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No good deed goes unpunished: HB 2832 will imbue the county recorder with unprecedented powers that will wreak havoc on real estate transactions

By Adam B. Whiteman

The Illinois House of the 98th Regular Session has recently passed HB 2832, a bill which, if it becomes law, will empower a county recorder to investigate filings it believes to be fraudulent and to report said filings to an administrative law judge ("ALJ"). The ALJ, in turn, can, based on a preponderance of the evidence, declare the filing to be fraudulent and cause it to be removed from the public record. Protecting the public from fraudulent filings is certainly a praiseworthy end. However, the problems that will be caused by HB 2832 far outweigh its potential benefit.

Summary of Bill 2832

Section 55 ILCS 5/3-5010.5(c) of the bill provides for the "Establishment and use of a fraud referral and review process" which allows a recorder to refer to an ALJ any deeds or instruments that "cause the recorder to reasonably believe that the filing may be fraudulent, unlawfully altered, or intended to unlawfully cloud or transfer the title of any real property."

The recorder will cause a notice to be published in the newspaper of its referral of a deed or instrument to the fraud review process.

The bill then identifies a list of factors that may guide the recorder in considering whether a deed or instrument should be subject to fraud review. Among these factors are:

"Whether a document is not related to a valid existing or potential adverse transaction, existing lien, or judgment of a court of competent jurisdiction"

"a document that is not related to a valid existing or potential commercial or financial transaction..."

"whether the document is filed with the intent to harass or defraud the person identified in the record or any other person..."

"whether the documents are previous court determinations, including a previous determination by a court of competent jurisdiction that a particular document is fraudulent, invalid, or forged."

Section (d) of the bill dictates that "If a recorder determines, after review by legal staff and counsel, that a deed or instrument may be fraudulent, unlawfully altered, or intended to unlawfully cloud or transfer the title of any real property, he or she shall refer the deed or instrument to an administrative law judge..." Section (e) allows the recorder to notify law enforcement officials "regarding a filing determined to be fraudulent, unlawfully altered, or interceded to unlawfully cloud or transfer the title of any real property."

Section (g) provides that the administrative law judge shall schedule an administrative hearing to occur no later than 30 days after receiving a notice of fraud from a county recorder. The bill contains no provision requiring personal service of the notice regarding the hearing.

Section (g) also provides:

If a preponderance of the evidence shows the document in question to be fraudulent, the administrative law judge shall rule the document to be fraudulent and forward the judgment to all the parties...

Following such a finding, the recorder will then record the judgment along with a notice that shall "clearly state that the document in question has been found to be fraudulent and shall not be considered to affect the chain of title of the property in any way."

Section (i) of the bill completely exonerates the recorder of any liability for any error or omission in the performance of its new enforcement powers except in a case of willful or wanton conduct.

Discussion

HB 2832 is unconstitutional, presents due process concerns, applies an incorrect burden of proof for fraud, will destabilize the process of acquiring title insurance, entrusts the recorder and an ALJ with unchecked authority, and provides insufficient recourse for those wrongfully disenfranchised by error of the recorder or ALJ.

HB 2832 is Unconstitutional

Section 4 of the Illinois Constitution labeled "County Officers" provides that County officers "shall have those duties and functions provided by law and those provided by county ordinance." Section 55 ILCS 5/2-5010 of the Illinois Compiled Statutes provides that "Every recorder shall, as soon as practicable after the receipt of any instrument in writing in his office, entitled to be recorded, record the same at length in the order of time of its reception..." Read together, it is, therefore, the constitutional duty of the recorder to record any instrument "entitled to be recorded."

The recorder's office serves a notice function, not a law enforcement function. Once it makes a decision to allow a document to be recorded, the recorder's office has fulfilled its constitutional and statutory function. It is then up to the courts to alter the public record.

Anyone who has been involved in a slander of title law suit, a mechanic's lien case, or any other matter involving a 'cloud on title' can attest to the fact that these are complicated cases involving the analysis of complex facts, evidence and law. It is no small matter to prove fraud, and the recorder's office and an administrative law judge are not proper substitutions for the chancery courts of this state.

Due Process Concerns

Section (e) of the bill titled "Notice" provides that "The recorder shall use county property tax records to identify and provide notice to the last owner of record by telephone, if available, and certified mail" when a deed or instrument has been referred to an ALJ for review. As regards the review itself, the bill only provides, "Notice of the hearing shall be provided by the administrative law judge to the filer, or the party represented by the filer, of the suspected fraudulent document, the legal representative of the recorder of deeds who referred the case, and the last owner of record, as identified in the referral."

First of all, giving notice to the "last owner of record" might be meaningless if there happens to be a chain of fraudulent transactions. In such a case, the last legitimate owner who really needs notice of the hearing would not receive it.

Next, the bill does not require personal service of the notice of fraud or of the hearing that could disenfranchise a person of their property. In virtually every other area of law involving a person's property rights, personal service is required. Personal service is a major issue in connection with tax liens, foreclosure cases and other law suits involving property rights. Under HB 2832, however, a person can lose their property rights within 30 days and not even know about it.

Also, who are the necessary parties in such a proceeding? In a mortgage foreclosure or mechanic's lien case, lenders and other lien holders must be made parties so that all those with an interest in the res have an opportunity to be heard and assert their rights. HB 2832 is completely devoid of provisions which would protect the rights of innocent third party lenders, contractors and lien holders.

The mechanics of the ALJ's hearing itself seems highly suspect. Who represents who in this proceeding and who is paying for this process? It seems entirely possible that a property owner can be forced to defend his property rights before an ALJ without any good cause and without any recourse for recovering attorney fees for improper prosecutions. Who is to say the ALJ will have the wherewithal and resources to call all the proper witnesses. Those who cannot afford to defend themselves will be at the total mercy of such a proceeding. Even in a criminal case, a public defender will be assigned to defend you if you cannot afford an attorney. No such rights are afforded to a property owners unfortunate enough to be subject to HB 2832.

In an attempt to protect property owners from fraud, what HB 2832 really does is to create a new prosecutorial power with the unhampered ability to summarily deny citizens of their property rights without due process of law.

A property owner has an obligation to police their own property ownership. This is the case where trespasses are concerned, where easements are concerned, where tax payments are concerned, etc. In all other areas of property ownership, the owner must accept the responsibility and obligation attendant to being in title. The courts provide adequate protections where fraud has been detected, and there is no legal, factual or historical basis to undermine this process.

Incorrect Burden of Proof

As highlighted above, Section (g) also provides:

If a *preponderance of the evidence* shows the document in question to be fraudulent, the administrative law judge shall rule the document to be fraudulent and forward the judgment to all the parties...

(Emphasis added).

It is black letter law that fraud is not proved by a "preponderance of the evidence." According to the Illinois Supreme Court, "fraud must be proved by clear and convincing evidence." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (2005). These are two distinct burdens and it is telling that the drafters got it wrong.

Fraud is very difficult to prove. To empower employees at the recorder's office with the ability to identify fraud and to cause the prosecution of the same through an ALJ who is applying a lower standard of proof than anyone else in any other fraud case in the state is to court disaster.

The damage to a person who is the victim of such a finding is incalculable. They will be announced as having committed fraud before the entire community, and they will have difficulty reversing the ruling in light of the high standard of review applicable to administrative law decisions. In addition, the owner will be at a huge disadvantage on any appeal of the matter because the case law regarding fraud applies a clear and convincing standard whereas the ALJ was permitted to find fraud based only on a preponderance of the evidence. Therefore, the court on appeal of the ALJ's decision would be forced to disregard the entire body of case law on fraud.

Destabilization of Title Insurance Industry

Title insurance is essential to the smooth and efficient passing of title to property. If a recorded document is subject to the ongoing possibility that it may be declared fraudulent, then the risk assumed by title insurance companies will increase dramatically. This will force them to wait a period of time before agreeing to insure title and will thereby cause unknown delays in standard real estate transactions. In addition, in light of the added risk and administrative complexities involved in supervising the ongoing validity of recorded documents, title insurance fees will certainly have to increase. This will cause untold economic harm to consumers around the entire state.

In short, any small consumer assistance the drafters might think will be created by HB 2832 will be quickly overshadowed by the uncertainty and increase cost they will have created by its passage.

Inadequacy of Resources

As stated above, fraud is difficult to prove and must be proven through clear and convincing evidence. The procedures and set up of the recorder's office are not such that a proper examination of the facts can really be made before reaching a determination that the matter should be referred to an administrative law judge.

The factors that may guide the recorder in consider whether an instrument should be subject to a fraud review involve an extremely broad range of categories. How, for example, is a recorder's office going to determine if the document is "related to a valid existing..transaction...lien or judgment"? Similarly, how will the recorder's office determine if a document is "filed with the intent to harass or defraud" another person?

Whether a transaction is "valid" or whether there was an "intent to defraud" are matters that are the subject of litigation that can take years to prove. Will the recorder's office subpoena records relating to a transaction or lien? Will it call in witnesses and take depositions. Will it determine if a mechanic's lien is timely or if the work was lienable? Will it review and assess the contracts relating to a transaction to determine if it is "valid"? Such propositions are simply untenable. Law firms throughout the state are engaged daily in such disputes and the contention that the record's office can accomplish any meaningful investigation into such areas is nothing short of uninformed hopeful speculation.

Once the matter is before the ALJ, who carries the burden of persuasion? Who presents the evidence? What is the quality of evidence that will be presented to the ALJ? What discovery can be conducted? What witnesses can be subpoenaed? Is the recorder's office acting as a prosecutor? Should the office that accepted the filing in the first place really be involved in assessing the ultimate validity of that document?

The point is that neither the recorder's office nor an ALJ is suited to make prosecutions of possibly fraudulent deeds in the context of private transactions. If a series of recordings becomes such that it affects the public at large, then the Attorney General's office can take up the call. They are far better suited to bring and prosecute such claims.

No Recourse for Wronged Property Owner

As noted above, Section (i) of the bill completely exonerates the recorder of any liability for any error or omission in the performance of its new enforcement powers except in a case of willful or wanton conduct. This means that the recorder's office can wrongfully publish an accusation that a property owner has filed fraudulent documents, destroy that property owner's credit and reputation, conduct a hearing without proper notice and evidence, force a property owner to defend himself without reimbursement and then send him on his way with nary an apology for the mistake. I do not believe any other governmental entity wields such unchecked power.

On the other side of the coin, what if the ALJ determines that a deed is not fraudulent, but that determination is incorrect? Will such a finding put an imprimatur of legitimacy on a fraudulent transaction? Is the owner now forced to appeal the ALJ's incorrect decision rather than pursuing their own fraud claim? Who pays property taxes, insurance and utilities on property that the ALJ has now determined no longer belongs to the owner? Will a prior owner now be forced to pay property taxes on property they thought they no longer owned? What about property tax escrows held by a lender? Must they now be returned? Are liens of innocent contractors and subsequent lenders now deemed void? What

are the remedies afforded to such innocent third parties who were not joined in the ALJ's hearing?

Suggested Solution

Before the legislature undertakes an historic restructuring of the purpose and power of a county recorder, it should consider a far simpler solution.

There already is a provision in the county code requiring the recorder to send a property owner a notice whenever a quit claim deed has been filed against their property. (55 ILCS 5/3-5046). This provision can be expanded to require notice to be sent to an owner any time anything is filed against their property. This solution preserves the purpose of the recorder's office while expanding protections to the public.

Conclusion

HB 2832 is a good example of how the rights of a people to be free of government intrusion in and to their property can be quickly eroded when unchecked panic is encouraged by those seeking to be champions of the public good.

HB 2832 is not in the public good. It dramatically and unconstitutionally enhances the power to libel a property owner in the newspaper with claims of fraudulent ownership without just cause. It permits fraud claims to be proven by a lower "preponderance of the evidence" standard rather than the more strict "clear and convincing" standard required under Illinois law. It permits judgments to be made against a property owner without first ascertaining personal service on said owner. It creates uncertainty in the title industry as to the validity of title and therefore will throw the state of property transactions into disarray. It allows judgments to be made about the quality of a recorded document without first assuring that all the evidence has been presented and brought before the trier of fact.

HB 2832 must be stopped. In seeking to stamp out a few bad deeds, it will, if passed, guaranty that no good deed goes unpunished. ■

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« [Back to the May 2013 Newsletter](#)

Member Comments

The duties of the Recorder of Deeds was never intended to include the practice of law. The Recorder has no standing or legal ability to determine what is fraud. The fraudulent clouding of title is a crime. If there is enough evidence for such a finding, it should be made by the States Attorney and not the Recorder, Before attempting to find a solution to this purported problem, I would like to see how often this issue occurs. I am not attempting to minimize a problem, I am just suggesting that this method is improper and will inconvenience innocent people and could even cause the loss a home sale. I would also like to know what the opinion of the States Attorney and the Attorney General is and whether they have supported the passage of this statute..

— Myles Jacobs on May 2, 2013

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