

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: CS/SB 1288

INTRODUCER: Judiciary Committee and Senator Negron

SUBJECT: Official Documents/Electronic Documents

DATE: March 19, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Fav/CS
2.			CA	
3.			GO	
4.			JA	
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 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 clarifies existing law and applies prospectively and retroactively. 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 is set to terminate on July 1, 2010, to July 1, 2013.

This bill creates section 695.28, Florida Statutes. This bill amends section 695.27, 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 Laws⁴ 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.

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 666 (2d pocket ed. 1996).

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://www.electronicrecording.org/DesktopDefault.aspx?tabindex=3&tabid=75> (follow the “Why States Should Pass URPERA” link) (last visited Mar. 11, 2010) [hereinafter *Why States Should Pass 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. 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.” National Conference of Comm’rs on Uniform State Laws, *Uniform Law Commission*, <http://www.nccusl.org/Update/> (last visited Mar. 11, 2010).

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 titleholder, 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.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, 24 states, including the District of Columbia and the U.S. Virgin Islands, have enacted the URPERA, and four other states have introduced URPERA legislation in 2010.⁷ See map on next page.

⁵ National Conference of Comm’rs on Uniform State Laws, *Uniform Real Property Electronic Recording Act*, <http://www.electronicrecording.org/DesktopDefault.aspx?tabindex=2&tabid=74> (last visited Mar. 11, 2010).

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

⁷ National Conference of Comm’rs on Uniform State Laws, *Enactment Status Map*, <http://www.electronicrecording.org/DesktopDefault.aspx?tabindex=4&tabid=76> (last visited Mar. 11, 2010).

- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

The department adopted rules in May 2008 relating to real property electronic recording.¹²

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.¹³

According to the PRIA, the following counties are recording documents electronically in Florida:

- Bay,
- Brevard,
- Broward,
- Charlotte,
- Clay,
- Duval,
- Escambia,
- Nassau,
- Orange,
- Pinellas,
- Santa Rosa,
- Suwannee, and
- Walton.¹⁴

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 clerks also serve as county recordors.¹⁵ 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 proceedings¹⁶

¹² See Rules 1B-31.001 and 1B-31.002, F.A.C.

¹³ Real Property, Probate and Trust Law Section, The Florida Bar, *Legislative Position Request Form* (2009) (on file with the Senate Committee on Judiciary).

¹⁴ Property Records Industry Ass'n, *List of Counties eRecording* (Dec. 31, 2009), available at <http://www.pria.us/xml.htm> (follow the "List of Counties eRecording" link) (last visited Mar. 11, 2010).

¹⁵ Section 28.222, F.S.

¹⁶ Fla. R. Jud. Admin. 2.420(b)(1)(A) (2009).

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

III. Effect of Proposed Changes:

This bill creates s. 695.28, F.S., providing 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 (DOS or department) 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 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 clarifies 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 conveyancing 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

Under current law, the Electronic Recording Advisory Committee is scheduled to terminate on July 1, 2010. 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. The bill also makes conforming changes to s. 695.27, F.S., which is Florida's URPERA.

The bill shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁷ Section 28.222, F.S.

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).

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

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*, 2010 WL 711801, *2 (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*, 2010 WL 711801 at *3.

²³ *Id.* at *4.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

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 18, 2010:

The committee substitute extends the existence of the Electronic Recording Advisory Committee, which is scheduled to terminate on July 1, 2010, to July 1, 2013.

B. Amendments:

None.