

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 Judiciary Committee

BILL: SB 1072

INTRODUCER: Senator Latvala

SUBJECT: Real Property

DATE: March 21, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maclure	Maclure	JU	Pre-meeting
2.			CA	
3.			BI	
4.			BC	
5.				
6.				

I. Summary:

This bill requires certain governmental liens to be recorded in the official records before they are binding as to subsequent interests in property acquired for value. With certain exceptions, the recorded liens must include a legally sufficient legal description and the tax or parcel identification number of the property subject to the lien, and they must state whether the lienor is claiming a priority other than based on the order of recording and the legal basis for that claim. The bill also expands the current mechanism under which a person can claim that property is a homestead and exempt from forced sale, in order to incorporate code enforcement liens. Under this process, code-enforcement lienholders who fail to challenge the homestead claim within a prescribed period will have their liens not attach.

Further, this bill provides that a document that is able to be recorded by electronic means and is (or was previously) 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 also makes conforming changes to the Uniform Real Property Electronic Recording Act and extends the existence of the Electronic Recording Advisory Committee, which terminated on July 1, 2010, to July 1, 2013.

This bill substantially amends the following sections of the Florida Statutes: 222.01, 695.01, and 695.27. The bill also creates section 695.28, Florida Statutes.

II. Present Situation:

Unrecorded Liens

Currently, a conveyance, transfer, or mortgage of real property is not valid against creditors or subsequent purchasers unless it is recorded in the official records of the county.¹ The statute, s. 695.01, F.S., does not require the recording of government liens.

The Real Property, Probate, and Trust Law Section (RPPTL Section) of the Florida Bar reports that liens assessed and maintained in the office of a municipality or branch of a municipality often go undetected. Among the reasons cited are the difficulty in finding the liens, knowing of their existence when they are unrecorded, and knowing which branches of government have the right to impose the lien. In addition, it can be difficult to know whom to contact to determine the existence of possible liens. The RPPTL Section conducted a unscientific polling of local governments and found that approximately 61 percent of the responding governments recorded all of their liens in the official records of the county.²

As a consequence of liens going undetected, they may go unpaid for extended periods and through successive mortgages and transfers of ownership. In such case, the burden falls on innocent purchasers. According to the RPPTL Section, non-record liens are covered by Florida title insurance policies in rare cases only.³ The RPPTL Section further noted that:

With the mass of foreclosures, local governments are facing increasing difficulties with vacant, unmaintained, and unsecured properties. Local governments are bearing significant costs in mowing, securing properties and eliminating health hazards and nuisances on these properties. Liens on foreclosed properties are quite common and[,] owing to the multitude of statutes and ordinances authorizing liens for various purposes and less than clear filing practices by some local governments[,] it is difficult if not impossible to tell (a) the body of law applicable to a recorded lien; and (b) the priority claimed by the local government as to a lien, and whether it has been properly eliminated by a foreclosure.

Very few types of governmental liens attach homestead property under the current statutory framework and the Florida constitutional provisions of Article X, sec. 4, regarding the forced sale of homestead have been generally applied with regard to local government liens.⁴

However, the RPPTL Section notes that the expedited mechanism at s. 222.01, F.S., for the determination of homestead does not apply to liens other than judgment liens. As a result, there is a need for “a separate lawsuit to judicially determine homestead status and whether such liens attached.”⁵ Section 222.01, F.S., prescribes a process for a person to avail himself or herself of

¹ Section 695.01(1), F.S.

² Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Fair Notice of Government Liens*, Nov. 20, 2010 (on file with the Senate Committee on Judiciary).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

the exemption for homestead property from forced sale. When a certified judgment is filed in the public records, the person may file a notice of homestead, notifying lienors that he or she is claiming the property as a homestead exempt from levy and execution. The clerk shall mail a copy of the notice to the judgment lienor. If the lienor fails to file an action for declaratory judgment to determine the constitutional homestead status of the property, or take other statutorily prescribed steps, the lien may not attach to the property.⁶

Uniform Real Property Electronic Recording Act: Background⁷

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.⁸ 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.⁹

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL)¹⁰ 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.

⁶ Section 222.01(2)-(4), F.S.

⁷ 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.

⁸ BLACK’S LAW DICTIONARY 666 (2d pocket ed. 1996).

⁹ 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*].

¹⁰ 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).

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 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.¹¹

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.¹²

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 2011.¹³

Electronic Recording of Documents in Florida

Florida adopted the Uniform Electronic Transaction Act (UETA) in 2000,¹⁴ based on the act promulgated by the NCCUSL. The NCCUSL, the PRIA and the Electronic Financial Services

¹¹ 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).

¹² *Why States Should Pass URPERA*, *supra* note 3.

¹³ 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).

¹⁴ Chapter 2000-164, s. 1, Laws of Fla., codified in s. 668.50, F.S.

Council, believed that UETA authorized the electronic creation, submission, and recording of electronic documents affecting real property.¹⁵

In 2007, Florida enacted the Uniform Real Property Electronic Recording Act, codified in s. 695.27, F.S.¹⁶ Under the law, the Department of State (department) is required to consult with the Electronic Recording Advisory Committee (committee)¹⁷ 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.¹⁸ 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.¹⁹

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.²⁰

Clerks of Court and County Recordors in Florida

Clerks of court and county recordors 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

¹⁵ 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)..

¹⁶ Chapter 2007-233, s. 1, Laws of Fla.

¹⁷ Under current law, the committee terminated on July 1, 2010. Section 695.27(5)(f), F.S.

¹⁸ Section 695.27(5)(e), F.S.

¹⁹ See Rules 1B-31.001 and 1B-31.002, F.A.C.

²⁰ Real Property, Probate and Trust Law Section, The Florida Bar, *Legislative Position Request Form* (2009) (on file with the Senate Committee on Judiciary).

the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings²¹

Court clerks also serve as county recorders.²² 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.²³

III. Effect of Proposed Changes:

Unrecorded Liens

The bill amends the statute governing recording of real property conveyances, s. 695.01, F.S., effective July 1, 2011, to include requirements for the recording of liens by a governmental entity or quasi-governmental entity when the lien relates to an improvement, service, fine, or penalty. Specifically, the bill:

- Requires governmental liens on real property for an improvement, service, fine, or penalty to be recorded in the official records with a legally sufficient description and tax or parcel identification number, as well as the name of the owner of record. The bill exempts specified liens from the requirement to state the legal description and parcel identification number in a notice of lien, including: liens evidenced by a recorded mortgage; liens pursuant to a court order or judgment; liens for local, state, and federal taxes; liens for special assessments levied and collected under the uniform method prescribed in s. 197.3632, F.S.; liens for utility services; liens for child and marital support; hospital liens; and liens imposed in connection with federal or state RICO claims and criminal prosecutions. Those types of liens will continue to be governed by current law and to attach to future acquisitions of property.
- Requires any lien that asserts a priority other than based on its recording order to so state on the face of the recorded lien and include a reference to the law authorizing such priority.
- Permits the assignment of such liens to third parties paying the amounts owed.

Effective July 1, 2011, the bill also amends the mechanism under s. 222.01, F.S., for the determination of homestead to incorporate code enforcement liens into that process (in addition to judgment liens under current law). Specifically, the bill permits a person entitled to an exemption from forced sale to record a notice of homestead when a code enforcement lien exists against the property. Further, the bill creates a process under which a lienholder, subsequent owner, or successor in interest of the property may record a notice of exemption from forced sale in the public records. The clerk shall mail a copy of the notice to the lienholder. If the lienholder fails to file an action for declaratory judgment to determine the constitutional homestead status of the property, or take other statutorily prescribed steps, within a specified time, the lien may not attach to the property.

²¹ Fla. R. Jud. Admin. 2.420(b)(1)(A) (2009).

²² Section 28.222, F.S.

²³ Section 28.222, F.S.

Electronic Recording of Documents

This bill creates s. 695.28, F.S., to provide that a document that is able to be recorded by electronic means and is (or was previously) accepted 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 clarifies existing law and is intended to apply retroactively.²⁴ 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.²⁵

The bill amends s. 695.27(5)(f), F.S., to authorize the Electronic Recording Advisory Committee to remain in existence until July 1, 2013. Under current law, the Electronic Recording Advisory Committee terminated on July 1, 2010. Because the statutory authority for the committee has already terminated, the Legislature may wish to reenact the provision rather than simply change the expiration date from 2010 to 2013.

The bill also amends s. 695.27, F.S., to provide conforming changes so that the new provisions of s. 695.28, F.S., may also be cited as the Uniform Real Property Electronic Recording Act (URPERA).

Effective Date

Except as otherwise provided, the bill takes effect upon becoming a law.

²⁴ As written, the bill states that “[t]his act” applies retroactively. If the intent is solely for the electronic-recording provisions to apply retroactively, the Legislature may wish to state that the provisions of newly created s. 695.28, F.S., apply retroactively.

²⁵ 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).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

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 retroactively. As written, the bill states that "[t]his act" applies retroactively. It appears, however, that the intent is solely for the electronic-recording provisions to apply retroactively, in which case the Legislature may wish to state that the provisions of newly created s. 695.28, F.S., apply 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."²⁶ 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?²⁷

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.²⁸ 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

²⁶ Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

²⁷ *Weingrad v. Miles*, 2010 WL 711801, *2 (Fla. 3d DCA 2010) (internal citations omitted).

²⁸ 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).

application, courts will apply the provision retroactively.”²⁹ A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.³⁰ This bill does not appear to do any of these things.

Accordingly, the retroactive nature of the bill may survive a constitutional challenge.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To bill requires the recording of certain governmental liens. It also prescribes a process by which a person may notify lienholders that the subject property is exempt from forced sale as a homestead. To the extent these processes provide greater notice of the existence and effectiveness of liens, individual engaged in conveyances of real property may benefit.

C. Government Sector Impact:

Recording offices in counties in which government liens are not currently recorded may experience an increase in workload due to the bill’s requirement for recording of government liens. To the extent the bill makes it easier to identify liens that attach to real property and eliminates the ability of cost assessments to be rejected in foreclosure, the bill may have a favorable impact on local government revenues. A governmental lienor who fails to challenge a claim of exemption from forced sale within the prescribed period may find that its lien does not attach to the property.

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.)

None.

²⁹ *Weingrad*, 2010 WL 711801 at *3.

³⁰ *Id.* at *4.

B. Amendments:

None.

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