State Attorney, anti-scalping statute

Number: INFORMAL

Date: September 26, 2003

The Honorable Mark A. Ober
State Attorney, Thirteenth Judicial Circuit
5th Floor County Courthouse Annex
Tampa, Florida 33602

RE: STATE ATTORNEYS–ADMISSIONS–TICKETS–interpretation of anti-scalping statute. s. 817.36(2), Fla. Stat.

Dear Mr. Ober:

You ask whether an individual or enterprise, who is not a travel agent, violates section 817.36(2), Florida Statutes, by contracting to be the exclusive distributor of tickets for an event and labeling those charges in excess of the retail admission price as a service charge or convenience fee.

Section 817.36(2), Florida Statutes, provides:

"(a) Whoever shall offer for sale or sell any ticket good for admission to any sporting exhibition, athletic contest, theater, or any exhibition where an admission price is charged and request or receive a price in excess of $1 above the retail admission price charged therefor by the original seller of said ticket shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(b) The provisions of this subsection shall apply to travel agencies that have an established place of business in this state, which place of business is required to pay state, county, and city occupational license taxes, unless such agencies are registered sellers of travel pursuant to part XI of chapter 559 and adhere to the restriction of selling said tickets as part of the travel packages specified in that part, and such travel agencies are reselling said tickets on behalf of the original sellers of said tickets. When any original seller of tickets provides a travel agency with tickets in bulk, the travel agent shall be deemed to be reselling the tickets on behalf of the original seller."

The statute has not been the subject of extensive review by the appellate courts of this state. In *State v. Sobieck*,[1] however, the court stated:

"[The act's] obvious goal is to protect the consuming public and event promoters from the economic harm done to them by persons who artificially corner the market for tickets to public events. . . . [T]icket scalpers deprive consumers of a valuable service – the availability of low-cost tickets through box office sources. The effect on the ticket market by scalpers who buy up available tickets *for resale* is to lessen public opportunity to buy tickets at the lowest prices. Statutes like section 817.36 are designed to prevent unfair cornering of the market and limit opportunities to manipulate prices, both of which damage the general public and the promoters

of public events." (e.s.)

The statute thus appears to address the resale of tickets, not the original sale of the tickets. The exception recognized in section 817.36(2)(b), Florida Statutes, for travel agencies constitutes an exception to the prohibition against reselling tickets and provides that if the conditions set forth in the statute are met, such agencies are deemed to be acting on behalf of the original seller.

The determination of whether an individual or enterprise is acting as the promoter of the event or as its agent or whether the individual or enterprise is reselling the tickets after the original seller is dependent upon the particular facts of the situation. I would note, however, that in some cases, enterprises may in fact be the promoter of the event or its agent and thus the sale of tickets by such corporation would constitute the original sale of such tickets.

For example, in *Campos v. Ticketmaster Corporation*[2] it was recognized that Ticketmaster has exclusive contracts for the sale and distribution of tickets with almost every promoter in the United States to distribute tickets for large-scale music concerts. The court stated that "[a]lthough the plaintiffs describe these fees as separate from what they call the actual purchase price of concert tickets, it appears clear that the actual purchase price and the cost of the service fees amount to the single cost of attending the concert, regardless of how that cost is divided into actual purchase price and service fees."[3]

As you note, other states such as New York and Connecticut may more clearly delineate what constitutes scalping for purposes of prosecution.[4] The Florida Legislature may wish to review the Florida statute to determine whether clarification is required.

The decision whether to prosecute under section 817.36, Florida Statutes, is one that must be made by your office based upon the particular facts. As a criminal statute, section 817.36(2), Florida Statutes, should be strictly construed.[5] As noted above, the statute would appear to contemplate the resale of tickets, not the original sale by the promoter of an event or its agent.

I trust that the above informal comments may be of assistance.

Sincerely,

Charlie Crist
Attorney General

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[1] 701 So. 2d 96, 104 (Fla. 5th DCA 1997), *review denied*, 717 So. 2d 538 (Fla. 1998).

[2] 140 F.3d 1166 (8th Cir. 1997), *cert. denied,* 525 U.S. 1102, 119 S.Ct. 865, 142 L.Ed. 2d 768 (1999). Plaintiffs had sued in federal court alleging antitrust violations.

[3] *Id.* at 1171.

[4] For example, Conn. Gen. Stat. s. 53-289, prohibits the sale of tickets at a price greater than the price fixed for admission, including tax, and a reasonable service fee not to exceed three dollars. The statute, however, recognizes:

"The owner or operator of the property on which such entertainment event is to be held or is being held may authorize, in writing, any person to sell such ticket, privilege or license of admission at a price in excess of that authorized under this section. Such writing shall specify the price for which such ticket, privilege or license of admission is to be sold. . . ."

And see N.Y. CLS Art and Cultural Affairs s. 25.03 (repealed June 1, 2005), specifically defining in subsection 9 the term "Resale" as any sale of a ticket "other than a sale by the operator or the operator's agent who is expressly authorized to make first sales of such tickets."

[5] *See, e.g., Wallace v. State*, 724 So. 2d 1176 (Fla. 1998); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *State v. Camp,* 596 So. 2d 1055, 1056 (Fla. 1992) (words in penal statute must be strictly construed, and, where words are susceptible of more than one meaning, they must be construed most favorably to the accused); *State v. Cohen,* 696 So. 2d 435, 436 (Fla. 4th DCA 1997) (rule of strict construction of penal statutes arises from due process requirement that criminal statutes must apprise ordinary persons of common intelligence what is prohibited).