

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 Budget Subcommittee on General Government Appropriations

BILL: CS/SB 1072

INTRODUCER: Judiciary Committee and Senator Latvala

SUBJECT: Recording of Real Property Documents

DATE: April 8, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Fav/CS
2.	Arzillo	Burgess	BI	Favorable
3.	Frederick	DeLoach	BGA	Pre-meeting
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:

This bill provides that a document that was or is submitted by electronic means to the clerk of court or county recorder and accepted for recordation is valid, even if the document was received and recorded prior to the Department of State adopting rules relating to the electronic recording of documents. These documents are also considered valid notwithstanding any defects in, deviations from, or the inability to demonstrate strict compliance with the statutory or regulatory framework in effect at the time of recordation. The bill specifies that it intends to clarify existing law and applies prospectively and retroactively. In this manner, the bill is designed to ratify the validity of documents submitted by electronic means to clerks of court or county recorders prior to the state's full implementation of electronic recording of real property documents.

This bill creates section 695.28, Florida Statutes.

II. Present Situation:

Uniform Real Property Electronic Recording Act: Background¹

Real estate transactions are some of the oldest forms of transactions governed by law. Over the years as literacy and technology have evolved, these transactions have moved from being conducted symbolically to being recorded through the use of paper deeds, mortgages, and leases. Today, electronic communications have become more prevalent and in many situations have replaced paper. However, there are certain barriers to using electronic communications to carry on real estate transactions. Many states have enacted statute of fraud requirements that inhibit the use of electronic communications. In 1677, the “statute of frauds” was enacted to declare all contracts that were not in writing and signed by the parties to be unenforceable.² These requirements have made it more difficult to develop electronic alternatives to paper transactions that are equally enforceable. According to the Property Records Industry Association (PRIA), there are more than 3,600 recording jurisdictions nationwide. Although many of these jurisdictions have shown an interest in converting from paper recording systems to electronic systems, only a small number of jurisdictions have actually done so due to the lack of clear authority for them to do so.³

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL)⁴ attempted to rectify this problem:

The first step to remedy this emerging problem took place in 1999 when the Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (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 the subsequent enactment of the Electronic Signatures in Global and National Commerce Act (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

¹ The information contained in this portion of the Present Situation of this bill analysis is from the Uniform Real Property Electronic Recording Act, as well as materials on the website of the National Conference of Commissioners on Uniform State Laws.

² BLACK’S LAW DICTIONARY (9th ed. 2009).

³ National Conference of Comm’rs on Uniform State Laws, *Why States Should Adopt the Uniform Real Property Electronic Recording Act (URPERA)*, available at <http://uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (follow the “Why States Should Adopt URPERA” link) (last visited Mar. 20, 2011) [hereinafter *Why States Should Adopt URPERA*].

⁴ The NCCUSL is an organization that “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” National Conference of Comm’rs on Uniform State Laws, *Uniform Law Commission*, <http://www.nccusl.org/> (last visited Mar. 20, 2011).

specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interests 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 help.⁵

In 2004, the NCCUSL finalized and approved the Uniform Real Property Electronic Recording Act (URPERA), in order to provide clear authority to recording jurisdictions that electronic recording is acceptable. The URPERA:

- Maintains conceptual and definitional consistency between URPERA and UETA and E-Sign.
- Equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality is satisfied by an electronic document.
- Provides greater clarity for the authority to implement electronic recording when compared with existing law.
- Designates a state entity or commission responsible for setting statewide uniform standards and requires it to set uniform standards that must be implemented in every recording office that elects to accept electronic documents.
- Establishes the factors that must be considered when a state entity formulates, adopts, and promotes standards for effective electronic recording.
- Allows for cross-storage of electronic and paper documents.⁶

Currently, 26 states, including the District of Columbia and the U.S. Virgin Islands, have enacted the URPERA, and three other states have introduced URPERA legislation in 2011.⁷

Electronic Recording of Real Property Documents in Florida

Florida adopted the Uniform Electronic Transaction Act (UETA) in 2000,⁸ based on the act promulgated by the NCCUSL. The NCCUSL, the PRIA and the Electronic Financial Services Council, believed that UETA authorized the electronic creation, submission, and recording of electronic documents affecting real property.⁹

In 2007, Florida enacted the Uniform Real Property Electronic Recording Act, codified in s. 695.27, F.S.¹⁰ Under the law, the Department of State (department) is required to consult with

⁵ National Conference of Comm’rs on Uniform State Laws, *Uniform Real Property Electronic Recording Act Summary*, <http://uniformlaws.org/ActSummary.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (last visited Mar. 20, 2011).

⁶ *Why States Should Pass URPERA*, *supra* note 3.

⁷ National Conference of Comm’rs on Uniform State Laws, *Real Property Electronic Recording Act: Enactment Status Map*, <http://uniformlaws.org/Act.aspx?title=Real%20Property%20Electronic%20Recording%20Act> (last visited Mar. 20, 2011).

⁸ Chapter 2000-164, s. 1, Laws of Fla., codified in s. 668.50, F.S.

⁹ See Property Records Industry Ass’n, *PRIA and EFSC on Electronic Recordation of Scanned Land Documents* (2004), available at http://www.pria.us/files/public/Committees/Real_Property_Law/URPERA/2004/FloridaSummary12204.pdf (last visited March 20, 2011).

¹⁰ Chapter 2007-233, s. 1, Laws of Fla.

the Electronic Recording Advisory Committee (committee)¹¹ to adopt standards to implement the URPERA in Florida. The department and committee are charged with keeping the standards and practices of county recorders in Florida in harmony with the standards and practices of other states' recording offices, and keeping the technology used by recorders in this state compatible with technology used in other states.¹² In doing this, s. 695.27(5)(e), F.S., directs the department, in consultation with the committee, to consider the following elements when adopting, amending, or repealing standards:

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

In May 2008, the department adopted rules pertaining to real property electronic recording.¹³

According to the Real Property, Probate and Trust Law Section of The Florida Bar, some of the state's clerks of court and county recorders began accepting electronic recordings prior to the adoption of URPERA, under the assumption that UETA authorized the use of electronic recordings, and others began accepting electronic documents before DOS adopted its rules governing electronic filing.¹⁴

Clerks of Court and County Recorders in Florida

Clerks of court and county recorders are required to maintain a variety of court and official records. Court records maintained by a clerk of court include:

the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings¹⁵

Court clerks also serve as county recorders.¹⁶ Official records maintained by the clerk of court, acting as the county recorder, include recorded judgments, deeds, mortgages, claims of liens, death certificates, certificates of discharge from military service, maps, and other records.¹⁷

¹¹ The committee terminated on July 1, 2010. Section 695.27(5)(f), F.S.

¹² Section 695.27(5)(e), F.S.

¹³ See Rules 1B-31.001 and 1B-31.002, F.A.C.

¹⁴ Real Property, Probate and Trust Law Section, The Florida Bar, *Legislative Position Request Form* (2009) (on file with the Senate Committee on Judiciary).

¹⁵ Fla. R. Jud. Admin. 2.420(b)(1)(A).

¹⁶ Section 28.222, F.S.

¹⁷ *Id.*

III. Effect of Proposed Changes:

Electronic Recording of Real Property Documents

This bill creates s. 695.28, F.S., to provide that a document that is entitled to be recorded and that was or is submitted by electronic means and accepted by the clerk of court or county recorder for recordation is valid, even if the document was received and recorded before the Department of State (department) adopted rules relating to the electronic recording of documents. These documents are also considered valid notwithstanding any defects in, deviations from, or the inability to demonstrate strict compliance with the statutory or regulatory framework in effect at the time of recordation. The bill specifies that the newly created section of law does not alter the duty of the clerk of court or county recorder to comply with s. 695.27, F.S., or the rules adopted pursuant to that section.

The bill states that it is intended to clarify existing law and applies prospectively and retroactively. Some clerks of court and county recorders began accepting electronic recordings prior to the department adopting rules to implement the Uniform Real Property Electronic Recording Act (URPERA). According to the Real Property, Probate and Trust Law Section of the Florida Bar:

The intent of the statute, of the rule and of the parties to the Electronic Documents was that they be valid, binding, validly filed and to provide constructive notice notwithstanding timing differences or the mechanism for converting the physical signature into an electronic signature.

Because of the importance of a stable and certain record title and land conveyance system, this bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, notwithstanding those types of possible technical defects.¹⁸

The bill provides that, except as otherwise provided, the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁸ Real Property, Probate and Trust Law Section, The Florida Bar, *White Paper: Bill Curing Certain Defects as to Electronic Documents and Electronically Recorded Documents* (2008) (on file with the Senate Committee on Judiciary).

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill provides that it is the Legislature's intent to clarify existing law and that the provisions of the bill apply prospectively and retroactively. Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."¹⁹ The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?²⁰

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.²¹ It appears that the bill is clarifying existing law, rather than creating new statutory rights, duties, or obligations.

Additionally, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."²² A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.²³ This bill does not appear to do any of these things. Accordingly, to that extent, the retroactive nature of the bill does not appear to pose significant constitutional concerns.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

¹⁹ Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

²⁰ *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).

²¹ *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

²² *Weingrad*, 29 So. 3d at 410.

²³ *Id.* at 411.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

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 by Judiciary on March 22, 2011:

The committee substitute:

- Removes from the original bill the provisions requiring certain governmental liens to be recorded in the official records and expanding the current mechanism under which a person can claim that property is a homestead and exempt from forced sale;
- Removes the provisions making conforming changes to the Uniform Real Property Electronic Recording Act and extending the existence of the Electronic Recording Advisory Committee to July 1, 2013; and
- Specifies that the changes made by the bill apply prospectively, as well as retroactively.

B. Amendments:

None.