

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.)

Prepared By: Criminal Justice Committee

BILL: CS/SB 1168

INTRODUCER: Commerce and Consumer Services Committee and Senators Bennett and Fasano

SUBJECT: Resale of Tickets

DATE: March 20, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gordon</u>	<u>Cooper</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill revises Florida's ticket scalping statute in the following manner:

- Imposes a second-degree misdemeanor penalty on anyone who knowingly purchases tickets in excess of the quantity allowed with the intent to resell those tickets;
- Increases the allowable resale price of a ticket for admission to any "sporting exhibition, athletic contest, theater, or other exhibition, or to any theme, amusement, or recreation park or entertainment complex, where an admission price is charged" from \$1 above the retail price to 25 percent of that price;
- Permits the resale of tickets by the original seller at any price without criminal penalty;
- Defines nonpark tickets as tickets "not for admission to a theme, amusement, or recreation park or entertainment complex or to a permanent exhibition or recreational activity within such a park or complex";
- Permits the resale of nonpark tickets at any price where the sale takes place through an Internet website that makes and posts certain specified guarantees and disclosures; and
- Amends the violations section of the sellers of travel statute to reference the criminal penalty in s. 817.36, F.S.

This bill creates the following section of the Florida Statutes: 817.357.

This bill amends the following sections of the Florida Statutes: 817.36 and 559.9335.

II. Present Situation:

Ticket Scalping Generally

Admission tickets to entertainment venues are available from a number of sources. The primary source of tickets sold to the public are ticket agencies and brokers. Ticket agencies are contracted by promoters on behalf of a particular venue to sell tickets for that venue's events. Agents, such as Ticketmaster, the largest agency,¹ usually sell tickets for the promoters and venues for a fee. The venue typically uses the same ticketing agency for all events at that venue. Unlike ticket agencies, brokers are independent entities "not affiliated with the artist, venue or the promoter"² and are either individuals or organized agencies. At times, tickets holders are unable to use their tickets and attempt, in a variety of ways, to resell them.

Ticket-scalping involves reselling tickets at a price above the retail price of the ticket.³ Until recently, ticket-scalping usually occurred outside of or near to the venue where an event was taking place. In recent years, the Internet has come to dominate the ticket resale industry and involves entities such as Internet auctions, sports teams and concert promoters.⁴

According to the National Conference of State Legislature:

There are no federal laws directly governing ticket resale, but several states and a number of municipalities prohibit the reselling of tickets for an amount in excess of the face price. Some states that have resale laws allow a small premium to be charged, usually no more than \$3 by a reseller, though they generally allow "authorized" ticket agents to charge whatever they want. These laws in these states are generally called "scalping laws," and the offenders are commonly called scalpers.

At least sixteen states prohibit⁵ resale of tickets: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Ohio, Rhode Island, and Wisconsin. At least seven states (Alabama, Georgia, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania) require a license to broker tickets, or else reselling is considered a crime. Four states—North Dakota, Ohio, South Dakota, and Virginia—grant localities or municipalities the ability to license or prohibit resale of tickets. Some cities have municipal regulations against ticket brokering, although state law does not expressly prohibit it. In almost all instances where ticket scalping is prohibited or there's resale without a license, the offense is a misdemeanor.⁶

¹ National Conference of State Legislatures, *Ticket Resale Laws*, <http://www.ncsl.org/program/lis/ticketscalplaws.htm>, 24 February 2006.

² *Id.*

³ Daniel J. Glantz, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 *Cardozo Arts & Ent. L. J.* 261, 262.

⁴ *Id.*

⁵ Further analysis of this data shows that several of the states listed do not actually prohibit the resale of tickets, but restrict resale by either limiting, for example, where resale can take place, the price at which tickets may be resold, and who may participate in reselling.

⁶ National Conference of State Legislatures, *supra*, note 1.

Ticket Scalping in Florida

Florida's ticket-scalping statute, which was enacted in 1945, is codified in s. 817.36, F.S. Subsection (1) prohibits the sale of tickets for more than \$1.00 of the face value of tickets for passage or accommodations on any common carrier. Travel agencies that have an established place of business in this state are *exempt* from this provision. Subsection (2) of the statute also prohibits the sale of tickets for admission to any sporting exhibition, athletic contest, theater, or any exhibition where admission is charged for more than \$1.00 of the face value of the tickets. The term "exhibition" as used in the statute refers to theme, amusement, and recreation parks as well as entertainment complexes.⁷ Section 817.36(2), F.S., also applies to travel agencies with an established place of business in the state *except* if they are sellers of travel under part XI of ch. 559, F.S., selling tickets as part of a travel package and on behalf of the original sellers of the tickets. Persons who violate this restriction are guilty of a second-degree misdemeanor.

Evidence suggests that this statute is only minimally enforced. During 2005, the Attorney General's office had no prosecutions under this statute.⁸ At least one State Attorney's Office indicated it had no prosecutions under the statute in the last 2 years.⁹ Given the prevalence of more significant crimes, law enforcement ranks ticket scalping as a low priority.¹⁰ According to the Office of State Courts Administrator, there were approximately 111 charges filed statewide under this statute in FY 2004-2005 and 117 charges filed statewide for the remainder of 2005.¹¹

Electronic Commerce (E-commerce)

Person-to-person transactions no longer dominate the ticket-resale industry. Increasingly, ticket-resale is occurring over the Internet. The practice poses unique problems concerning the legality of the transactions and judicial jurisdiction. Websites such as Ebay and StubHub, for example, that permit the public to sell tickets on their sites, maintain that they are facilitators, not participants in ticket resale transactions. Usually, the sites have disclaimers indicating that they are not the sellers and can not be held responsible for the acts of sellers. For example, Ebay requires users to agree to a User Agreement which states, in part:

"You will not hold eBay responsible for other users' actions or inactions, including things they post....We are not involved in the actual transaction between buyers and sellers. We have no control over and do not guarantee the quality, safety or legality of items advertised...."¹²

Similarly, StubHub, an online site where individuals can buy and sell tickets to sporting and other entertainment events, has a disclaimer on its home page warning users, "You are buying

⁷ Disney and Universal are examples of exhibitions.

⁸ As reported by Legislative Affairs Office of the Attorney General, January 2006.

⁹ As reported by the Leon County State Attorney's office, January 2006.

¹⁰ Kati Schardl, *The Show Must Go On, But At Higher Prices*, Tallahassee Democrat, March 13, 2004, <http://www.tallahassee.com/mld/tallahassee/news/local/8175596.htm>, (quoting a law enforcement officer who stated that ticket scalping was not a high priority).

¹¹ This data was compiled by OSCA from the Offender Based Transaction System (OBTS), a computer system through which counties report criminal charges. Note that 11 counties are currently not reporting circuit criminal and county criminal data via this system, therefore, the number quoted may not reflect actual statewide prosecutions under s. 817.36, F.S.

¹² Ebay User Agreement, <http://pages.ebay.com/help/policies/user-agreement.html>. 7 February 2006.

tickets from a third party; neither StubHub.com nor StubHub, Inc., is the ticket seller. Ticket prices are set by the seller and may differ from face value.”¹³

Federal legislation reinforces the idea that websites are simply a pass-through for information. For example, the Communications Decency Act of 1996, which regulates information over the Internet contains a provision that states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁴ However, despite legislation and website disclaimers, some still argue that where individuals use websites to sell tickets at prices forbidden by state laws, the sites, by providing the technology and charging a fee for the use of the site, are helping individuals break state laws.^{15 16}

A particularly difficult issue that has arisen as a result of the increase in e-commerce is determining where jurisdiction over a defendant should lie if civil or criminal wrongdoing occurs. In Florida, physical entry into the state is not necessary to establish jurisdiction over an out-of-state defendant who has defrauded a Florida resident via the Internet.¹⁷ Electronic, telephonic, or written communications into Florida will suffice to form the basis of jurisdiction if the cause of action arises from the communications transmitted into Florida.¹⁸ However, courts are reluctant to extend jurisdiction over a website owner or operator. Courts have held that the existence of a defendant’s website alone is an insufficient basis to assert personal jurisdiction over that defendant.¹⁹ Moreover, a court may refuse to exercise jurisdiction over a nonresident interactive website owner/operator who inserts a forum-selection clause into their site requiring customers to agree to settle their disputes in a particular state’s courts.²⁰

In the case of criminal misconduct, Florida’s long-arm criminal statute could be employed where wrongdoing occurs in connection with an electronic transaction and the defendant is out-of-state. That statute, codified in s. 910.005, F.S., states:

(1) A person is subject to prosecution in this state for an offense that she or he commits, while either within or outside the state, by her or his own conduct or that of another for which the person is legally accountable if:

(a) The offense is committed wholly or partly within the state;

¹³ StubHub home page, <http://www.stubhub.com>. 7 February 2006.

¹⁴ 47 U.S.C. § 230(c)(1).

¹⁵ Notably, according to one newspaper, Ebay removes tickets from their site that are being sold for more than \$1.00 above the permissible price in Florida. Hilary Roxe, *Legislature: Bill Would Allow Scalping Of Event Tickets*, Tallahassee Democrat, March 9, 2004.

¹⁶ Hannah R. Short, *Implications of Grokster for Online Ticket Sale Companies: Why Online Ticket Resale Sites Should Be Held Liable for Violating State Scalping Laws*. 7 N.C.J.L. & Tech. 181 (2005)(arguing that under the U.S. Supreme Court decision in *Metro Goldwyn-Mayer Studios v. Grokster*, 543 U.S. 1032 (2004), which extended secondary liability for copyright infringement to companies that distributed software enabling users to commit infringement, a website that facilitates ticket scalping could also be held liable for breaking state ticket scalping laws).

¹⁷ *Fletcher Jones West Shara, Ltd., LLC v. Rotta*, 2006 WL 231484 (Fla. 3d DCA 2006), p. 2 (holding that the court had jurisdiction over defendant who sold plaintiff defective car through eBay).

¹⁸ *Id.*

¹⁹ Am Jur. 2d Computers and the Internet §25.

²⁰ *Id.*

(2) An offense is committed partly within this state if either the conduct that is an element of the offense or the result that is an element, occurs within the state.

In *State v. Ruiz*,²¹ for example, an appellate court held the state could prosecute a defendant for the crime of computer pornography even though the defendant had solicited the victim from Virginia. However, in that case, the statute that forbade computer pornography specifically listed solicitation over the Internet as one way of violating the statute. Section 817.36, F.S., does not specifically forbid ticket-scalping over the Internet and, therefore, may not provide the specific jurisdictional basis necessary. At the same time, s. 817.36, F.S., does not mention any specific method of ticket-scalping, including the more common person-to-person transactions, and, therefore, may be considered broad enough to encompass scalping via the Internet.

Sellers of Travel

Chapter 559, F.S., governs the regulation of trade, commerce, and investments in Florida. Part XI of that chapter, ss. 559.926-559.39, F.S., govern “sellers of travel.” Section 559.927(1), F.S., defines a “seller of travel,” in pertinent part, as:

[A]ny resident or nonresident person, firm, corporation, or business entity who offers for sale, directly or indirectly, at wholesale or retail, prearranged travel, tourist-related services, or tour-guide services for individuals or groups, including but not limited to, vacation or tour packages, or vacation certificates in exchange for a fee, commission or other valuable consideration.

According to the Department of Agriculture and Consumer Affairs (DOACS), any individual or entity fitting this definition, including travel agents and agencies, are considered sellers of travel.²² There are currently 1,626 sellers of travel registered with DOACS.²³

Sellers of travel were specifically exempted from the ticket scalping penalty in the original version of s. 817.36, F.S. Section 1-A of ch. 22726, L.O.F. (1945), stated: “The provisions of this law shall not apply to travel agencies that have an established place of business in this State....” The exemption has continued to exist since the enactment of the original statute, but has not gone without challenge.

In *State v. Sobieck*,²⁴ the defendant, who was charged with violating the state racketeering statute as a result of his unlawful reselling of sports and entertainment tickets, claimed s. 817.36, F.S., violated the due process and equal protection clauses of the state and federal constitutions. The appeals court noted that under *Nebbia v. New York*,²⁵ the Legislature could “regulate and limit the terms upon which persons may conduct a certain business, if it is affected with public interest, in the sense that the economic policies adopted are designed to promote the public welfare and the means shown are reasonably related to that purpose.”²⁶ The court then reasoned

²¹ 909 So.2d 986 (5th DCA 2005).

²² As reported by DOACS, 1 March 2003.

²³ *Id.*

²⁴ 701 So. 2d 96 (Fla. 5th DCA 1997).

²⁵ 291 U.S. 502 (1934).

²⁶ 701 So.2d 96, 103.

that the statute's regulation of public events and tourism constituted a legitimate exercise of state concern. Importantly, the court noted that the statute sought to protect consumers from economic harm caused by people who "artificially corner the market for tickets to public events."²⁷

The court also refuted the defendant's claim that the exemption for sellers of travel in s. 817.36, F.S., has no rational basis. The court emphasized the heightened regulation to which these entities are subject, such as being required to be bonded, financially answerable to travelers, and annually registered with the state. Moreover, they are required to "provide extensive information concerning their business operations and agents, pay a registration fee, keep extensive records and be subject to civil, administrative, or criminal penalties."²⁸

These heightened duties and responsibilities imposed upon registered sellers of travel provide a legitimate basis for allowing them to sell tickets in a manner different from that allowed to a general member of the public.²⁹

III. Effect of Proposed Changes:

Section 1 creates s. 817.357, F.S., to impose a criminal penalty on anyone who knowingly buys tickets in excess of retail caps placed on the quantity of tickets that may be purchased with the intent to resell those tickets. This section also provides that no person or firm who is the original seller of the tickets will incur liability with respect to such tickets by contracting for services for such sales.

Section 2 amends paragraph (2)(a) of s. 817.36, F.S., to change the allowable resale price of a ticket for admission to any "sporting exhibition, athletic contest, theater, or other exhibition, or to any theme, amusement, or recreation park or entertainment complex, where an admission price is charged" from \$1 above the retail price to 25 percent of the retail price.

Paragraph (2)(b) is created to permit the resale of tickets at any price by the original seller.

Paragraph (2)(c) is created to permit the resale of nonpark tickets, at any price, without criminal penalty if those tickets are sold through a website that makes certain guarantees and disclosures. According to the bill, nonpark tickets are tickets "not for admission to a theme, amusement, or recreation park or entertainment complex or to a permanent exhibition or recreational activity within such a park or complex." In order to be exempted, the transaction must occur through a website that posts a guarantee of a full refund if one of certain specified circumstances occurs. Those specific circumstances include:

- (a) The ticketed event is canceled;
- (b) The purchaser is denied admission to the ticketed event, unless such denial is due to the action or omission of the purchaser; or
- (c) The ticket is not delivered to the purchaser in the manner requested and pursuant to any delivery guarantees made by the reseller and such failure results in the purchaser's inability to attend the ticketed event.

²⁷ *Id.* at 104.

²⁸ *Id.*

²⁹ *Id.*

The website must also disclose that it is not the issuer, original seller, or reseller of the ticket and does not control the pricing of the ticket.

This paragraph of the bill also specifies that a refund shall include any servicing, handling, or processing fees unless such fees are declared nonrefundable under the terms of the guarantee.

Paragraph (2)(d) makes a minor technical change to paragraph (2)(b) of the current statute, which discusses sellers of travel, by substituting the words “[t]he provisions of this subsection shall apply” with the phrase “[p]aragraph (a) applies.”

Paragraph (2)(e) is created to require that any resale under subsection (2) shall be remitted to the Department of Revenue in accordance with s. 212.04, F.S., which governs sales tax.

Section 3 amends subsection (8) of s. 559.9335, F.S., which governs violations of the sellers of travel statute. The bill makes it a violation to resell or offer for resale a ticket in violation of s. 817.36(2), F.S.

Section 4 provides that this bill is effective July 1, 2006.

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:

Private businesses and individuals, including travel agencies and ticket brokers, will likely profit from the ability to sell tickets at 25 percent above the retail price.

C. Government Sector Impact:

This bill creates a new second degree misdemeanor for knowingly purchasing tickets in excess of retail caps placed on the quantity of tickets that may be purchased with the intent to resell those tickets. Sanctions for misdemeanors do not include incarceration in

prison. Therefore, there will be no costs to the state. However, this bill could impact costs for the counties in the operation of local detention facilities that routinely detain people accused and convicted of misdemeanors.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
