
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
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Bill No: SB 1326 **Hearing Date:** May 27, 2020
Author: Morrell
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Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Forged or False Instruments*

HISTORY

Source: California Land Title Association
Prior Legislation: AB 1698 (Wagner), Ch. 455, Stats. 2014
Support: California Association of Realtors; California Credit Union League
Opposition: California District Attorneys Association

PURPOSE

The purpose of this bill is to require a criminal court to decline to void a false or forged instrument affecting real property when there is a pending civil proceeding brought by a third party claiming bona fide purchaser or bona fide encumbrancer protections with respect to the real property.

Existing law provides that a person who, with intent to defraud, signs the name of another person or of a fictitious person to specified items, knowing that he or she has no authority to do so, is guilty of forgery. (Pen. Code, § 470.)

Existing law makes participation in a fraudulent conveyance a misdemeanor. (Pen. Code, §§ 531 & 531a.)

Existing law defines mortgage fraud for the purpose of criminal prosecution. (Pen. Code, § 532f.)

Existing law permits a party to file a civil action, commonly known as a "quiet title action," to establish title against adverse claims to real or personal property or any interest therein. (Code Civ. Proc., § 760.020, subd. (a).)

Existing law makes it a felony for every person to knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or the United States. (Pen. Code, § 115, subd. (a).)

Existing law provides that after a person is convicted of procuring or offering a false or forged instrument, upon a written motion by the prosecutor and a hearing, the court shall issue an order

adjudging the false or forged instrument to be void *ab initio* (from inception) if the court determines that such an order is appropriate. The order shall state whether the instrument is false or forged, or both, and describe the nature of its falsity or forgery and a copy of the instrument shall be attached to the order. A certified copy of the order shall be filed, registered, or recorded at the appropriate public office by the prosecuting agency. (Pen. Code § 115, subd. (e)(1).)

Existing law states that if the order pertains to a false or forged instrument that has been recorded with a county recorder, an order made as to the instrument's falsity or forgery shall be recorded in the county where the real property is located and reference the county recorder's document recording number of any notice of pendency of action recorded pursuant to this section's provisions. (Pen. Code § 115, subd. (e)(2)(A).)

Existing law specifies that a prosecuting agency shall do the following within 10 calendar days of filing a criminal complaint or indictment alleging a violation of this section:

- Provide written notice by certified mail to all parties who have interest in the property affected by the false or forged instrument, or in the instrument itself;
- Record a notice of pendency of action in the county in which the affected real property is located;
- Record a withdrawal of the notice of pendency of action in the county where the affected real property is located. (Pen. Code, § 115, subds. (f)(1)-(2).)

Existing law requires the written notice from the prosecuting agency informing the interested parties that the criminal action has commenced that may result in adjudications against the false or forged instruments or the property affected, and notify the interested parties of their right to be heard if a motion is brought to void the instrument. The notice shall state the street address, if available, and the legal description of the affected real property. (Pen. Code, § 115, subd. (f)(3).)

Existing law provides that the prosecuting agency's failure to provide written notice as required within 10 calendar days shall not prevent the prosecuting agency from later making a motion to void the false or forged instruments, but the court shall allow the interested parties additional time to respond to the motion and shall create a presumption that a finding that the matter is more appropriately determined in a civil proceeding and declining to void the instrument is necessary to protect the property rights of the interested parties. (Pen. Code, § 115, subd. (f)(4).)

Existing law specifies that if the instrument sought to be declared void involves real property, "interested parties" include, but are not limited to, all parties who have recorded with the county recorder in the county where the affected property is located any of the following: a deed, lien, mortgage, deed of trust, security interest, lease, or other instrument declaring an interest in, or requesting notice relating to, the property affected as of the date of the filing of the criminal complaint or indictment. (Pen. Code, § 115, subd. (f)(5).)

Existing law states that any party not required to be noticed who nonetheless notifies the prosecuting agency in writing of the party's desire to be notified if a motion is brought to declare the instrument void shall be treated as an interested party for purposes of this section. (Pen. Code, § 115, subd. (f)(6).)

Existing law requires the court to set a hearing for the prosecuting agency's motion no earlier than 90 calendar days from the date the motion is made. The prosecuting agency shall provide notice to all interested parties no later than 90 days before the hearing date set by the court. (Pen. Code, § 115, subd. (f)(7).)

Existing law states that at the hearing, the defendant, prosecuting agency and interested parties have the right to be heard and to present information to the court. No party shall be denied a right to present information due to a lack of notice by the prosecuting agency or failure to contact the prosecuting agency or the court prior to the hearing. (Pen. Code, § 115, subd. (f)(8).)

Existing law states that if the court determines that the interests of justice or the need to protect the property rights of any person or party so requires, including but not limited to, a finding that the matter may be more appropriately determined in a civil proceeding, the court may decline to make a determination that the instrument is void. (Pen. Code, § 115, subd. (f)(9)(A).)

This bill amends the above provision and states that the court shall decline to make a determination that the instrument is void if the court determines that the interests of justice or the need to protect the property rights of any person or party so requires.

Existing law provides that if, prior to the hearing on the motion, any person or party files a quiet title action that seeks a judicial determination of the validity of the false or forged instrument, or the status of an interested party as a bona fide purchaser of, or bona fide holder of an encumbrance on, the property affected by the instrument, the court may consider that as an additional factor in making its determination; provided that a final judgment previously entered in that quiet title action shall be followed to the extent otherwise required by law. (Pen. Code, § 115, subd. (f)(9)(B).)

This bill amends the above provision and states that if a quiet title action or declaratory relief action has been filed by an interested party concerning the validity or enforceability of the same false or forged instrument that is the subject of the motion, and said instrument affects an interest in real property held by an interested party claiming status of a bona fide purchaser or encumbrancer, the court shall decline to make a determination to void the false or forged instrument.

This bill specifies that its provisions govern all motions made by the prosecuting agency to declare an instrument as false or forged that have not yet been ruled on as of the effective date of this bill, as well as all relevant orders made that are not yet final.

COMMENTS

1. Need for This Bill

According to the author of this bill:

The process under current Penal Code Section 115 (AB 1698) allows a criminal court to void and extinguish recorded documents without affording a meaningful hearing that considers a party's innocent status as a bona fide purchaser or bona fide encumbrancer, or other defenses or remedies, thereby depriving them of property rights without due process. In some cases, the original victim may be the

recipient of a windfall, such as a paid off lien, at the expense of a new victim in the form of a bona fide purchaser or encumbrancer. By not providing innocent parties the possibility of establishing an equitable defense, the current process can therefore create multiple new victims in place of the original victim.

SB 1326 would require a criminal court to defer to a pending civil proceeding brought by a third party claiming bona fide purchaser or bona fide encumbrancer protections with respect to real property, thereby preserving the intent of existing law to allow for the voiding of false deeds by a criminal court in appropriate cases, while at the same time giving innocent parties the due process protections long afforded under the law.

2. Voiding False or Forged Documents

The purpose of Penal Code section 115 is to preserve the integrity of public documents. (*People v. Denman* (2013) 218 Cal.App.4th 800, 808-809.) The statute differentiates between false and forged documents, but clearly proscribes either kind of instrument. (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682.)

A forgery is a "writing which falsely purports to be the writing of another, . . ." made with the "intent to defraud." (*Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 41-42.)

A false instrument is one "that has the effect of defrauding one who acts on the instrument as genuine." (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682.) In the context of a deed, the court explained in more detail the notion of a false deed: "Here the lack of an ownership interest in the land goes to the deception itself. If *Generes* did not own the interest she purported to convey, the instrument she filed was clearly false. Having no right to grant or convey an easement, her recording of a deed transferring an easement would establish a cloud on the title of those persons who lawfully owned interests in the land. A title searcher encountering the spurious document who acted upon it as genuine would of course be materially deceived." (*Ibid.*)

Under case law, forged real estate instruments are void *ab initio* (from inception) (see *Schiavo v Armando Brothers* (2000) 85 Cal. App. 4th 374, 375). There was not similar authority with regards to false instruments. In 2014, AB 1698 created a process for the criminal court to void a false document. The process enacted by that bill authorized a criminal court, upon a conviction for knowingly procuring false or forged instruments to be filed, registered or recorded, after a hearing requested by the prosecution, to issue a written order that the false or forged instrument is void *ab initio* if the court determines that such an order is appropriate. (Pen. Code, § 115, subd. (e).) The order must state whether the instrument is false or forged and describe the nature of the falsity or forgery. (Pen. Code, § 115, subd. (e)(1).) A copy of the instrument must be attached to the order and a certified copy of the order should be filed, registered or recorded at the appropriate public agency. If the instrument pertains to real property, the court's order shall be recorded in the county where the affected real property is located and include notice of pendency of action to void the instrument. (Pen. Code, § 115, subd. (e)(2).)

When filing the motion for the hearing, the prosecuting agency is required to provide notice to interested parties that a criminal action has commenced that may result in an adjudication against the false or forged instrument or the property affected by the instrument. Pen. Code, § 115, subd.

(f)(2)-(3).) Interested parties have the right to be heard at the hearing to void the false or forged instrument. (Pen. Code, § 115, subd. (f)(3).) When the instrument sought to be voided involves real property, the statute specifies that “interested parties” include, but are not limited to, “all parties who have recorded with the county recorder in the county where the affected property is located any of the following: a deed, lien, mortgage, deed of trust, security interest, lease, or other instrument declaring an interest in, or requesting notice relating to, the property affected by the false or forged instrument as of the date of the filing of the criminal complaint or indictment.” (Pen. Code, § 115, subd. (f)(5).) The statute further provides that any party who is not specifically required to be noticed who nonetheless notifies the prosecuting agency, shall be treated as an interested party. (Pen. Code, § 115, subd. (f)(6).)

The court is required to set a hearing for the motion to void the false or forged instrument and notice is required to be provided to all interested parties or all other persons who obtain an interest in the property prior to the recordation of notice of pendency of action. (Pen. Code, § 115, subd. (f)(7).) At the hearing, all interested parties shall have the right to be heard and present information to the court. No party shall be denied a right to present information due to not receiving notice by the prosecuting agency or failure to contact the prosecuting agency of the court prior to the hearing. (Pen. Code, § 115, subd. (f)(8).)

If the court determines at the hearing that the interests of justice or the need to protect the property rights of any person or party so requires, including but not limited to, a finding that the matter may be more appropriately determined in a civil proceeding, the court may decline to make a determination to void the instrument. (Pen. Code, § 115, subd. (f)(9)(A).) If prior to the hearing, a person or party has filed a quiet title action (a lawsuit which a person files to establish their title against an adverse claim) that seeks judicial determination of the validity of the false or forged instrument or the status of an interested party as a bona fide purchaser, or a bona fide holder of an encumbrance on, the property affected by the instrument, the court may consider that as an additional factor in making its determination. (Pen. Code, § 115, subd. (f)(9)(B).) If a final judgment has previously been entered in the quiet title action, the court shall follow the judgment to the extent otherwise required by law. (*Ibid.*)

3. Removal of Court’s Discretion

Under existing law, prior to the hearing to adjudge an instrument void, if a person or party has filed a quiet title action to have a civil court validate the instrument or their status as a bona fide purchaser or bona fide holder of an encumbrance on the property affected by the instrument, the criminal court may consider this as a factor in determining whether to void the instrument. (Pen. Code, § 115, subd. (f)(9)(B).) If the court determines that the *interests of justice or the need to protect the property rights or any person or party so requires*, the court may make a finding that the matter may be more appropriately determined in a civil proceeding and decline to void the instrument. (Pen. Code, § 115, subd. (f)(9)(A), italics added.)

In the context of real property, this bill would remove the court’s discretion and instead require the court in such situations to decline to void the instrument and have the issue determined by the civil court. This could cause delays in finalizing the criminal case (e.g. determining restitution to the victim or victims) and require the victim to hire private counsel to defend their claim to the property in civil court which they may not have the resources to do. The sponsor of this bill believes that innocent third parties who may also be a victim may not have their interests fully considered by the criminal court, whereas these interests could be fully litigated in civil proceedings that take into account all parties more equitably.

4. Argument in Support

California Land Title Association, the sponsor of this bill, writes in support of the bill:

As has long been the case under existing law, civil courts considering these matters are able to afford innocent third parties a meaningful hearing and provide proper due process that allows for sufficient investigation of evidentiary findings, as well as consideration of a party's innocent status as a bona fide purchaser or bona fide encumbrancer, or other defenses or remedies, and issue a ruling accordingly.

For example, a civil court could consider whether the original victim may in fact be the recipient of a windfall, such as a paid off lien with the new forged or false deed of trust, and whether a new victim may be created in the form of an innocent bona fide purchaser or encumbrancer who was unaware of the falsified document and that has subsequently had their real property rights summarily extinguished by the criminal court.

SB 1326 would simply require, in instances when a civil action has already been filed by an interested party claiming innocent bona fide purchaser or encumbrancer status, that the criminal court allow the matter to be fully adjudicated within the civil court and thereby provide maximum fairness and proper due process to all parties.

The amendments proposed by SB 1326 will better protect innocent parties, as well as hold them accountable by placing the onus on them to timely file an action in civil court, while also preserving the intent of AB 1698 to allow for the voiding of false deeds by a criminal court in appropriate cases.

5. Argument in Opposition

The California District Attorneys Association opposes the bill and writes:

The current provisions allow any interested party to participate in the criminal proceedings under Penal Code section 115. Therefore, there is ample opportunity for their interests to be addressed in the criminal context.

Further, the current language of Penal Code section 115 *allows* the criminal court to defer to a civil Quiet Title action in appropriate situations. This bill *requires* the criminal court to do so regardless of whether that is the most appropriate thing to do.

This bill works to the disadvantage of real estate fraud victims, many of whom are vulnerable seniors. Below is an example from a case in San Mateo County, which will illustrate the problems posed by this amendment:

Defendant got the elderly victim drunk and presented her with paperwork that Defendant said was a reserve mortgage for the victim's home. Instead, Defendant slipped the victim a Grant Deed wherein the victim inadvertently transferred title to her home to the defendant's cohort.

In approximately 30 days, the defendants resold the victim's house to a third-party buyer. This third-party buyer paid well below market value for a home in which the elderly victim still lived. The third-party buyer also had title insurance.

Once the third-party buyer was advised of the criminal charges, he filed a Quiet Title Action. The third-party buyer's title insurance company is paying the costs of the attorney in the Quiet Title action as well as a separate attorney to represent the third party in the event his interests diverge from the title insurance company.

The elderly victim does not have the funds for counsel in the Quiet Title action. She cannot leverage her home to obtain a loan for said funds because of the clouded title. Only because the police were involved, she connected to a community representation program for the elderly.

The defendant has been convicted of violating (1) Penal Code section 115(a) with respect to the drunken Grant Deed, (2) grand theft from an elder based on stealing the house, and (3) grand theft from the third-party buyer. Through the Penal Code section 115(a) conviction, the defendant admitted that the drunken Grant Deed was false or fraudulent.

Under the current 115(e) provisions, the criminal court can put the parties back to where they were before the crimes – by voiding the drunken Grant Deed and returning title to the elderly victim, and by ordering Victim Restitution to the third-party buyer. The third-party buyer does not want this because there are insufficient assurances that the defendant will actually pay the restitution ordered. While the third-party buyer can make a claim against the title insurance policy to recuperate his losses, the attorneys who represent him and are paid for by the title insurance company do not like that option.

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