOS.