

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/CS/HB 915	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Judiciary Committee; Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Combee	116 Y's	0 N's
COMPANION BILLS:	(CS/CS/CS/SB 112)	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/CS/HB 915 passed the House on April 30, 2013 as CS/CS/CS/SB 112.

The bill creates s. 817.535, F.S., which makes it a third degree felony for a person to file, or direct another to file, with the intent to defraud or harass another, any instrument containing materially false or fraudulent statements or representations which affect an owner's property interest. The bill requires the offense to be reclassified to the next higher degree of felony in specified instances, and ranks the offenses in the offense severity ranking chart.

The bill gives authority to the sentencing court to:

- Declare the instrument null and void and have it sealed; and
- Enjoin the defendant from filing any future instruments affecting property interests in an official record without prior court approval.

The bill also creates a civil cause of action for any person adversely affected by a false or fraudulent instrument filed in the official record. In a civil action, the court may:

- Hold part or the entire instrument null and void;
- Award actual and punitive damages, in accordance with s. 768.72, F.S.; and
- Grant such other relief it deems necessary.

The bill also broadens the application of s. 843.0855, F.S., which establishes a variety of crimes relating to impersonating public officers and fraudulently simulating legal process, by expanding the definition of "public officer or employee." The bill ranks the offenses in s. 843.0855, F.S., in Level 7 of the offense severity ranking chart.

On March 21, 2013, the Criminal Justice Impact Conference determined that the bill will have an indeterminate prison bed impact on the Department of Corrections. Additionally, the bill may have an insignificant fiscal impact on the court system. See fiscal section.

The bill was approved by the Governor on June 28, 2013, ch. 2013-228, L.O.F., and will become effective on October 1, 2013.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Criminal Actions Under Color of Law or through Simulated Legal Process

The following subsections of s. 843.0855, F.S., makes it a third degree felony¹ for a person² to:

- (2) Deliberately impersonate or falsely act as a public officer or tribunal, public employee or utility employee (including, but not limited to, marshals, judges, prosecutors, sheriffs, deputies, court personnel, or any law enforcement authority) in connection with or relating to any legal process³ affecting persons and property, or otherwise take any action under color of law against persons or property;
- (3) Simulate legal process, including, but not limited to, actions affecting title to real estate or personal property, indictments, subpoenas, warrants, injunctions, liens, orders, judgments, or any legal documents or proceedings, knowing or having reason to know the contents of any such documents or proceedings or the basis for any action to be fraudulent; or
- (4) Falsely under color of law attempt in any way to influence, intimidate, or hinder a public officer or law enforcement officer in the discharge of his or her official duties by means of, but not limited to, threats of or actual physical abuse or harassment, or through the use of simulated legal process.⁴

Section 843.0855(1), F.S., provides the following definitions:

- “Public officer” is defined in accordance with s. 112.061, F.S., as an individual who, in the performance of his or her official duties, is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.
- “Public employee” is defined in accordance with s. 112.061, F.S., as an individual, whether commissioned or not, other than an officer or authorized person as defined in s. 112.061, F.S., who is filling a regular or full-time authorized position and is responsible to an agency head.

The offenses listed above are currently unranked third degree felonies for purposes of the Criminal Punishment Code offense severity ranking chart.⁵ Unranked third degree felonies default to a Level 1 (4 points) offense.⁶

Effect of the Bill

The bill amends s. 843.0855, F.S., to define the term “public officer or employee” to mean any:

¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

² Section 843.0855(1), F.S., defines the term “person” as an individual, public or private group incorporated or otherwise, legitimate or illegitimate legal tribunal or entity, informal organization, official or unofficial agency or body, or any assemblage of individuals.

³ Section 843.0855(1), F.S., defines the term “legal process” as a document or order, issued by a court, or filed or recorded for the purpose of exercising jurisdiction, or representing a claim against a person or property, or for the purpose of directing a person to appear before a court or tribunal, or to perform or refrain from performing a specified act. The term includes, but is not limited to, a summons, lien, complaint, warrant, injunction, writ, notice, pleading, subpoena, or order.

⁴ Section 843.0855(5), F.S., states that nothing in s. 843.0855, F.S., shall: make unlawful any act of any law enforcement officer or legal tribunal which is performed under lawful authority; prohibit individuals from assembling freely to express opinions or designate group affiliation or association; or prohibit or in any way limit a person’s lawful and legitimate access to the courts or prevent a person from instituting or responding to legitimate and lawful legal process.

⁵ The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. Criminal offenses are ranked in the “offense severity ranking chart” from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the Legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant’s sentence is calculated based, in part, on points assigned for the offense severity ranking. The points are added in order to determine the “lowest permissible sentence” for the offense. Section 921.0022, F.S.

⁶ Section 921.0023, F.S.

- Person elected or appointed to a local, state or federal office, including a person serving on an advisory body, board, commission, committee, council, or authority;
- 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 court, or marshals;
- State or federal executive, legislative, or judicial officer, employee, or volunteer authorized to perform actions or services for any executive, legislative, or judicial office, or agency;
- 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
- Person who is a candidate for public office or judicial position.

As a result, the application of the statute is broader because the new definition of “public officer or employee” encompasses more people.

The bill amends s. 843.0855(4), F.S., to include attempting to harass or retaliate against a public officer or employee, under color of law, as a violation of subsection (4).

The bill also amends s. 843.0855(2), F.S., to add the following legislative intent statement:

It is the intent of the Legislature that this section applies if a person acts as an officer or employee purporting to supersede or override any legislation or statute of this state, or to supersede or override any action of any court of this state.

The bill ranks s. 843.0855(2), (3), and (4), F.S., in Level 7 (56 points) of the offense severity ranking chart.

Florida Law Relating to Property Interests, False Liens, etc.

In addition to the above-described statute relating to criminal actions under color of law or through simulated legal process, Florida law contains a variety of statutes designed to protect the interests of property owners and that criminalize the actions of those who fraudulently attack such interests. A description of these statutes follows.

Florida’s Recording Act

Section 695.01, F.S., requires that any conveyance, transfer, mortgage, or other interest in real property be recorded in the public records of the county where the property is located. Every state in the United States has an analogous statutory recording system making information about interests in property available to the public.⁷ The purpose of a public recording system for land titles is to allow 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.⁸ 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.⁹

Section 28.222(1), F.S., requires the clerk of the circuit court to record all of the instruments, such as deeds, liens, mortgages, etc., in the county where he or she is clerk. The clerk must record instruments presented to him or her for recording upon payment of the service charges prescribed by law.¹⁰ Florida law does not require the clerk to investigate the accuracy of any such instruments he or she records.

⁷ Jesse Dukeminier and James E. Krier, PROPERTY, 662 (5th ed. 2002).

⁸ *Id.*

⁹ *Id.*

¹⁰ Section 28.222(3), F.S.

Fraud - Generally

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 felony¹¹ 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. For example, s. 713.31(3), F.S., makes it 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.¹²

Fraudulent Recording of Deeds

Florida law offers redress for a property owner where a fraudulent deed is recorded with respect to his or her property. A property owner who has a fraudulent deed recorded on his or her property may pursue a suit to quiet title, which is “an equitable action that involves clearing a title of an invalid charge against the title.”¹³ The court may award costs as it considers equitable in a quiet title action, but such costs do not include attorney’s fees.¹⁴ A property owner may also choose to sue for slander of title, a tort action for which damages may be recovered.¹⁵ 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.¹⁶

Recent Caselaw

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.¹⁷ Although the liens in this case were “fantastic, delusional and incredible,”¹⁸ with each claiming the amount owed was “\$48,489,000.00 plus interest, penalties, and fees,”¹⁹ 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.²⁰ 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.²¹ The United States sought injunctive relief under several federal laws, including 26 U.S.C. s. 7402(a),²² and 18 U.S.C. s. 1345(a)(1).²³ The United States prosecuted the defendant in accordance with 18 U.S.C. s. 1341,²⁴ which prohibits actions that

¹¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹² Section 713.31(2)(a), F.S.

¹³ 65 AM. JUR. 2d, *Quieting Title and Determination of Adverse Claims* s. 2 (2011).

¹⁴ Section 86.081, F.S.; see also *Wiggins v. Wiggins*, 446 So.2d 1078, 1079 (Fla. 1984) (citing *State ex rel. Royal Ins. Co. v. Barrs*, 99 So. 668 (Fla. 1924)).

¹⁵ *Id.*

¹⁶ *McAllister v. Breakers Seville Ass’n Inc.*, 981 So.2d 566, 575 (Fla. 4th DCA 2008).

¹⁷ *United States v. Leitner*, 2011 WL 2532745, No. 3:10cv454/RS/CJK. (N.D. Fla. June 6, 2011).

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 7.

²¹ *Id.* at 9. The defendant was subsequently sentenced to 30 months in prison for the fraudulent filings. *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 March 13, 2013).

²² 26 U.S.C. s. 7402(a), permits a court to enjoin a defendant if necessary and appropriate for the enforcement of the internal revenue laws. *Leitner*, at 8. Courts have interpreted 26 U.S.C. s. 7402(a), to be used to enjoin interference with tax enforcement “even when such interference does not violate any particular tax statute.” *United States v. Kaplowitz*, 201 Fed. Appx. 659; *See also United States v. McGugan*, 600 F.Supp.2d 608 (D.N.J. 2009)(Court held that 26 U.S.C. s. 7402(a), has been used on numerous occasions to grant the exact relief sought here, *i.e.*, to enjoin taxpayers from filing frivolous and unsupported documents against IRS [and other federal] employees acting in accordance with their official duties, and declare such documents null, void, and with no legal effect).

²³ 18 U.S.C. s. 1345(a)(1), which permits the Government to commence a civil action in federal court to enjoin the current or future commission of fraud against the United States or any agency thereof.

²⁴ 18 U.S.C. s. 1341, which states that any person who, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, . . . places any item in any post office or authorized depository

constitute mail fraud. Currently, there are no comparable statutes in Florida which would provide for injunctive relief or criminal prosecution.

Effect of the Bill

The bill creates s. 817.535, F.S., which creates new criminal offenses as well as a civil cause of action relating to the unlawful filing of false claims against real or personal property. The bill provides the following definitions that apply to the section:

- “File” means to present an instrument for recording in an official record or to cause an instrument to be presented for recording in the official record;
- “Filer” means the person who presents an instrument for recording in an official record, or causes an instrument to be presented for recording in an official record;
- “Instrument” means any judgment, mortgage, assignment, pledge, lien, financing statement, encumbrance, deed, lease, bill of sale, agreement, mortgage, notice of claim of lien, notice of levy, promissory note, mortgage note, release, partial release or satisfaction of any of the foregoing, or any other document that relates to or attempts to restrict the ownership, transfer, encumbrance of, or claim against real or personal property, or any interest in real or personal property;
- “Official record” means the series of instruments, regardless of how they are maintained, which a clerk of the circuit court, or any person or entity designated by general law, special law, or county charter, is required or authorized by law to record. The term also includes a series of instruments pertaining to the Uniform Commercial Code filed with the Secretary of State or with any entity under contract with the Secretary of State to maintain Uniform Commercial Code records and a database of judgment liens maintained by the Secretary of State; and
- “Public officer or employee” is defined in accordance with s. 843.0855, F.S. (see above).

Criminal Offenses

Subsection (2) of s. 817.535, F.S., makes it a third degree felony for a person to file or direct another to file, with the intent to defraud or harass another, any instrument containing a materially false, fictitious, or fraudulent statement or representation that purports to affect an owner’s property interest. The offense is reclassified to a second degree felony²⁵ for a second or subsequent offense. The offense is also reclassified to the next higher degree of felony if the:

- Person affected by the materially false or fraudulent filing is a “public officer or employee;”
- Defendant committed the offense while incarcerated in a jail or correctional institution, a participant in a pretrial diversion program, under any form of pretrial release or bond, on probation or parole, or under any post-release supervision;²⁶ or
- Person affected by the materially false or fraudulent filing has incurred financial loss as a result of the instrument being filed in the official record, including costs and attorney fees incurred in correcting, sealing, or removing the false instrument from the official record.

The bill ranks offenses reclassified from a third degree felony to a second degree felony in Level 8 (74 sentencing points) of the offense severity ranking chart. Offenses reclassified from a second degree felony to a first degree felony²⁷ are ranked in Level 9 (92 sentencing points) of the offense severity ranking chart.

for mail matter to be sent or delivered by any private or commercial interstate carrier...or knowingly cause to be delivered by mail or such carrier according to the direction thereon shall be fined or imprisoned not more than 20 years, or both.

²⁵ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

²⁶ The bill specifies that if a person’s offense has been reclassified in accordance with s. 817.535(4), F.S., as a result of the defendant committing the offense while incarcerated, the sentencing court is required to issue a written finding that the offense occurred while incarcerated in jail or correctional institution and direct that a copy of the written finding and judgment be forwarded to the appropriate facility for consideration of disciplinary action and forfeiture of all gain-time or any early release credits accumulated up to the date of the offense.

²⁷ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

Additionally, if a person is convicted of a violation of s. 817.535, F.S., the sentencing court must issue an order declaring the instrument null and void and may:

- Enjoin the person from filing any instrument absent prior review and approval for filing by a circuit or county court judge; and
- Order the instrument forming the basis of the conviction sealed from the official record and removed from any applicable electronic database used for recording instruments in the official record.

The bill states that a person who fraudulently records a construction lien in the official records pursuant to Part 1, of ch. 713, F.S., remains subject to the fraud provisions of s. 731.31, F.S., not the newly created s. 817.535, F.S.

Civil Actions

Subsection (8) of s. 817.535, F.S., authorizes a civil cause of action for any person adversely affected by a materially false or fraudulent instrument filed in the official record, without regard to whether criminal charges are pursued under subsection (2).

The bill requires that a notice of lis pendens in accord with s. 48.23, F.S., be filed which specifically describes the instrument at issue in the suit and the real or personal property affected by the instrument.²⁸

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 must determine whether the entire instrument or certain parts are null and void ab initio,²⁹ and 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 official records; and
- The court or jury must, upon a finding of intent to defraud or harass, award actual and punitive damages, subject to the criteria in s. 768.72, F.S., to the person adversely affected by the filing.

The court *may* also:

- Permanently or temporarily, enjoin the person who filed or directed the filer to file the instrument, from filing or directing a person to file an instrument in the official records, without prior approval for filing by a circuit or county court judge;
- Levy a civil penalty of \$2,500 for each instrument filed in violation of subsection (2); and
- Grant such other relief or remedy it determines is just and proper within its sounds discretion.

The prevailing party in the civil suit is entitled to recover costs and reasonable attorney fees.

The records custodian of any official record must, upon payment of appropriate fees:

- Provide a certified copy of the sealed instrument to the party seeking relief under s. 817.535, F.S., for use in subsequent court proceedings, in correcting adverse effects upon the persons credit or property rights, or reporting the matter for investigation and prosecution; or in response to a subpoena for investigative or prosecution purposes; and
- Provide a certified copy of the sealed instrument to any federal, state, or local law enforcement agency.

²⁸ Generally, the purpose of a notice of lis pendens is to alert creditors, prospective purchasers, and others to the fact that the title to a particular piece of real property is involved in litigation, thereby warning all persons that the title to the property is in litigation and that they are in danger of being bound by an adverse judgment and notifying prospective purchasers and encumbrancers that any interest acquired by them in the property in litigation is subject to the decree of a court. 35 Fla. Jur 2d, Lis Pendens s. 2 (2nd edition). See also *S & T Builders v. Globe Properties, Inc.*, 944 So.2d 302 (Fla. 2006); *Intermediary Fin. Corp. v. McKay*, 111 So. 531 (Fla. 1927).

²⁹ Ab initio means “from the beginning; from the first act; from the inception.” Black’s Law Dictionary, 6 (5th ed. 1979).

Additionally, if feasible, the custodian of any official records, where an instrument is recorded, must also record any court order finding that the instrument is null and void in its entirety or in certain parts.

An instrument removed pursuant to s. 817.535, F.S., from an electronic database used for recording instruments in the public record, must be maintained in a manner allowing the instrument to be reduced to paper form.

If the instrument at issue appears to have been filed to defraud or harass a public officer or employee in their official capacity, the bill provides authority for a government agency to provide legal representation to that public officer or employee. If the public officer or employee is the prevailing party, the award of attorney fees shall be paid to the agency.

The bill states that s. 817.535, F.S., does not apply to the procedures for sealing or expunging of criminal history records as provided in ch. 943, F.S. The bill also provides a severability clause to protect any constitutional provisions in the event that some provisions of the act are held unconstitutional.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill authorizes the courts to levy a civil penalty of \$2,500 for each instrument filed with the intent to defraud. This penalty is levied at the courts discretion, so the positive fiscal impact to the courts cannot be determined.³⁰

2. Expenditures:

On March 21, 2013, the Criminal Justice Impact Conference determined that the bill will have an indeterminate prison bed impact on the Department of Corrections.

Additionally, the Office of the State Courts Administrator stated in their Judicial Impact Statement for this bill that there may be a modest increase in additional criminal cases because the bill criminalizes a broader range of fraudulent filings that may not otherwise be specifically addressed in Florida Statutes. It cannot be determined if the discretionary \$2,500 civil penalty would support the insignificant additional workload or provide surplus funding.³¹

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

³⁰ Section 142.01, F.S., provides that all revenues received into the fine and forfeiture fund from court-related fines are considered state funds and must be remitted monthly to the Department of Revenue for deposit into the Clerks of the Court Trust Fund.

³¹ *Id.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons who are affected by the fraudulent filings of liens, etc. will have recourse to obtain reasonable attorney's fees and costs associated with removing or sealing the false liens, etc. from public record or public database. Persons who file valid liens, etc. could be sued by someone who maliciously moves to have the filing sealed or removed.

D. FISCAL COMMENTS:

None.