

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1832

SPONSOR: Senators Bennett and Posey

SUBJECT: Use of the Term "Chamber of Commerce"

DATE: April 4, 2003

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------------|----------------|-----------|------------------------|
| 1. | <u>Cibula</u> | <u>Maclure</u> | <u>CM</u> | <u>Fav/1 amendment</u> |
| 2. | <u>Cellon</u> | <u>Cannon</u> | <u>CJ</u> | <u>Favorable</u> |
| 3. | _____ | _____ | <u>JU</u> | _____ |
| 4. | _____ | _____ | <u>GO</u> | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill defines the term "chamber of commerce" as a not-for-profit corporation that is qualified for tax exempt status under s. 501(c)(6) of the Internal Revenue Code; is dedicated to improving the economic climate and business development in the area in which the organization is located; makes appropriate filings with the Department of State and Internal Revenue Service; and is governed by a volunteer board of directors. The bill further prohibits a business entity from using the term "chamber of commerce" in its name or to describe itself unless it meets the proposed definition, except for certain bi-national chambers of commerce and chambers of commerce in existence on or before October 1, 1992. The bill provides that unauthorized use of the term "chamber of commerce" is a first-degree misdemeanor. The bill authorizes chambers of commerce to sue to have any business entity that is not a chamber of commerce enjoined from using the term "chamber of commerce" in its name or to describe itself.

This bill creates section 501.972, Florida Statutes.

II. Present Situation:

Chambers of Commerce

Black's Law Dictionary, Seventh Edition, defines the term "chamber of commerce" as:

An association of merchants and other business leaders who organize to promote the commercial interests in a given area and whose group is generally affiliated with the national organization of the same name.

State and federal laws often encourage cooperation between government and chambers of commerce to advance government goals. *See, e.g.*, s. 445.013(2)(f), F.S., (directing Workforce Florida, Inc., to solicit participation from chambers of commerce to maximize the use of welfare-to-work funds) and 7 U.S.C. s. 1624(a) (authorizing the Secretary of Agriculture to cooperate with chambers of commerce with respect to the production, transportation, storing, processing marketing, and distribution of agricultural products). Nevertheless, there is no Florida or federal law that defines the term “chamber of commerce” or limits its usage.

Bi-National Chambers of Commerce

Like the term “chamber of commerce,” there is no statutory definition of the term “bi-national chamber of commerce.” However, the common thread between organizations that have been labeled as bi-national chambers of commerce by the Department of State in the *2001 Florida Bi-National Chambers of Commerce & Trade Associations Directory* is a mission to promote trade between the United States and another country or continent. (This directory is available at http://oir.dos.state.fl.us/pdf/bi_national.pdf.) No formal process exists in the Florida Statutes or the Florida Administrative Code to recognize an organization as a bi-national chamber of commerce.

Prohibited Names

Statutes have been enacted limiting the use of certain terms in the name of a business entity. *See, e.g.*, ss. 636.033 and 641.33, F.S., (limiting the use of the following words in the name of a business: “insurance,” “casualty,” “surety,” and “mutual”); former s. 665.02, F.S., (repealed in 1969) (limiting the use of the term “savings” in the name of a business). Statutes limiting the use of certain terms in the name of a business have been upheld against attack under the First Amendment of the U.S. Constitution and under the Equal Protection Clause of the U.S. Constitution when the purpose of the statute is to prevent consumers from being misled. *See Baker v. Registered Dentists of Oklahoma*, 543 F. Supp 1177 (W.D. Oklahoma 1982); *Greater Miami Fin. Corp. v. Dickinson*, 214 So. 2d 874 (Fla. 1968).

Civil Enforcement

Chapter 495, F.S., relating to the registration of trademarks and service marks, authorizes the courts to enjoin the improper use of a mark, trade name, label or form of advertisement under certain circumstances. Section 495.011(6), F.S., defines the term “trade name” to mean any word, name, symbol, character, design, drawing or device, or any combination thereof, adopted and used by a person to identify her or his business, vocation, or occupation and to distinguish it from the business, vocation, or occupation of others. Under s. 495.151, F.S.:

Every person, association, or union of workers adopting and using a mark, trade name, label or form of advertisement may proceed by suit, and all courts having jurisdiction thereof shall grant injunctions, to enjoin subsequent use by another of the same or any similar mark, trade name, label or form of advertisement if it appears to the court that there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the mark, trade name, label or form of

advertisement of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services.

Section 495.151, F.S., provides a dilution action for injury to business reputation. This is different from a trademark infringement action under s. 495.131, F.S., or a common-law action for trademark infringement which is expressly preserved in s. 495.161, F.S. The Florida Supreme Court case of *Great Southern Bank v. First Southern Bank*, 625 So. 2d 463 (Fla. 1993), is the seminal trade name case. In *Great Southern*, the court held that a dilution action differs from an infringement action in that the dilution action does not necessarily depend on the disputed names involving competing goods or creating the likelihood of confusion. A violation of s. 495.151, F.S., results from a likelihood of injury to business reputation or the dilution of the distinctive quality of the trademark name. A person can be enjoined from use under s. 495.151, F.S., if the actor uses a designation that resembles the distinctive mark or name of another, in a manner likely to cause a reduction in the distinctiveness of the other's mark or name, or it tarnishes the images associated with the other's mark or name. Whether the mark or name has acquired sufficient distinctiveness to be protected from dilution involves consideration of many factors, such as the duration and extent of advertising that emphasizes the mark or name and the degree of recognition by prospective purchasers. *Great Southern*, 625 So. 2d at 469; *see also Tortoise Island Homeowners Association, Inc. v. Tortoise Island Realty, Inc.*, 790 So. 2d 525, 534-535 (Fla. 5th DCA 2001).

III. Effect of Proposed Changes:

Chamber of Commerce Defined

The bill creates s. 501.972, F.S. Paragraph (1)(a) defines the term "business entity" to mean any corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

Paragraph (1)(b) defines the term "chamber of commerce" as: a not-for-profit corporation that is qualified for tax exempt status under s. 501(c)(6) of the Internal Revenue Code; is dedicated to improving the economic climate and business development in the area in which the organization is located; makes appropriate filings with the Department of State and Internal Revenue Service (IRS); and is governed by a volunteer board of directors of at least seven members.

Required filings by chambers of commerce that are tax exempt organizations pursuant to s. 501(c)(6) of the Internal Revenue Code are generally open to public inspection. *See* IRS Publication 557, *Tax-Exempt Status for Your Organization* (Rev. July 2001). This disclosure includes the disclosure of IRS Form 990, *Return of Organization Exempt From Income Tax*, and IRS Form 1024, *Application for Recognition of Exemption Under Section 501(a)*, which contain financial and operational data.

Prohibition and Exceptions

Subsection (2) of s. 501.972, F.S., prohibits a business entity that does not meet the proposed definition of "chamber of commerce" from using the term "chamber of commerce" in its name

or to describe itself as a chamber of commerce, unless the entity is a bi-national chamber of commerce recognized by the Department of State's, Office of International Affairs, or was a chamber of commerce in existence on or before October 1, 1992.

Criminal Penalties

Subsection (2) of s. 501.972, F.S., also provides that unauthorized use of the term "chamber of commerce" is a first-degree misdemeanor, for which the maximum penalty is a fine not to exceed \$1,000 and imprisonment for a term not to exceed 1 year.

The Legislature has enacted statutes prohibiting the use of certain terms in the names of regulated business entities. These include "HMO," "insurance," "casualty," "surety," and "mutual." There are no criminal penalties attached to a violation of these prohibitions, although the state does exercise regulatory authority.

Department of State Responsibility

To clarify that no duties are imposed on the Department of State, the language of the bill is inserted in ch. 501, F.S., (a chapter under which the Department of State bears no responsibility), and the bill expressly provides in subsection (3) that no requirement is created for oversight or regulation of a business entity name, trademark, trade name, or other requirement for filing or registration.

Civil Enforcement

Subsection (4) of s. 501.972, F.S., authorizes chambers of commerce, subject to the provisions of s. 495.151, F.S., to sue any business entity that is not a chamber of commerce to enjoin it from using the term "chamber of commerce" in its name or to describe itself. The term "subject to" as used in the bill appears to imply that s. 495.151, F.S., (authorizing injunctions against dilution of a trade name or label) limits a chamber of commerce from seeking an injunction for unauthorized use of the term "chamber of commerce." If it is the Legislature's intent that a chamber of commerce is always authorized to seek an injunction for unauthorized use of the term "chamber of commerce" or that unauthorized use of the term is a dilution, it may wish to amend the bill on page 2, line 24, by deleting the underlined words "**Subject to**" and inserting "**Under.**"

Effective Date

The bill takes effect on October 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Beginning October 1, 2003, a business entity using the term “chamber of commerce” in its name that does not meet the statutory definition of “chamber of commerce” will be subject to criminal prosecution or civil actions, unless the business entity is a bi-national chamber of commerce or a chamber of commerce that was in existence on or before October 1, 1992.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The question arises regarding how a non-profit corporation might be made subject to a criminal penalty. A corporation is recognized as a “person” for the purposes of the Florida Statutes (s. 1.01(3), F.S.), and some statutes prohibiting certain criminal acts have been applied by the courts to corporations as well as their officers and employees.

For example, s. 849.01, F.S., the statute which prohibits keeping a gaming house (a third degree felony) is applicable to corporations. In *State v. Willard*, 54 So.2d 183 (Fla. 1951), the court stated:

It is the rule that, except where the only punishment for an offense is death or imprisonment, a corporation may be held criminally liable for acts of misfeasance, malfeasance or nonfeasance, even though the act constituting the offense may be ultra vires, or one as to which a specific intent is essential. And the fact that the punishment for an offense is either fine or imprisonment, or both, will not ordinarily render the offense inapplicable to a corporation. *Id.* at 185.

Black's Law Dictionary, Fifth Edition, defines "misfeasance" as the improper performance of some act which a man may lawfully do. "Malfeasance" is the doing of an act which a person ought not to do at all. "Nonfeasance" is the omission of an act which a person ought to do. "Ultra vires" means acts which are beyond the scope of the powers of a corporation.

The general rule that "a corporation may be held criminally responsible for illegal acts of its employees if the acts are (a) related to and committed within the course of employment, (b) committed in furtherance of the business of the corporation, (c) authorized or acquiesced in by the corporation" has been applied in cases involving grand theft and unlawful dredging. *State v. Municipal Auto Sales*, 222 So.2d 278 (Fla. 3rd DCA 1969); *West Valley Estates v. State*, 286 So.2d 208 (Fla. 2nd DCA 1973).

In *State v. Shouse*, 177 So.2d 724 (Fla. 2nd DCA 1965), the court found that the fact that a corporation may be held criminally liable for embezzlement does not render an officer or employee of the corporation immune from prosecution.

VIII. Amendments:

#1 by Commerce, Economic Opportunities, and Consumer Services:
Broadens the types of organizations that may use the term "chamber of commerce" in their names to include certain entities that are exempt from taxation under s. 501(c)(3) of the Internal Revenue Code, as an addition to the bill's authorization for certain entities exempt under s. 501(c)(6) of the code.