Under SB 112 and HB 915, which passed both houses of the Florida legislature by unanimous votes, filing an instrument containing false, fictitious or fraudulent statements in the official records will be a third degree felony in Florida. This has great potential to impact title agents and anyone else routinely preparing and filing deeds, mortgages and other instruments.

While some will be quick to suggest that this is a response to the robo-signing scandals of the last few years – and this law can certainly be applied to some of those scenarios – the main focus of the bill was on fraudulent liens and claims filed by so-called “Sovereign Citizens” and others in retaliation against government officials who have displeased them.

Needless to say, FLTA and the RPPTL Section had some serious concerns with the early drafts of the bill, and we greatly appreciate the willingness of the Attorney General’s office, the Florida Department of Law Enforcement and the Florida Sheriff’s Association to work with us to improve the bill and avoid turning innocent typing errors into criminal acts.

While we were sharing our concerns about early drafts of the bill, we learned a great deal about the abuses being made of our real estate and UCC systems. We learned of fraudulent judgments by “people’s courts” being filed of record against sitting judges; about UCC liens, mortgages and even federal maritime liens being filed claiming debts of millions of dollars; and other abuses. These are serious problems and taint the validity of the land title records on which we rely.

The law enforcement and A.G. officials who deal with these claims on a regular basis were very receptive to the suggestions and concerns voiced by Gene Adams (on behalf of RPPTL) and Alan Fields for FLTA. Most of our suggestions for improvements made their way into the final bill, but from a title insurance standpoint there are still some risks and areas that we need to keep in mind. As with most bills negotiated in good faith, neither side gets everything they would have liked. That is definitely the case with this bill.

The key operative provision of the bill states:

“A person who files or directs a filer 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 interest in the property described in the instrument commits a felony of the third degree….”
Various terms are defined in the bill, and the degree of the violation escalates if the victim is a public official, or if the perpetrator is a repeat offender or in jail.

In negotiating this language, we were comfortable that the intent requirement – “with the intent to defraud or harass another” -- would keep an honest error by a closing officer or paralegal from turning into a criminal charge. At one time or another most of us have mistyped a legal description – Lot 11 instead of Lot 1 - and recorded the instrument. When we caught the error, we went to great lengths both to obtain a corrected deed and to cure the cloud we had caused on the wrong lot. We didn’t intend to defraud anyone, and our corrective actions bore this out.

As closers, we have less protection when we prepare and record an affidavit to clear title defects, to remove exceptions or establish homestead issues. In those contexts, there is quite possibly an intent to defraud – just not by the closer. Someone knows the property really is homestead and that the wife should have signed. Someone knows that there was construction within the last 90 days, but hopes to sell and be gone before the lien hits.

In contrast to a typo in a legal description, when caught, most sellers will swear their title agent either knew the real facts, and “coached them” on what to say, or prepared an affidavit that they didn’t even read. There is no surefire defense against the “Big Lie” – but the best practice is to review your affidavits paragraph-by-paragraph with the party while looking them in the eye.

Few people are great liars, and you will often detect a hint of deception when you go through this process. Then ask them if there are any changes or corrections that need to be made for the affidavit to be perfectly correct, make the changes, and then put them under oath to execute and initial each page of the final product. Some people will try to rush through this part of the process, so be prepared to explain that “you are about to swear to something under oath, and subject yourself to criminal penalties – so I’m trying to protect you by going over it with you to make sure everything is exactly correct.”

This Act also creates another potential criminal count against those title agents who “look the other way” regarding investors claiming multiple homes (each closed through that agent) are going to be the primary residence – and recording mortgages that contained this representation. When you are asked to close the third “primary residence” in a year, you should be asking some tough questions! That practice was already considered bank fraud and some agents have been prosecuted. This statute just makes it a little easier to prove.

The Act provides that, upon conviction, the court has the authority to declare the fraudulent instrument null and void, to enjoin the person from filing ANYTHING in the official records without prior review and approval by a judge. The judge can also seal and remove the instrument from the official records.

Recognizing limited prosecution resources, the Act also creates a private cause of action, allowing any person adversely affected by a fraudulent instrument to sue – without regard to whether criminal charges are pursued. At our request, the civil cause of action requires the filing of a lis pendens describing the instrument alleged to be false. We were concerned that otherwise a title professional might inadvertently insure an interest based on a fraudulent deed or mortgage – while the suit was pending.

As title people, we are always hesitant to remove anything from the Official Records. We prefer to leave the “bad” document in place and record an order declaring it to be void. We like to see
and understand the complete chain. The victims of this type of fraud, understandably want the false, scurrilous, and often defamatory document to disappear completely from public view.

Well, we lost that position in the negotiations, but were able to limit the scope of what could “disappear” from the Official Records to things that don’t create a valid property interest in anyone. The bill provides that “[u]pon a finding [by the court] 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” (emphasis added) the court shall determine whether the entire instrument or only certain parts are void. Only if the entire instrument is found void, may the “bad” document be “sealed” from the official record.

The act allows the civil court to enjoin the defendant from filing anything in the official records without prior approval of a judge, but we negotiated a “savings clause” that provides that even if something is recorded in violation of the injunction, as to third parties who gave value, the instrument (assuming it is otherwise valid) shall be deemed validly filed and to provide constructive notice.

To encourage the enforcement of the civil cause of action, the bill allows the prevailing party to recover its costs and fees. If they are successful in proving an intent to defraud or harass, the court may award actual and punitive damages as well as a civil penalty of $2,500 per instrument determined to be in violation.

From a title standpoint, there are several key points to remember:

1. This is a criminal statute which can potentially catch title people. When you find you have recorded an error, fix it immediately and be very cautious and diligent in documenting the correctness of your affidavits. Even if your intent was “pure as the driven snow,” none of us wants to have to prove our purity, much less deal with the bad press and reputational damage of facing a criminal charge of this type.

2. While courts have always had the authority to declare an instrument null and void, ab initio, it’s been fairly rare. This statute will probably make it much more common. As title people, we will find it confusing when our search turns up an order declaring an instrument void, but no instrument (because it has been sealed). The Act allows the plaintiff who had a record sealed to obtain a certified copy and it is appropriate to request a copy to close out your examination.

3. The safe harbors were built into the civil cause of action, but didn’t make it to the criminal action. If you find a document in your chain of title recorded by a party who was subject to an injunction (in the criminal case) prohibiting them from recording anything, call your underwriter.

4. If you find a strange looking lis pendens, which describes an instrument in your chain of title instead of a particular property (hopefully they will describe both in the lis pendens so we can find it), pull the case and discuss it with your underwriter.
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