

SUBJECT: Filing and using fraudulent legal documents

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Place, Talton, Dunnam, Galloway, Keel, Nixon, A. Reyna
0 nays
2 absent — Farrar, Hinojosa

WITNESSES: For — Shanna Igo, Texas Municipal League; Larry Zacharias, Texas Police Chiefs Association; Ray Speece, District Judges of Harris County; Dianne Wilson, County and District Clerks Association; Bob McFarland, Tarrant County and City of Arlington; Jim Allison, County Judges and Commissioners Association of Texas

Against — Keith Hampton, Texas Criminal Defense Lawyers Association

On — August Boto, Texas District and County Attorneys Association; Drew Durham, Office of the Attorney General

DIGEST: CSHB 1185 would establish criminal penalties for filing and holding fraudulent court documents and impersonating public servants. The bill also would require court clerks to notify persons if they suspected a fraudulent document has been filed; establish a process for judicial review and removal of potentially fraudulent court documents; and create a specific civil cause of action for making or using fraudulent court records, liens or claims against property.

CSHB 1185 would take immediate effect if finally approved by a two-thirds record vote of the membership in each house.

Criminal Offenses

CSHB 1185 would criminalize the following:

- causing a public servant to file or record a purported document of a purported court, judicial entity or judicial officer that is not established

under laws or constitutions of the United States or Texas. This offense would be a state jail felony, which would carry a penalty of six months to two years in state jail and optional fine of up to \$10,000.

- recklessly causing a document simulating a summons, complaint, judgment or other court process to be delivered to another person with the intent to extract payment from the other person or to cause the person to submit to the authority of the document or to take action in response to the document. These offenses would be Class A misdemeanors, with a maximum penalty of one year in jail and a \$4,000 fine; repeat offenses would be state jail felonies. A defendant could not claim as a defense to prosecution that the document stated it was not legal process or that it was issued by an entity without legal authority. Showing that the document was filed with or delivered to a court clerk would be a rebuttable presumption that it was delivered with the necessary intent.

- holding, with intent to defraud, a fraudulent lien or claim against real property (real estate) or personal property (property other than real estate) and refusing to release a person from that claim if that person or someone with an interest in the property so requested. Intent to defraud would be presumed if the claim was not released within 21 days of a request. The offense would be a Class A misdemeanor.

- making or using a document with the intent that it be treated as a legal document and with the knowledge that it was not a record of a court established by the United States or Texas constitutions. First and second offenses would be Class A misdemeanors; third and subsequent offenses would be third-degree felonies, with penalties of two to 10 years in prison and an optional fine of up to \$10,000. If the activity also constituted offenses of simulating legal process or tampering with governmental records, it could be prosecuted under any of those statutes.

The bill also would expand the following existing offenses:

- tampering with governmental records would also include tampering with letters of patent, punishable as a second- or third-degree felony.

If tampering also constituted the offenses of simulating legal process or making or using fraudulent court documents, the offense could be prosecuted under any of those statutes.

- impersonating a public servant would include purporting to exercise the function of a public servant or a public office — including a judge and court — if the purported servant or office had no lawful existence under the laws or constitutions of the United States or Texas. The bill would change the penalty for impersonating a public servant to make all offenses third-degree felonies. Currently only impersonating a peace officer is a third-degree felony; all other offenses are Class A misdemeanors.
- impersonating a public servant would be added to the list of activities that could be used to define the offense of engaging in organized criminal activity.

The bill also would repeal a section in the Business and Commerce Code that makes filing a forged, materially false or groundless financing statement a criminal offense and insert a similar provision into the Penal Code. Under the new provision, forging a lien would be a third-degree felony; third and subsequent offenses would be second-degree felonies, punishable by two to 20 years in prison and an optional fine of up to \$10,000. Filing a groundless lien or one with a false statement would be a Class A misdemeanor, unless done with intent to defraud or harm, in which case it would be a state jail felony.

CSHB 1185 would apply only to criminal offenses committed on or after the date the bill took effect.

Other Provisions in Criminal Law

The bill would add a definition of a court record to the Penal Code section on perjury and other falsification. Court records would include decrees, judgments, orders, subpoena, warrants or other documents issued by the courts of Texas, other states, the United States, a foreign country or Indian tribe recognized by the United States or other jurisdictions, territories or protectorates entitled to full faith and credit in Texas under the U.S. constitution.

CSHB 1185 would require that in criminal cases pleadings, motions or other legal papers be signed by an attorney or by the defendant, if the defendant did not have an attorney, certifying that to the best of the signer's knowledge the paper was not groundless and brought in bad faith or groundless and used for harassment, unnecessary delay or other improper purpose. Unsigned pleadings would have to be struck unless promptly signed once the defect was called to the attention of the attorney or defendant.

An attorney or defendant who filed a fictitious pleading for harassment, delay or other improper purpose or who made a groundless and false statement in a pleading to delay a trial or to harass someone would be guilty of contempt of court. Pleas of not guilty, no contest or nolo contendere would not violate this provision. If a pleading or other paper was signed in violation of these provisions, courts, either on their own initiative or because of a motion, would be required to impose "appropriate sanctions." The sanctions could include reimbursing the other party or the county for reasonable expenses incurred because of the filing. Courts would be required to presume that pleadings or other papers were filed in good faith and sanctions could only be imposed for good cause.

Responsibility of Court Clerks

Court clerks who believe that a document filed or submitted for filing was fraudulent would be required to notify the persons against whom the purported judgment or order was rendered or against whom the purported lien or claim on real or personal property was made. A document would be presumed fraudulent if it:

- purported to be a judgment or other document of a purported court or judicial entity or from a purported judicial officer of courts not established under the laws or constitutions of the United States or Texas; or
- purported to create a lien or claim against real or personal property and was not a document provided for by the constitutions or laws of the United States or Texas; was not created with the consent of the person who owed the money or owned the property, if required by state law; or was not a lien imposed by a court established under the constitutions or laws of the United States or Texas.

Clerks would be able to notify persons about fraudulent documents filed before, on or after the bill's effective date.

Court clerks would be required to post signs stating that it was a crime to intentionally or knowingly file a fraudulent court record or fraudulent instrument. CSHB 1185 also would amend continuing education requirements for clerks to include at least one hour on fraudulent court documents in the minimum 20 hours required every two years.

Process to Determine Fraudulent Liens

CSHB 1185 would establish a process for court rulings on whether a judgement lien was fraudulent. A person who believed that a filed or submitted judgment against them was fraudulent would be able file a motion with the district clerk asking for a judicial review of the document. The bill would provide model forms for persons seeking motions and for judges' rulings on the motions. District judges would be able to rule immediately on the motion solely by reviewing documents and without having to give notice or hearing testimony. Judges' rulings would be unappealable if they were substantially similar to the model form. Clerks could not collect a filing fee for such motions and rulings.

The bill would set up a similar process for persons purported to be debtors, obligors or owners of real or personal property and who had a purported claim or lien filed against their property. The person could file a motion in district court asking for review of the document, and judges could make immediate rulings solely by reviewing the documents and without having to give notice or hearing testimony. Decisions on real and personal property liens would be appealable, with appeals courts required to expedite their review. District clerks could not collect filing fees for these motions and rulings.

If a lien or other claim reviewed by a court under these provisions was filed with the secretary of state, any person would be able to file with the secretary of state a copy of the judicial finding. The secretary of state would be authorized to charge a \$15 fee for filing judicial findings under these provisions.

The bill would define the type of judgments that may be recorded as judgments of courts established under the constitutions or laws of the United States or Texas, of foreign countries recognized by the federal government, or of other jurisdictions entitled to full faith and credit under the U.S. constitution.

These processes could be used with documents filed before, on or after the effective date of the bill.

Civil Remedies

CSHB 1185 also would create a new section in the Property Code to allow civil suits to be filed against anyone who made, presented or used a fraudulent court record, document or claim against property. The action would have to be committed with the intent that the record or claim be given the same legal effect as it would have under a document of a court established under the constitutions or laws of the United States or Texas or other legal government entity and with intent to cause suffering, physical or financial injury, mental anguish or emotional distress.

Suits could be brought by the attorney general, a district attorney, criminal district attorney, county attorney, county attorney with felony responsibilities, municipal attorney, or a person against whom a fraudulent judgement lien was filed. Suits involving fraudulent liens and claims against real or personal property also could be brought by the obligor, debtor or property owner.

Civil liability could amount to the greater of \$10,000 or actual damages plus court costs, attorneys' fees and exemplary damages as determined by the court. Courts would be required to award plaintiffs court costs, attorneys' fees and other expenses of bringing the suit if they prevailed and the person who filed the document knew or should have known it was fraudulent.

Persons selling property would not be required to disclose that a fraudulent document purporting to place a lien or claim on their property had been filed.

Civil suits could be brought only against actions occurring after the effective date of the bill.

**SUPPORTERS
SAY:**

CSHB 1185 is needed to help combat persons who have clogged the state's legal system with fraudulent documents causing innocent victims to spend time and money to clear their names and property. This "paper terrorism" is a growing statewide problem, estimated to have already cost hundreds of thousands of dollars. It must be addressed both in criminal and civil law.

Individuals and groups, some denying the authority of the state government and Texas courts, have issued bogus judgments from nonexistent courts and filed fraudulent liens and other documents in legitimate courts and with the secretary of state. Liens and judgments that have been filed against both real and personal property can go unnoticed until a person tries to sell property or obtain credit. Having the judgments or liens removed usually involves hiring a lawyer and incurring considerable trouble and expense. CSHB 1185 would provide tools for fighting this problem and remedies for persons who have been harmed.

Criminal Offenses

New criminal offenses are needed to address the problems being caused by persons clogging the legal system with fraudulent documents. These are serious offenses, committed for harassment, intimidation, delay or in retaliation for some perceived injustice. The penalties in CSHB 1185 would be in line with the seriousness of these offenses and would serve to both punish offenders and deter future offenses.

CSHB 1185 would attack these problems on the front end, keeping bogus documents out of the legal system by making it illegal to cause someone to file a fraudulent document, serve a bogus legal document, and hold a fraudulent lien with intent to defraud. Persons who filed legitimate liens or mistakenly file an erroneous lien but meant no harm would not fall under the law.

The bill would use careful legal strategies to ensure that only fraudulent behavior was covered. For example, the provision creating the offense of delivering a fraudulent document would establish a rebuttable presumption

that a document was delivered with the necessary intent to defraud. The provision would not mean that every case would be entitled to the presumption — it would have to be reasonable and proved to the court. In addition, defendants would be able to rebut the presumption.

CSHB 1185 would give prosecutors the flexibility they need to address current problems by allowing them to prosecute tampering with governmental records and making or using a fraudulent document as other offenses if the conduct constituted those other offenses. This flexibility would track current legal doctrines and practices that allow prosecutors to choose the statute under which they will pursue a judgment.

Current problems also make it necessary to expand the definition of impersonating a public servant to cover individuals who may "purport to exercise any function of a public servant" by doing such things as issuing fraudulent traffic tickets under the aegis of a bogus authority. CSHB 1185 also would allow prosecution under the organized crime statutes for persons impersonating a public servant so that groups of persons can be prosecuted, if appropriate.

Other Provisions in Criminal Law

Requiring defense attorneys and defendants to sign pleadings certifying that they are not groundless and brought in bad faith or for harassment or other improper purpose is similar to Rule 13 of the Rules of Civil Procedure and should be applied to criminal law as well. This would help prevent the filing of groundless pleadings being brought for improper purposes and keep the courts from being unnecessarily clogged. Pleadings violating these provisions would have to be more than groundless — they also would have to be brought in bad faith for harassment, unnecessary delay or other improper purposes. The rule would not apply to pleas of not guilty, no contest or nolo contendere.

In addition, pleadings and other papers would be presumed to be filed in good faith, and sanctions could only be imposed for good cause. There is a body of case law that defines “groundless,” ensuring that the term would be

applied only under specific circumstances. These provisions adequately protect defendants and attorneys from misuse of the provisions and would not chill the filing of pleadings brought in good faith.

Responsibility of Court Clerks

Requiring court clerks to notify persons against whom fraudulent judgments or liens have been filed would be a fair means of allowing persons to respond in time to clear their names and property. CSHB 1185 would give clerks guidelines on when to notify persons and would only apply to documents that clerks in good faith believed were fraudulent. Clerks would not be making any kind of legal decision, just providing notice.

Process to Determine Fraudulent Liens

CSHB 1185 would set up a quick, free process for judicial review of liens and judgments that might be fraudulent. This would keep these documents from entering the legal system and promote speedy removal of documents that have already been filed. Because the process would be free and quick, persons would not have to hire a lawyer or spend months getting their property cleared of bogus claims. The bill provides model forms for filing the motions. These simple forms could even be preprinted and available in the offices of court clerks.

Judges are able to look at a judgment lien and easily determine if it is fraudulent. For example, a judgment issued under the authority of a bogus "common law court" clearly would be fraudulent. These decisions would be solely decisions of law, almost ministerial in nature, and would not involve any facts, so there would be no need for an appeals process.

The procedure for fraudulent liens on real or personal property would be similar. These liens do not arise from a court ordering a judgment but from a claim on property or from a claim for the payment of a debt, such as mechanics, contractors and materialman's liens. Since these documents may be more complex and could possibly involve narrow issues of fact, decisions on these motions would be appealable.

Civil Remedies

CSHB 1185 would allow persons to use the civil courts to obtain damages from persons who make, present or use fraudulent court records, liens or other claims. This would both serve as a deterrent to such misuses of the courts and give relief to persons who have been harmed by fraudulent filings. The bill contains adequate safeguards to ensure it would not be used against someone who made an innocent mistake with a document. An offense would have to be committed with knowledge that the document was fraudulent, with intent that it be used as a legal document and with intent to cause suffering or injury.

Current law is insufficient to deal with the problems now occurring because of widespread filing of fraudulent documents. Slander of title can be used only to clear a title when trying to sell property and suits concerning clouds on titles can only clear titles, not award any damages. Likewise, statutes dealing with frivolous lawsuits and fraud would not adequately cover the problems being raised by the filing of fraudulent documents.

OPPONENTS SAY:

CSHB 1185 would go too far in creating new criminal offenses and penalties and would unnecessarily create a new civil cause of action. The problem of fraudulent lien filings could be handled under current law or through other avenues, such as changing filing procedures, so that fraudulent documents are quickly spotted and removed. CSHB 1185 also fails to recognize that some people who use courts outside the regular judicial system — such as common law courts — would be unfairly penalized under this bill.

Criminal Offenses

The offenses created in CSHB 1185 could be dealt with under current law concerning forgery, fraud, tampering with government records, filing fraudulent financing statements, impersonating a public servant and more. The 1993 Penal Code was carefully crafted to establish broad language and eliminate special provisions, and the balance of offenses and penalties should not be distorted for specific situations. In addition, many of the situations described by newly created offenses in CSHB 1185 are civil in nature and would be better dealt with by the civil courts.

Some of the offenses created by CSHB 1185 carry inappropriately harsh penalties. For example, the bill would change all offenses of impersonating a public servant to third-degree felonies, bypassing the state jail felony and the entire range of misdemeanors.

Also troubling is the provision establishing an offense for causing a fraudulent legal document to be delivered. It would establish an offense based on a rebuttable presumption, which would inappropriately shift a burden to the defense to rebut the presumption than an offense was committed with the necessary intent. At a minimum, this type of provision should hinge on the presence of other facts, as it is in the law making it illegal to pass bad checks.

How the courts would interpret the provision allowing tampering with governmental records and using a fraudulent court document to be prosecuted under other offenses if a person's actions constituted other offenses is unclear. This provision raises questions of double jeopardy and could possibly violate doctrines that generally require persons to be prosecuted under the most specific statute available.

The organized crime statute was intended for gangsters and criminal street gangs, not persons impersonating public servants. Establishing criminal and other punitive laws aimed at prosecuting particular political organizations, however extreme their beliefs and methods, is highly questionable.

Other Provisions in Criminal Law

Provisions requiring all pleadings to be signed and establishing penalties for groundless proceedings are unnecessary and could subject defendants and attorneys to sanctions if someone alleged that their pleading or other paper was "groundless." Defendants and attorneys could be diverted from making their case in a criminal trial while they fought contempt of court charges that their pleadings were groundless. This could have a chilling effect on defendants and attorneys mounting a vigorous defense, especially since criminal law, unlike civil law, gives defendants a right to effective assistance of counsel. The codes of conduct that already govern attorneys could easily be used against someone filing groundless documents.

Responsibility of Court Clerks

Court clerks should not be given authority to make decisions about documents nor the responsibility of notifying persons named in a document. Clerks are administrative personal and should not be involved in quasi-judicial decisions.

Process to Determine Fraudulent Liens

The decisions concerning fraudulent documents and liens are more than simply ministerial, and persons affected by these decisions should be afforded normal due process, including notice, hearings and appeals.

Civil Remedies

A specific civil cause of action should not be created for making or using fraudulent documents. Other avenues can be used to clear a title including suing for slander of title or cloud of title. Damages for persons harmed by the use of bogus documents might be awarded under laws governing frivolous lawsuits or fraud.

NOTES:

The committee substitute changed the original bill to: require affidavits with motions for judicial review of judgment liens and liens on real and personal property; require appellate courts to expedite reviews of court findings concerning fraudulent liens on real and personal property; include liens on personal property with the types of documents about which clerks would be able to notify persons; set a 21-day deadline for releasing a person from a fraudulent lien; and change the penalties for making or using a fraudulent court document from a Class B misdemeanor to a Class A misdemeanor with increased penalties for third and subsequent offenses

The companion bill, SB 661 by Armbrister, is pending in the Senate Jurisprudence Committee. Other bills dealing with fraudulent court records include HB 426 by Hartnett, which has been referred to the Judicial Affairs

Committee; SB 124 by Bivins, referred to the Senate Jurisprudence Committee; and SB 424 by Bivins, reported favorably as substituted from the Senate Jurisprudence Committee on March 11.