

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 739 Secondhand Dealers

SPONSOR(S): Judiciary Committee; Criminal Justice Subcommittee; Passidomo and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 948

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Keegan	White
2) Judiciary Committee	18 Y, 0 N, As CS	Keegan	Havlicak

SUMMARY ANALYSIS

Sections 538.03-538.17, F.S., regulate specific secondhand dealers and their business practices. Secondhand dealers must comply with recording and reporting requirements for secondhand dealer transactions. Secondhand dealers must keep secondhand goods for at least 15 days before they can be modified, transferred, disposed of, or used in any way.

The bill amends the secondhand dealers transaction form requirements to include digital photos of the relevant goods and permit International Mobile Station Equipment Identity (IMEI), the mobile equipment identifier (MEID), and other unique identifying numbers to be recorded as serial numbers. The bill also expands the holding period for the following secondhand goods from 15 to 30 days: a gemstone, an item of jewelry, an antique furnishing, fixture, or decorative object, an item of art, or goods purchased through an automated kiosk.

Section 538.08, F.S., authorizes a civil action of replevin when a person contests the identification or ownership of property in a secondhand dealer's possession. The bill expands the action to allow lienors alleging a right of possession to bring suit and entitles any plaintiff to use a summary procedure process.

The bill creates a noncriminal violation punishable pursuant to s. 775.083, F.S., by a fine of up to \$2,500, which is committed by a secondhand dealer if:

- An owner or a lienor makes a written demand for return of the property and provides proof of ownership or proof of the right of possession to the secondhand dealer at least five calendar days before filing a replevin action;
- The secondhand dealer knows or should have known based on the proof that the property belongs to the owner or lienor;
- The secondhand dealer fails to return the property and does not file an action for interpleader to determine conflicting claims to the property; and
- The owner or lienor prevails in the replevin action against the secondhand dealer.

The bill authorizes storage at a secondhand dealer registered location outside the appropriate law enforcement official's jurisdiction when the law enforcement official agrees and the secondhand dealer provides proof that he or she is able to and agrees to deliver the stored secondhand goods to the appropriate law enforcement official within 2 business days upon request.

The bill amends and creates definitions of key terms.

The bill may have an economic impact on secondhand dealers and local governments. (See Fiscal Analysis section.)

The bill is effective July 1, 2016.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0739b.JDC

DATE: 2/22/2016

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Sections 538.03-538.17, F.S., regulate secondhand dealers and their business practices. A “secondhand dealer” is defined as any person, corporation, or other business entity that is engaged in the business of purchasing, consigning, or trading secondhand goods, but that is not a secondary metals recycler subject to Part II of Chapter 538, F.S.¹ Additionally, the following persons and business entities that fall under the definition of a secondhand dealer are excluded from the requirements of ch. 538, F.S.:

- A secondhand goods transaction involving an organization or entity registered with the state as a nonprofit, religious, or charitable organization or any school-sponsored association or organization other than a secondary metals recycler;²
- A law enforcement officer acting in an official capacity;
- A trustee in bankruptcy, executor, administrator, or receiver;³
- A public official acting under judicial process or authority;⁴
- A sale on the execution, or by virtue of any process issued by a court;⁵
- A garage sale operator who holds garage sales less than 10 weekends per year;
- A person at antique, coin, or collectible shows or sales;
- A person selling household personal property as agent of the property owner or the property owner's representative;⁶
- The purchase, consignment, or trade of secondhand goods from one secondhand dealer to another secondhand dealer when the seller complies with ch. 538, F.S.;
- A person accepting a secondhand good as a trade-in for a similar item of greater value;
- An auction business⁷ operating as an auction business in the buying and selling of specified property;
- A business that is registered as an antique dealer⁸ that purchases secondhand goods from the property owner or her or his representative at the property owner's residence pursuant to a written agreement;
- A business that contracts with another party to offer its secondhand goods for sale, purchase, consignment, or trade via an Internet website, and that maintains a shop, store, or other business premises for this purpose, if the business meets statutory requirements;⁹
- Any person offering his or her own personal property for sale, purchase, consignment, or trade via an Internet website, or a person or entity offering the personal property of others for sale, purchase, consignment, or trade via an Internet website, when that person or entity does not have, and is not required to have, a local occupational or business license for this purpose;
- A business whose primary business is the sale, rental, or trade of motion picture videos or video games, if the business meets statutory requirements;¹⁰ and
- A motor vehicle dealer as defined in s. 320.27, F.S.¹¹

¹ s. 538.03(1)(g), F.S.

² “Secondary metals recycler” as used in this analysis means a secondary metals recycler subject to Part II of Chapter 538, F.S.

³ The party must present proof of such status to the secondhand dealer for the exclusion to apply. s. 538.03(2)(c), F.S.

⁴ The party must present proof of such status to the secondhand dealer for the exclusion to apply. s. 538.03(2)(d), F.S.

⁵ Proof thereof must be presented to the secondhand dealer for the exclusion to apply. s. 538.03(2)(e), F.S.

⁶ Such a sale must be pursuant to a written agreement. s. 538.03(2)(h), F.S.

⁷ An “auction business” means a sole proprietorship, partnership, or corporation which in the regular course of business arranges, manages, sponsors, advertises, promotes, or carries out auctions, employs auctioneers to conduct auctions in its facilities, or uses or allows the use of its facilities for auctions.” s. 468.382(1), F.S.

⁸ The business must be registered with the Department of Revenue for sales tax purposes as an antique dealer. ch. 212, F.S.

⁹ Section 538.03(2)(m), F.S., provides a detailed list of the requirements a business must meet for the exclusion to apply.

¹⁰ Section 538.03(2)(o), F.S., provides a detailed list of the requirements a business must meet for the exclusion to apply.

¹¹ s. 538.03(2), F.S.

A “secondhand good” is defined as meaning “personal property previously owned or used, which is not regulated metals property regulated under part II and which is purchased, consigned, or traded as used property. Such secondhand goods do not include office furniture, pianos, books, clothing, organs, coins, motor vehicles, costume jewelry, cardio and strength training or conditioning equipment designed primarily for indoor use, and secondhand sports equipment that is not permanently labeled with a serial number. For purposes of this paragraph, ‘secondhand sports equipment’ does not include golf clubs.”¹²

Records and Reporting Requirements

Secondhand dealers must maintain detailed records related to each secondhand dealer transaction.¹³ To ensure compliance with these requirements, a law enforcement officer is statutorily authorized to inspect the entire registered premises and required records of any secondhand dealer during normal business hours.¹⁴ A “transaction” is defined as “any purchase, consignment, or trade of secondhand goods by a secondhand dealer.”¹⁵ When a secondhand dealer conducts a transaction, the dealer must complete a secondhand dealers transaction form at the time the transaction is completed.¹⁶ Dealers are required to keep copies of completed transaction forms for at least three years and must keep copies on the registered secondhand dealer premises for at least one year after the transaction.¹⁷

Secondhand dealers are required to present completed transaction forms to the appropriate law enforcement official¹⁸ within 24 hours of the transaction, and must include a wide variety of information relating to the transaction, the seller or buyer, and the secondhand property involved.¹⁹ The required information includes:

- A complete description of the goods acquired;
- The location, date, and time of the transaction;
- A description of the person from whom the goods were acquired; and
- Any other information required on the secondhand dealer transaction form.

The reporting requirements currently do not require a secondhand dealer to include photographs of the goods with the secondhand dealer transaction form.

Holding Period

A secondhand dealer is prohibited from selling, bartering, exchanging, altering, adulterating, using, or disposing of any secondhand goods within 15 calendar days of acquiring the goods.²⁰ This holding period does not apply to the person known to the secondhand dealer to be the same person who provided the goods to the secondhand dealer, when the person wishes to recover the goods.²¹ If a law enforcement officer has probable cause that goods in a secondhand dealer’s possession were stolen, the law enforcement officer may issue a 90-day hold order²² to prevent the stolen goods from being sold while an investigation is conducted.²³

Petition for Return of Stolen Goods

If a person is alleging ownership of property in the possession of a secondhand dealer, and the secondhand dealer is contesting the identification or ownership of the property, the person may file a civil

¹² s. 583.03(1)(h), F.S.

¹³ s. 583.04, F.S.

¹⁴ s. 538.05(1), F.S.

¹⁵ s. 538.03(1)(j), F.S.

¹⁶ s. 538.04(1), F.S.

¹⁷ *Id.*

¹⁸ “‘Appropriate law enforcement official’ means the sheriff of the county in which a secondhand dealer is located or, if the secondhand dealer is located within a municipality, both the police chief of the municipality and the sheriff; however, the sheriff or police chief may designate as the appropriate law enforcement official for that county or municipality, as applicable, any law enforcement officer working within that respective county or municipality.” s. 538.03(1)(b), F.S.

¹⁹ s. 538.04(1), F.S.

²⁰ s. 538.06(1), F.S.

²¹ The holding period is inapplicable only if the secondhand dealer can produce the record of the original transaction. s. 538.06(1), F.S.

²² s. 538.06(3), F.S.

²³ Adam Sacasa, *Stolen Items at Pawn Shops Often a Challenge to Get Back*, SUN SENTINEL (July 13, 2014), http://articles.sun-sentinel.com/2014-07-13/news/fl-pawn-stolen-property-recovery-20140712_1_pawn-shops-palm-beach-county-sheriff-property (last visited Dec. 30, 2015).

action of replevin²⁴ in the county or circuit court.²⁵ The petition must contain statutorily-prescribed allegations.²⁶ For example, the petition must include a description of the property and indicate that the plaintiff is entitled to possession of the property under a security agreement and that the property is wrongfully held by the defendant.²⁷ The court is required to award the prevailing party attorney fees and costs, and when the petitioner is the prevailing party, the court must order payment of filing fees to the clerk and service fees to the sheriff.²⁸

Summary Procedure

Summary procedure is an expedited process for considering civil disputes.²⁹ Summary procedure is provided for in statute,³⁰ and it streamlines civil litigation in a number of ways. For example, the time period for responding to a complaint is significantly shortened,³¹ fewer pleadings are permitted to be filed,³² and reasons for postponing a case are restricted.³³ Summary procedure is only available in those actions specified by statute or rule.³⁴ Summary procedure is not currently authorized in statute or rule to apply to actions of replevin against a secondhand dealer.

Criminal Liability and Punishment

Unless otherwise provided, any person who knowingly violates the regulations of ch. 538, F.S., commits a first degree misdemeanor, punishable by up to one year in jail and a \$10,000 fine.³⁵ When a secondhand dealer returns stolen property to a lawful owner, and the person who transacted the property to the secondhand dealer is convicted of theft, a violation of ch. 538, F.S., or dealing in stolen property, the court must order the defendant to pay restitution to the secondhand dealer or the owner of the stolen property.³⁶

Automated Secondhand Goods Kiosks

Automated kiosks are remotely operated devices that resemble ATMs that are capable of purchasing used electronic devices for an immediate cash payment.³⁷ Customers seeking to sell a used electronic device must insert a state-issued identification card into the kiosk's driver license reader to be scanned and photographed.³⁸ The customer then places the device into the kiosk test station, allowing the equipment in the kiosk to examine and test the device.³⁹ The kiosk then offers the customer a price to be paid for the device, and if the customer agrees, he or she deposits the device into the kiosk and the kiosk immediately dispenses a cash payment to the customer.⁴⁰

ecoATM is a common provider of automated kiosks that purchase used electronic devices.⁴¹ There are ecoATMs operating in 43 states,⁴² and five of these ecoATMs are currently operating in Florida.⁴³

²⁴ An action of replevin is a lawsuit by someone claiming the right to have personal property returned from another person's possession. THE LEGAL DICTIONARY, *Replevin*, <http://legal-dictionary.thefreedictionary.com/replevin> (last visited Dec. 30, 2015). Replevin actions in this state are governed by ch. 78, F.S.

²⁵ s. 538.08(1), F.S.

²⁶ *Id.*

²⁷ *Id.*

²⁸ s. 538.08(2), F.S.

²⁹ Daniel Morman, *Application of Summary Procedure by Agreement*, 76-Feb. FLA. BAR. J. 12, 12 (Feb. 2002).

³⁰ s. 51.011, F.S.

³¹ s. 51.011(1), F.S.

³² *Id.*

³³ s. 51.011(2), F.S.

³⁴ s. 51.011, F.S.

³⁵ s. 538.07(1), F.S.

³⁶ s. 538.07(2), F.S.

³⁷ Jenn Strathman, *ATM at Mall Takes Your Old Electronics and Gives You Cash on the Spot*, ABC NEWSNET5 (Jan. 8, 2013), <http://www.newsnet5.com/money/consumer/consumer-specialist/atm-at-malls-takes-your-old-electronics-and-gives-you-cash-on-the-spot>.

³⁸ ECOATM, *How It Works*, <https://www.ecoatm.com/how-it-works/> (last visited Feb. 18, 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ As of May, 2014, ecoATM was the first and only company providing automated self-serve kiosks using advanced features and diagnostics to evaluate and pay cash for used electronics. Natalie Pace, *Fast Cash for Your Old Cell Phone*, HUFFINGTON POST (May 2, 2014), http://www.huffingtonpost.com/natalie-pace/fast-cash-for-your-old-sustainable_b_5255262.html.

⁴² ECOATM, *Search ecoATM Kiosk Locations by State*, <https://www.ecoatm.com/locations/by-state/> (last visited Feb. 19, 2016).

Effect of the Bill

The bill amends the secondhand dealers transaction form requirements specified in s. 538.04(1), F.S., to require digital photos of the goods involved in the transaction, which clearly depict the items, to be submitted with the form. The bill clarifies that the serial numbers that must be included on the secondhand dealers transaction form may include unique identifying numbers on electronics devices, such as IMEI and MEID numbers.

The bill expands the holding period specified in s. 538.06(1), F.S., from 15 days to 30 days for a precious metal,⁴⁴ gemstone, or item of jewelry; an antique furnishing, fixture, or decorative object; an item of art as defined in s. 686.501, F.S.;⁴⁵ or for goods purchased through the use of an automated kiosk. The bill specifies that the term “antique” means “being at least 30 years old and having special value because of age.”

The bill amends the process for an action of replevin against a secondhand dealer specified in s. 538.08, F.S., by:

- Expanding the action of replevin to include lienors with a right of possession as plaintiffs;
- Removing the term “petition” and replacing it with the term “complaint,” as “complaint” is the term utilized in ch. 78, F.S., which governs replevin actions.⁴⁶
- Entitling plaintiffs to the process of summary procedure provided in s. 51.011, F.S.
- Specifying that a secondhand dealer commits a noncriminal violation punishable pursuant to s. 775.083, F.S., by a fine of up to \$2,500, if:
 - An owner or a lienor makes a written demand for return of the property and provides proof of ownership or proof of the right of possession to the secondhand dealer at least five calendar days before filing a replevin action;
 - The secondhand dealer knows or should have known based on the proof that the property belongs to the owner or lienor;
 - The secondhand dealer fails to return the property and does not file an action for interpleader⁴⁷ to determine conflicting claims to the property; and
 - The owner or lienor prevails in the replevin action against the secondhand dealer.

The bill creates or amends the following definitions:

- “Automated kiosk” means an interactive device that is permanently installed within a secure retail space and that:
 - Is remotely monitored by a live representative during all business operating hours;
 - Verifies a seller's identity by official identification issued in the United States;
 - Performs automated reading and recording of item serial numbers;
 - Compares item serial numbers against databases of stolen items;
 - Securely stores goods accepted by the kiosk; and
 - Captures and stores images during the transaction.
- “Secondhand dealer” means any person, corporation, or other business organization or entity which is not a secondary metals recycler subject to part II and which is engaged in the business of purchasing, consigning, or trading secondhand goods. The term includes any secondhand dealer engaged in the business of purchasing secondhand goods by means of an automated kiosk.

⁴³ The Florida ecoATM kiosks are located in Mary Esther, Melbourne, Merritt Island, Panama City, and Sebring, Florida. ECOATM, *ecoATM Kiosks in Florida*, <https://www.ecoatm.com/locations/Florida/> (last visited Feb. 19, 2016).

⁴⁴ Section 538.03(1)(e), F.S., defines “precious metals” to mean “any item containing any gold, silver, or platinum, or any combination thereof, excluding any chemical or any automotive, photographic, electrical, medical, or dental materials or electronic parts.”

⁴⁵ Section 686.501(1), F.S., defines “art” as “a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, print, photograph, or craft work executed in materials including, but not limited to, clay, textile, paper, fiber, wood, tile, metal, plastic, or glass. The term shall also include a rare map which is offered as a limited edition or a map 80 years old or older; or a rare document or rare print which includes, but is not limited to, a print, engraving, etching, woodcut, lithograph, or serigraph which is offered as a limited edition, or one 80 years old or older.”

⁴⁶ See, e.g., s. 78.055, F.S.

⁴⁷ The procedure of interpleader allows conflicting claimants seeking a judgment for a single fund or piece of property to litigate their claims in a single civil suit. FLA. R. CIV. P. 1.240; 32 FLA. JUR. 2d *Interpleader, or Third- and Fourth-Party Practice* § 1 (Nov. 2015).

- "Secondhand goods" means personal property previously owned or used, which is not regulated metals property regulated under part II and which is purchased, consigned, or traded as used property. The term includes gift certificates and credit memos as defined in s. 501.95 which are purchased, consigned, or traded by a secondhand dealer. The term does not include office furniture, pianos, books, clothing, organs, coins, motor vehicles, costume jewelry, cardio and strength training or conditioning equipment designed primarily for indoor use, and secondhand sports equipment that is not permanently labeled with a serial number. For purposes of this paragraph, the term "secondhand sports equipment" does not include golf clubs.

The bill authorizes storage at a secondhand dealer registered location outside the appropriate law enforcement official's jurisdiction only when such law enforcement official agrees and the secondhand dealer provides proof that he or she is able to and agrees to deliver the stored secondhand goods to the appropriate law enforcement official within 2 business days upon request.

The bill takes effect on July 1, 2016.

B. SECTION DIRECTORY:

Section 1. Amends s. 538.03, F.S., relating to definitions; applicability.

Section 2. Amends s. 538.04, F.S., relating to recordkeeping requirements; penalties.

Section 3. Amends s. 538.06, F.S., relating to holding period.

Section 4. Amends s. 538.08, F.S., relating to stolen goods; petition for return.

Section 5. Amends s. 538.09, F.S., relating to registration.

Section 6. Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state revenues.

2. Expenditures:

The bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

As noted above, the bill expands various requirements under ch. 538, F.S., any violation of which is a first degree misdemeanor. Therefore, this bill may have a positive jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a secondhand dealer to hold specified property for 30 days instead of 15 days, and requires secondhand dealers to take digital photos for each transaction. These new requirements may increase operating costs for secondhand dealers. Additionally, the bill provides that a secondhand

dealer commits a noncriminal violation if the dealer has failed to return property to an owner or lienor under specified circumstances. A secondhand dealer who commits such violation may be liable for a fine up to \$2,500.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 19, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute (PCS) with one amendment and reported the bill favorably as a committee substitute. The PCS: (a) limited the bill's 30-day holding period to specified property; (b) removed language specifying that a secondhand dealer has a duty to return goods and references to loss-of-use damages; and (c) created a noncriminal violation. The amendment: (a) provided that a "plaintiff" rather than a "claimant" is entitled to the summary procedure provided in s. 51.011, F.S.; and (b) clarified the elements of the noncriminal violation created by the bill in s. 538.08(5), F.S.

On February 18, 2016, the Judiciary Committee adopted a strike-all amendment and reported the bill favorable as a committee substitute. The amendment:

- Creating a definition for "automated kiosk;"
- Expanding the definition of "secondhand dealer" to include dealers engaged in the business of purchasing secondhand goods by means of an automated kiosk;
- Including gift certificates and credit memos in the definition of "secondhand goods;"
- Specifying what can be used as the serial number of a secondhand good, for purposes of complying with secondhand dealer reporting requirements;
- Requiring a 30 day holding period for secondhand goods that are acquired by the secondhand dealer through an automated kiosk; and
- Authorizing the storage of secondhand goods outside the appropriate law enforcement official's jurisdiction upon specified circumstances.

This bill analysis is drafted to the committee substitute as passed by the Judiciary Committee.