



The Florida Senate

Interim Project Report 2005-108

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Committee on Banking and Insurance

Senator Rudy Garcia, Chairman

ENFORCING THE BAN ON THE RETAIL SALE OF FIREWORKS

SUMMARY

For purposes of public safety, Florida has banned the retail sale of fireworks to the general public since 1941, but allows sparklers and other novelty products to be sold. However, the fireworks code (chapter 791, F.S.) does allow exceptions to this ban which has resulted in illegal fireworks sales.

According to a national report in 2003, fireworks devices were involved in an estimated 9,300 injuries treated in U.S. hospital emergency departments, most occurring during the period surrounding the Fourth of July. Children under 15 accounted for almost half of these injuries. Nationwide, there were 24,200 fires associated with fireworks in 1999 and such fires caused \$17.2 million in direct property damage.

Currently, thirty-six states permit the sale of some or all kinds of consumer fireworks, including Florida. Seven states ban all consumer fireworks, while seven states allow only sparklers and other novelties to be sold to the public.

According to state and local fire officials, the current fireworks code is virtually unenforceable because it allows fireworks sellers to routinely use unverified forms for buyers to sign when purchasing fireworks under a claimed exemption. This has resulted in virtually no successful prosecutions under the fireworks code. As a result of the growing number of illegal fireworks sales, an estimated sixty-five cities and ten counties have enacted ordinances providing for stricter enforcement of fireworks and sparkler sales.

Recently, a statewide task force on fireworks found that injuries, deaths, and property damage were caused by illegal fireworks sales due to the exemption loopholes and recommended making the law more stringent. In July of 2004, a national consortium of leading health and safety groups called for a complete ban by the states as to all consumer fireworks.

According to industry representatives, the fireworks industry in Florida brings revenue and jobs to the state. Industry representatives insist that fireworks are safe due to state and federal testing programs and that the exemption verification form furnished by the seller and signed by the purchaser is a legitimate way to comply with state law.

Committee staff recommends the fireworks code be strengthened in the following manner:

- Establish a centralized fireworks injury-reporting program within the Office of the State Fire Marshal (SFM).
- Eliminate all of the wholesale fireworks exemptions except for certain specified provisions which must be verified at point of sale.
- Require fireworks sales facilities to carry a public and product liability insurance policy in an amount not less than \$2 million.
- Authorize the SFM to have cease and desist powers, suspension and revocation authority, and injunctive relief powers, including imposing administrative fines.
- Require manufacturers, distributors, and wholesalers of fireworks to register with and pay fees to the SFM.
- Establish a minimum age (18 years old) to purchase sparklers.
- Provide for forfeiture and disposal of fireworks or sparklers.
- Require the storage of sparklers or fireworks according to national standards.
- Increase the penalty provisions (to a third degree felony) for persons who violate specific fireworks code provisions a second or subsequent time; and,
- Clarify that the state does not preempt the regulation of fireworks and sparklers so long as local jurisdictions enact ordinances or rules which are more stringent, or provide a higher degree of safety, than provided under chapter. 791, F.S.

BACKGROUND

Purpose of this Interim Project

Traditionally, fireworks¹ have been used in our country to celebrate various occasions such as, the Fourth of July, and New Year's Eve. Today fireworks are used throughout the year to celebrate festive occasions ranging from parades and cookouts to concerts and sporting events. However, fireworks can turn a joyful celebration into a painful memory when children and adults are injured while using these products. Although some pyrotechnic devices like sparklers² can be relatively safe, all fireworks are hazardous and can cause injury. Even sparklers, when lit, can reach temperatures between 1,300 and 1,800 degrees, which is at least 200 degrees hotter than a standard butane lighter.³

For purposes of public safety, Florida banned the retail sale of fireworks to, and the use of fireworks by, the general public in 1941 when the fireworks code was initially enacted.⁴ This provision has remained in the law during its sixty-three year history. However, the law provides exceptions to this general prohibition which have resulted in illegal fireworks sales to the public. This has led to deaths, injuries, and fires caused by the misuse of fireworks by inexperienced, often young, users. Furthermore, the decision in 2002 by the Third District Court of Appeal in *State v. Miketa*, 824

So.2d 970 (Fla. 3rd DCA 2002) has rendered the fireworks law virtually unenforceable, according to state and local fire and law enforcement officials, discussed later in this report.

As a result, many municipal and county governments have enacted ordinances to eliminate these illegal sales, but this has led to a sometimes confusing patchwork of state and local regulations. This committee's interim project is designed to review these issues in order to recommend provisions for more effective regulation and enforcement of the fireworks code.

Florida's Fireworks Law

Chapter 791, F.S., sets forth the framework for the regulation of fireworks and sparklers in Florida under the State Fire Marshal's office (SFM) within the Department of Financial Services (DFS); however, the enforcement of this law is lodged with local law enforcement departments.⁵ The statute bans the retail sale of all fireworks to, and the use of fireworks by the public. However, the statutory provisions of chapter 791, F.S., exempt out certain wholesale sales and commercial uses of fireworks from this general ban. The law does allow sparklers and other novelty products,⁶ like smoke devices and noisemakers, to be sold at retail to and used by the public.⁷ This is because sparklers and similar items, as opposed to fireworks, do not contain explosive compounds, cannot be propelled through the air, and are hand held or ground based.

The SFM issues a Certificate of Registration to persons and companies engaged in the business of manufacturing, distributing, wholesaling, and retailing

¹ "Fireworks" means any combustible or explosive substance or combination of substances or any article prepared for producing a visible or audible effect by combustion, explosion, deflagration, or detonation. The term includes blank cartridges and toy cannons in which explosives are used, the type of balloons which require fire underneath to propel them, firecrackers, torpedoes, skyrockets, roman candles, dago bombs, and any fireworks containing any explosives or flammable compound or any tablets or other device containing any explosive substance (s.791.01(4)(a), F.S.).

² "Sparkler" means a device which emits showers of sparks upon burning, does not contain any explosive compounds, does not detonate or explode, is hand held or ground based, cannot propel itself through the air, and contains not more than 100 grams of the chemical compound which produces sparks upon burning (s.791.01(8), F.S.).

³ State Fire Marshal's office.

⁴ Chapter 41-20445, L.O.F. (Chapter 791, F.S.) See *State v. Mitchell*, 652 S.2d 473 (Fla. 2nd DCA 1995), where the Court found that it is "clear that the legislature intended to regulate all aspects of legal and illegal uses of explosives to protect the public safety."

⁵ Section 791.001, F.S. Chapter 552, F.S., regulates the use of explosives and specifically excludes fireworks as defined under ch. 791, F.S. (s. 552.081(2), F.S.), as does chapter 790, F.S., which regulates weapons and firearms (s. 790.001(5), F.S.).

⁶ Section 791.01(4)(c), F.S. Novelty products include: snakes or glow worms, smoke devices, trick noisemakers, party poppers, booby traps, snappers, trick matches, cigarette load, and auto burglar alarms.

⁷ Retailers that sell sparklers to the general public are classified into two groups: "seasonal retailers" are persons who sell sparklers only from June 20 through July 5 and from December 10 through January 2 (the temporary stands and tents near roads are operated by seasonal retailers); "retailers" are persons who sell sparklers throughout the year from a fixed location, for example, convenience stores and supermarkets (s. 791.015, F.S.).

sparklers and imposes an annual fee.⁸ All sparklers must be annually tested⁹ and approved by the SFM according to specified standards prior to sale or use.¹⁰ Pursuant to s. 719.01(8), F.F., any sparkler that is not approved by the SFM is classified as fireworks and therefore subject to the fireworks provisions under the law. The SFM promulgates an annual list of approved sparklers every year, which is on its website.¹¹

According to the SFM, there are currently 3,384 retailers, 1,297 seasonal retailers, 115 wholesalers, and 9 distributors registered with that office in Florida. There are no manufacturers of fireworks registered in the state.

The law allows wholesalers, distributors, and manufacturers registered with the SFM to sell fireworks *at wholesale*, but only if the purchaser meets one of the nine exceptions enumerated under the fireworks code.¹² These exemptions allow the sale of fireworks to:

1. other manufacturers, distributors, or wholesalers registered with the SFM;
2. other registered manufacturers, distributors, or wholesalers who ship fireworks directly out of Florida;
3. persons holding a permit from any board of county commissioners (or municipality) at the display covered by such permit;¹³

⁸ Section 791.05, F.S. The certificate issued by the SFM is mandatory and contains the licensed address where sales are permitted and must be posted at the registered location. Fees for manufactures, distributors, and wholesalers of sparklers are \$1,000; for retailers the fees are \$15; and for seasonal retailers, the fee is \$200.

⁹ Sparklers, unless they are subsequently altered, are only tested once by the SFM.

¹⁰ Sections 791.015 and 791.013, F.S. Sparklers must be submitted for testing to the SFM's Bureau of Forensic Fire and Explosives Analysis Laboratory in Tallahassee prior to September of each year. The SFM does not test novelties or trick noisemakers.

¹¹ <http://www.fldfs.com/sfm/sparklerindex.htm>. The SFM also publishes its list of approved sparklers in the Florida Administrative Weekly. The list is effective February 1 of each year and expires each January 31.

¹² Sections 791.04 and 791.07, F.S. The sale must be a wholesale transaction.

¹³ Section 791.02, F.S., allows counties and cities to adopt reasonable rules and regulations for the granting of permits for the supervised public display of fireworks within their boundaries. Display operators must apply for a permit at least 15 days in advance and obtain approval from municipal chiefs of police and fire departments.

4. railroads or other transportation agencies for signal, illumination, quarrying, blasting or other industrial use;
5. a show or theater for the sale or use of blank cartridges;
6. athletics or sports for signal or ceremonial purposes;
7. military organizations, or organizations composed of the Armed Forces of the United States;
8. licensed manufacturers who experiment by exploding and storing fireworks in their own compounds; and,
9. agricultural works and fish hatcheries in order to frighten birds. The Department of Agriculture and Consumer Services governs this provision pursuant to their rules, which mandate that persons who utilize this exemption must first file a written statement with the county sheriff verifying such persons are engaged in agriculture or operate a fish hatchery.¹⁴ These persons must then present this statement to the seller at the point of sale.¹⁵

It is a first-degree misdemeanor penalty for any person, firm, copartnership, or corporation to offer for sale, expose for sale, sell at retail, or use or explode any fireworks.¹⁶ It is not, however, a violation of the law to merely possess fireworks. The law imposes a similar penalty for individuals, members of a partnership, officers of an association or corporation who violate the terms of the fireworks code¹⁷ and for persons who alter approved sparklers and subsequently sell such products or fraudulently represent a device is approved for sale

Section 791.03, F.S., authorizes counties to require a bond of not less than \$500 for any damages caused by a fireworks display.

¹⁴ Rules 5A-3.001 and 5A-3.002, F.A.C.

¹⁵ According to the Department of Agriculture and Consumer Affairs, this provision is used primarily by small blueberry and strawberry farmers and those who operate small tropical fish hatcheries to scare away birds. Under s. 597.004, F.S., (aquaculture regulation) fish farmers must apply to the Department to receive a certificate and be inspected. Large agriculture farmers do not use fireworks, but employ propane air cannons to frighten birds.

¹⁶ Section 791.02, F.S. A misdemeanor penalty is one year in jail and a \$1,000 fine.

¹⁷ Section 791.06, F.S. Firms, copartnerships, or corporations found to violate the law are subject to a \$1,000 fine.

as a sparkler by the SFM when it is not approved.¹⁸ In addition, the sheriff or any other police officer is authorized to seize, take or remove at the expense of the owner, all stocks of fireworks or combustibles offered for sale, stored, or held in violation of chapter 791, F.S.¹⁹

The outdoor display of fireworks is governed by the National Fire Protection Association (NFPA), which establishes minimum safety standards for outdoor public displays.²⁰ Local governments may adopt more stringent restrictions for the outdoor display of fireworks, but cannot enact less stringent provisions. The law further outlines restrictions on the storage of sparklers to ensure such products are kept in a safe manner.²¹

Legislative History

Since the inception of the fireworks law in 1941, the State of Florida has prohibited the retail sale of fireworks to and the use of fireworks by members of the public.²² Novelty items like toy guns or other devices containing twenty-five hundredths grains or less of explosive compound were allowed to be sold as they are today. Wholesale sales of fireworks were allowed but only if persons met one of the enumerated exemptions referenced above. The agriculture and fish hatchery exemptions were added in 1955 and 1957, respectively.²³

Provisions empowering the board of county commissioners to adopt rules and regulations for the granting of permits for the supervised public displays of fireworks were adopted in 1961.²⁴ A definition of

sparklers was added in 1984,²⁵ and comprehensive changes were enacted in 1987.²⁶ These provisions included the testing and approval of sparklers by the SFM; the registration of sparkler manufacturers, distributors, wholesalers, and retailers with the SFM; the definition of terms relating to novelties and trick noisemakers; and, the addition of language stating that chapter 791 was to be applied uniformly throughout the state²⁷ with enforcement remaining at the local level. Further changes were made in subsequent years including requiring registration fees,²⁸ authorizing outdoor displays of fireworks to be covered by a national code,²⁹ and authorizing the SFM to develop registration rules.³⁰

Recent Legislation

During the 2004 session, two bills representing opposing views were filed. Senate Bill 2686³¹ made substantial changes to ch. 791, F.S., in order to strengthen the regulatory and enforcement provisions of the law. These changes included: eliminating the majority of wholesale fireworks exemptions; requiring purchasers to obtain, and sellers to keep, records verifying purchasers qualified for one of the retained exemptions;³² authorizing the SFM to have increased enforcement powers; mandating that fireworks manufacturers, distributors, and wholesalers register with and pay fees to the SFM; establishing a minimum age (18 years old) to purchase sparklers; increasing the penalty provisions (to a third degree felony) for persons who violated specific code provisions a second or subsequent time; and clarifying that local jurisdictions could enact ordinances regulating fireworks if such ordinances were more stringent or provided a higher degree of safety than provided under the statute.

¹⁸ Section 791.013, F.S.

¹⁹ Section 791.05, F.S.

²⁰ Section 791.012, F.S. NFPA 1123, Code for Fireworks Display, 1995 Edition, approved by the American National Standards Institute. The NFPA 1123 Code applies to the construction, handling, use, and operation of fireworks intended solely for public outdoor fireworks display and to the general conduct and operation of the display.

²¹ Section 791.055, F.S.

²² Chapter 41-20445, L.O.F. The 1941 definition of fireworks is similar to the terms used presently in ch. 791, F.S., except sparklers were included as fireworks and therefore prohibited from being sold at retail. In 1957, the law was changed to allow sparklers to be sold to the public (ch. 57-338, L.O.F.).

²³ The agricultural use exemption was placed in ch. 791 in 1955 (ch. 55-29780, L.O.F.), while the fish hatchery exemption was added in 1957 (ch. 57-336, L.O.F.).

²⁴ Chapter 61-312, L.O.F.

²⁵ Chapter 84-201, L.O.F.

²⁶ Chapter 87-118, L.O.F.

²⁷ The issue of whether this provision preempts local governments from regulating fireworks is currently being litigated before the Second District Court of Appeal in *Phantom Fireworks of Clearwater v. Pinellas County*, (Case No. 03-5408). See further discussion below under the Recent Litigation section.

²⁸ Chapter 89-233, L.O.F.

²⁹ Chapter 96-285, L.O.F.

³⁰ Chapter 2000-370, L.O.F.

³¹ This bill (Sen. Lawson) died in the Committee on Banking and Insurance. Representatives with the fire enforcement associations supported this legislation.

³² The retained exemptions pertained to the shipping of fireworks out of state, the public display of fireworks, and the use of fireworks for agriculture work or for use in fish hatcheries.

Senate Bill 2706 was supported by many in the fireworks industry.³³ That legislation struck the ban on the sale and use of fireworks and expanded the types of fireworks which could be sold to the public to include all “consumer fireworks.”³⁴ The bill allowed fireworks to be sold to persons 18 years of age or older who certified in writing that they intended to use fireworks solely for noncommercial purposes and understood that if misused, fireworks could cause injury, death, or serious property damage; it limited the number of temporary tent facilities by imposing ownership, registration, and location requirements; and further restricted the areas where local governments could impose regulations.³⁵

Federal Fireworks Provisions

The Federal Hazardous Substances Act (Act)³⁶ classifies explosives, including fireworks, and prohibits the sale of the most dangerous types of fireworks to consumers. These banned fireworks include large reloadable mortar shells, cherry bombs, aerial bombs, M-80 salutes and larger firecrackers containing more than two grains of powder. Also banned are mail-order kits designed to build these fireworks. The U.S. Consumer Product Safety Commission (CPSC) is responsible for enforcing the fireworks regulations under the Act, including preventing the import of illegal fireworks from other countries. It is a violation of Federal law to sell, distribute, or import fireworks that violate provisions of the Act.

The CPSC regulates all fireworks devices intended for use by consumers,³⁷ (so called “consumer fireworks”

which are legal under the Act) and has issued mandatory safety regulations for these devices. In order to be classified as “consumer fireworks”, the CPSC tests these products, which must meet various requirements with regard to composition, the quality of pyrotechnic material, and the stability of the product under heat and stress.³⁸ These regulations aim to prevent injuries and death from hazards from fireworks to ensure that such devices work properly and safely. Fireworks, which do not meet these requirements, are banned hazardous substances.

Florida law limits the types of “consumer fireworks” that may be sold to and used by the public. Only devices that meet the definition of “sparkler” and have been tested and approved by the SFM are allowed to be sold to the public. Pursuant to s. 719.01(8), F.F., any sparkler that is not approved by the SFM is classified as fireworks which means that such products may only be sold subject to persons qualifying for one of the wholesale exemptions noted earlier in this report.

METHODOLOGY

Staff conducted interviews with a number of interested parties including the Division of State Fire Marshal, the League of Cities (League), the Florida Association of Counties, the Florida Fire Chiefs Association., the Florida Fire Marshals and Inspectors, the Florida Professional Firefighters Association, the Florida Department of Agriculture and Consumer Affairs, and representatives with the fireworks industry. Staff reviewed the history of Chapter 791, F.S., as well as recent legislative proposals to amend the law. Local government ordinances were reviewed along with the Federal fireworks provisions. Recent court cases were analyzed as well.

³³ This bill (Sen. Alexander) was withdrawn prior to introduction.

³⁴ The bill adopted the federal standard for “consumer fireworks” discussed below under the Federal Fireworks Provisions section.

³⁵ These areas included the use of fireworks by consumers on public lands; setting the hours and days fireworks could be used; and zoning and land use regulations relating to construction of facilities for fireworks sales.

³⁶ 15 U.S.C. s. 1261.

³⁷ The term “consumer fireworks” means any small firework device designed to produce visible effects by combustion and which must comply with the construction, chemical composition, and cautionary labeling regulations of the CPSC, as set forth in title 16, Code of Federal Regulations, parts 1500 and 1507. Some small devices designed to produce audible effects are included, such as whistling devices, ground devices containing 50 mg or less of explosive materials, and aerial devices containing

130 mg or less of explosive materials. The U.S. Dept. of Transportation (DOT) at 49 CFR 172.01 classifies consumer fireworks as fireworks UN0336 and UN0337. The DOT sets standards for the classification and transportation of consumer fireworks, (referred to as DOT 1.4G).

³⁸ These performance requirements range from specifying the types of fuses used in fireworks to prohibiting the use of certain chemicals. Fireworks intended solely for commercial use, such as fireworks used in public displays, are not covered by CPSC regulations. However, any professional or display fireworks device which contains a specific defect that presents a risk to consumers (such as those observing fireworks displays) may be subject to provisions of the Consumer Product Safety Act, 15 U.S.C., s. 2064.

Committee staff obtained fireworks information from the National Conference of State Legislators, the U.S. Consumer Product Safety Commission and other national and local fireworks organizations.

FINDINGS

Fireworks Related Injuries, Deaths, and Fires

In its annual fireworks report, the U.S. Consumer Product Safety Commission (CPSC) estimates that fireworks devices were involved in 9,300 injuries treated in U. S. hospital emergency departments during calendar year 2003.³⁹ Six deaths were associated with fireworks during the same period. Of the six deaths, four were associated with aerial fireworks while the other two occurred in fires that were started by fireworks.

During 2003, the CPSC reports that an estimated 6,800 fireworks-related injuries were treated in hospital emergency departments during the one-month period surrounding the Fourth of July (June 20, 2003 - July 20, 2003).⁴⁰ This figure represents over two-thirds of the annual fireworks-related injuries for that year.⁴¹ For 2002, the report estimates that there were 8,800 fireworks injuries with 5,700 injuries during the one-month period surrounding the Fourth of July.

Injuries to children were a major component of the total fireworks-related injuries with children under 15 accounting for almost half the estimated injuries. The highest injury rates were for young teenagers--those aged 10 to 14. Sparklers accounted for more than half the injuries for children under 5 years of age.

About three times as many males (71 percent) were injured as females and burns were the leading type of fireworks injury accounting for two-thirds of the total fireworks-related injuries. The parts of the body most often injured were hands, eyes, head, face and ears. Among the types of fireworks, firecrackers were

associated with the greatest number of estimated injuries at 1,600, followed by bottle rockets at 1,000 and sparklers at 700.

Nationwide, there were 24,200 fires associated with fireworks in 1999 according to the National Fire Protection Association (NFPA). Most of the fires were outdoor brush or refuse fires which usually began with the outdoor use of fireworks. For example, when a device is launched outside and lands on a roof or other location, it can ignite combustibles before being retrieved. The fires started by fireworks caused \$17.2 million in direct property damage.

According to the recent report of fireworks-related injuries, deaths, and fires,⁴² the trend in fireworks-related injuries has been up and down since 1996, with a slight net increase as of 2002 (and 2003). An unusually large number of injuries occurred in 2000, with most of the difference associated with New Year's celebrations of the last year of the millennium. Injuries were higher in 1984-1995 than in recent years, but lower in the mid-1970s and earlier.

According to the SFM, there is no standardized statewide tracking system for the reporting of fireworks related injuries or deaths in Florida. Nor does that office track the number of fires that are associated with fireworks. Some local governments keep track of this type of data, but there are no uniform record-keeping procedures in place.

Fireworks Laws in Other States

Currently, thirty-six states, plus the District of Columbia, permit the sale of some or all kinds of consumer fireworks.⁴³ Florida is included in this category because it allows the sale of sparklers and, as discussed earlier, the sale of fireworks to persons who claim they qualify for an exemption. Many of these states typically ban the most dangerous types of fireworks, including large firecrackers, rockets, and Roman candles, essentially anything that can explode or is launched into the air. Further, most of these states permit further regulation by local governments. In some instances, cities and counties can completely ban fireworks or limit the types that can be sold and used within their boundaries.⁴⁴ Variations in local regulation

³⁹ 2003 *Fireworks Annual Report*, U.S. Consumer Product Safety Commission (CPSC). The CPSC monitors a sample of hospital departments and produces annual injury estimates associated with fireworks and other consumer products based upon the injuries that are recorded by these selected hospitals. The CPSC also conducts telephone follow-up investigations of some fireworks-related injuries.

⁴⁰ Staff with the CPSC estimated that there were 5,700 injuries during 2002 for that one-month period.

⁴¹ There were a relatively small number of injuries (100) associated with public fireworks displays.

⁴² John R. Hall, Jr., Fire Analysis & Research Division, National Fire Protection Association, April 2004.

⁴³ U.S. Consumer Product Safety Commission, Publication # 12, March 2004.

⁴⁴ *State Regulation of Fireworks* by Jeanne Mejeur,

of fireworks makes enforcement more difficult because what is illegal to buy or use in one city, county, or state may be legal to purchase or use in another community.

Seven states ban all consumer fireworks,⁴⁵ while seven states allow only sparklers and other novelties to be sold to the public.⁴⁶

Recent Litigation Involving Fireworks and Local Ordinances regulating Fireworks

Two years ago, the Third District Court of Appeal in *State v. Miketa*, held that chapter 791, F.S., did not require a seller of fireworks to use due diligence to determine if a purchaser met one of the statutory wholesale exemptions under the law.⁴⁷ The Court reasoned that all that is required of the seller, before he could lawfully sell the fireworks, was for the purchaser to sign a statement, supplied by the seller, that he is covered by one of the exemptions to the statute. Since the statute was penal in nature, it should be strictly construed against the state. Because the fireworks statute failed to include a requirement that the seller make a bona fide attempt to determine if the purchase is exempt by requiring supporting documentation, such a requirement could not be read into the law.

The *Miketa* case involved the criminal prosecution of an individual for the illegal sale of fireworks to an undercover detective in violation of s. 791.04, F.S. The State had argued that when a purchaser of fireworks executes an affidavit (declaring that the purchaser meets one of the statutorily provided exemptions for sales under s. 791.04, F.S.), the seller of the fireworks must request further documentation to establish the transaction is, in fact, exempt.

This decision has rendered the proscriptions against

selling illegal fireworks “meaningless,” according to the Director of the State Fire Marshal’s office.⁴⁸ This is because fireworks sellers routinely use these affidavits and require buyers to sign these forms “falsely”, stating that they are purchasing fireworks under one of the exemptions when in fact they are not, according to the Director and other fire officials. Since the affidavit is not verified, virtually anyone can purchase illegal fireworks. These officials further state that they do not know of any successful prosecutions which have occurred under the fireworks law.

According to these same officials, some fireworks vendors do not even use “exemption affidavits” when selling fireworks. This fact was illustrated when a member of the staff of this committee purchased fireworks (firecrackers) in Tallahassee on July 3, 2004. The staff member was not required to sign an exemption affidavit or to offer evidence that the staff person met any of the statutory exemptions.

In the past several years, at least sixty-five municipalities and ten counties have enacted ordinances to provide for more stringent regulation of the sale and use of fireworks than under chapter 791, F.S.⁴⁹ According to local government officials, passage of these ordinances is due to scores of complaints these officials have received from citizens concerning the illegal use of fireworks.⁵⁰ This is because these devices are no longer just a nuisance, but cause injury, property damage, noise pollution, and result in local entities expending scarce resources to clean up fireworks debris.

Several of the ordinances require fireworks buyers to provide documentation showing compliance with the exemption requirements under ch. 791, F.S., and mandate vendors obtain and record copies of a buyer’s documentation, or occupational or business license evidencing such compliance. The regulations furthermore range from completely banning the sale of all fireworks within the city’s limits (and prohibiting any exemptions from the ban)⁵¹ to establishing permitting, zoning, storage, and disposal restrictions on the sale of fireworks and sparklers.

National Conference of State Legislatures, 2002.

⁴⁵ The ban includes those fireworks that are allowed by CPSC regulations. The states that ban fireworks are Arizona, Delaware, Georgia, New Jersey, New York, Massachusetts, and Rhode Island.

⁴⁶ States which allow sparklers and other novelties are Connecticut, Illinois, Iowa, Maine, Ohio, Pennsylvania and Vermont.

⁴⁷ 824 So.2d 970 (Fla 3rd DCA 2002). The Court noted that the question of how the fireworks sale was treated for sales tax purposes would be instructive as to the legality of the sale. That is because no collection of sales tax would be evidence of a wholesale transaction while the collection of sales tax in conjunction with the purchase would be evidence of a retail sale. See, Attorney General Opinion to Senator Lawson (AGO 2001-35).

⁴⁸Memorandum to Committee Staff from Randall Napoli, Director, October 25, 2004.

⁴⁹ Committee staff obtained these estimates from the League of Cities and the Florida Assn. of Counties.

⁵⁰ Greg Northrup, Mayor of Daytona Beach Shores.

⁵¹ St. Augustine ordinance 2004-18; enacted October 25, 2004. It does authorize the granting of permits for supervised public displays of fireworks.

In 2003, Pinellas County enacted an ordinance applying stricter requirements as to the enforcement of the state fireworks law because both purchasers and fireworks sellers were able to “circumvent state law and hide behind the guise of sparkler sales in order to sell illegal fireworks in Pinellas County.”⁵² In passing the ordinance, the county stated that it was a proper exercise of its home rule authority to enact legislation for the safety and welfare of its citizens.

Phantom Fireworks Company sued the county stating that the Pinellas ordinance was preempted by the sale of fireworks under ch. 791, F.S. Phantom argued that the specific language in s. 791.001, F.S., which stated that the fireworks code “shall be applied uniformly throughout the state” preempted any local government regulation. The Circuit Court rejected Phantom’s argument stating that state law did not preempt or specifically conflict with the ordinance. This case is on appeal before the Second District Court of Appeal.

Recently, the City of Daytona Beach Shores prevailed in an action in Federal Court involving its fireworks ordinance.⁵³ That regulation established building permit requirements along with other restrictions for selling fireworks. A local fireworks seller challenged the ordinance on a number of grounds including due process, equal protection, inverse condemnation, and state preemption. The Court rejected all the seller’s arguments and granted the City’s summary judgment motion.⁵⁴

Advocates for More Stringent Fireworks Regulation and Enforcement

In November 2004, the Florida Fire Service Task Force on Fireworks issued its “White Paper” recommending that “more stringent” fireworks laws be adopted by the State since the law had “not undergone a comprehensive legislative review since its inception in 1941.” The Task Force, composed of a cross section of state, county, and city fire, law enforcement, health, and government officials,⁵⁵ found that injuries, deaths,

and property damage were caused by the illegal sales of fireworks; that the exemptions under current law were utilized by the fireworks industry to circumvent the law and allow for the purchase of illegal fireworks (due to the use of unverified exemption affidavits); and that the materials used in the construction of fireworks could be used to create explosive and incendiary devices which could pose a “threat to homeland security.” It recommended, at a minimum, that proper documentation and verification procedures be used by persons qualifying for an exemption and that exemption provisions be clearly defined.

State and local fire and government officials state that most of the fireworks exemptions enacted in 1941 are no longer necessary. According to the Director of the office of SFM, with the “exception of the occasional locally produced theatre performance, we are unable to verify that any of the exemptions are being used as they were intended. Since there is no verification of one’s claim to an exemption, they have simply become the rule for doing business rather than the exception.” Railroads, military organizations, organizers of sporting events, theaters and large agricultural concerns no longer utilize fireworks, but employ other means.⁵⁶ For example, as noted above, the vast majority of agriculture farmers employ air cannons set on timers to scare away birds.

On July 1, 2004, a national consortium of leading health and safety groups called for a ban by the states as to all consumer fireworks.⁵⁷ Citing deaths, injuries and fires, the group strongly recommended that adults and children not use these devices and instead attend public fireworks displays conducted by professionals. The group came together to call attention to the dangers of seemingly harmless fireworks. For example,

Firefighters; Florida League of Cities; Florida Assn. of Counties; Florida Division of the State Fire Marshal; Florida Division of Forestry; Florida Sheriffs Assn.; Florida Fire Marshals and Inspectors Assn.; Florida Emergency Physicians; National Fire Protection Assn.; Ft Lauderdale Fire Rescue; City of Daytona Beach Shores; Florida State Attorneys Office; and, Florida Department of Revenue.

⁵⁶ For example, railroads may obtain explosives under other state laws including chapter 552, F.S.

⁵⁷ Members of the group are: American Academy of Ophthalmology; American Academy of Pediatrics; American Assn. for Hand Surgery; American Burn Assn.; American College of Emergency Physicians; International Assn. of Fire Chiefs; International Assn. of Fire Fighters; International Fire Marshals Assn.; National Assn. of State Fire Marshals; and, National Fire Protection Assn.

⁵² Fireworks Ordinance #03-48. Answer Brief of Respondent Pinellas County in *Phantom Fireworks of Clearwater v. Pinellas County*; Appeal No. 2D03-5408.

⁵³ *Davken, Inc. v. City of Daytona Beach Shores*, (Case No. 6:04-cv-207-Orl-19DAB, U.S. District Court for the Middle District of Florida, Orlando Division.)

⁵⁴ Order by Chief Federal Judge Patricia C. Fawsett dated November 12, 2004.

⁵⁵ Members of the Task Force included the following: Florida Fire Chiefs Assn.; Florida Professional

in 2002, eight out of nine emergency department fireworks injuries involved fireworks that federal regulations permit consumers to use, e.g., “consumer fireworks.” The advocates stated that “fireworks can result in scars and disfigurement that can last a lifetime.”

Response of the Fireworks Industry in Florida

According to industry representatives, the fireworks industry in Florida brings revenue and jobs to the state. The industry consists primarily of twelve corporate entities⁵⁸ and numerous smaller “mom and pop” companies. Economically, this breaks down to approximately 1,100 jobs, an estimated \$1 million in tax revenues, and another \$3 million in related commerce annually according to these representatives. For example, one of the larger Florida-based companies is Galaxy Fireworks, a multi-million dollar corporation that wholesales, retails, and imports consumer fireworks products in three states. Located in Tampa, it has both permanent stores and temporary tent locations and, along with its full-time staff, utilizes an estimated 100-125 independent contractors per sales season (March through July) to carry out these operations. It has an estimated market share of 20 percent statewide and 75 percent in the Tampa Bay area.

Industry representatives stress that if the State further restricts the sales of consumer fireworks, then a large portion of the revenues listed above would be lost, and many of the people currently employed by the industry would be filing for unemployment compensation. This does not include the budgetary increases that would be required at the State level for additional enforcement costs, the cost of potential lawsuits from retailers and users alike and the increased injuries from illegal devices that tend to fill the void when consumer fireworks are unavailable.

The volume of current consumer fireworks sales in Florida should be an obvious indication of the level of demand by the citizenry for the products, state these representatives. For example, the usage rate for consumer fireworks has steadily increased over the past 20 years, growing from 51.9 million lbs. in 1983 to over 220 million lbs. in 2003. In 2002, the total volume of consumption of all types of fireworks was 190.1 million pounds.

Industry representatives emphasize that chapter 791, F.S., preempts all local governments from enacting any ordinance to further restrict the regulation of fireworks. As noted above, the preemption issue is currently before the Second District Court of Appeal in *Phantom Fireworks of Clearwater v. Pinellas County*. Further, industry officials state that:

- fireworks are safe due to state and federal testing programs and regulations;
- statistics relating to injuries, deaths, and property damage cited by advocates for stricter laws are based only on estimates and have been decreasing over the years even though the fireworks sales are increasing; and,
- the use of the verification form furnished by the seller and signed by the purchaser under one of the exemptions under ss. 791.04 and 791.07, F.S., is regarded as a “legitimate business decision made by the defendants in an effort to get an affirmative representation from the seller as to their intended uses” under the *Miketa* decision.

RECOMMENDATIONS

Based on the findings contained in this report, committee staff recommends that in order to protect the public’s safety and welfare, to promote effective enforcement of the exemption provisions, and to establish statewide fireworks regulations, thereby minimizing differences between state and local regulations, the fireworks code under ch. 791, F.S. should be strengthened in the following manner:

1. Establish a centralized fireworks injury-reporting program within the State Fire Marshal and provide that office with rule making authority to implement this program.
2. Eliminate the wholesale fireworks exemptions except for those provided below:
 - manufacturers, distributors, or wholesalers registered with the SFM;
 - registered manufacturers, distributors, or wholesalers who ship fireworks directly out of state or store fireworks in compliance with the law;

- persons holding permits issued by a local government for the purpose of conducting a public fireworks display; and,
- persons engaged in agricultural works or who operate fish hatcheries.

3. Require that a person who is engaged in agricultural works or who operates fish hatcheries may use fireworks solely and exclusively for the purpose of frightening birds from doing harm to such person's agriculture works or fish hatchery operation; however, such person:

- must first file with the fire official having jurisdiction in the city or county in which the person is engaged in agricultural works or the operation of a fish hatchery, a sworn affidavit in writing that he or she is engaged in agricultural works or operates a fish hatchery, describing the nature of such and desires to use fireworks for the purposes stated therein;
- the fire official must determine that the sworn affidavit is sufficient and the request valid, and shall issue a permit on a form provided by the SFM.
- at the point of sale, the purchaser must give a copy of the permit to the manufacturer, distributor, or wholesaler making the sale and a copy retained by the seller.

4. Require fireworks sales facilities to carry a public and product liability insurance policy in an amount not less than \$2 million.

5. Authorize the SFM to have cease and desist powers, suspension and revocation authority, and injunctive relief powers, including imposing administrative fines.

6. Require manufacturers, distributors, and wholesalers of fireworks register with and pay fees to the SFM.

7. Establish a minimum age (18 years old) to purchase sparklers.

8. Provide for court ordered forfeiture and disposal of contraband fireworks or sparklers.

9. Require the storage of sparklers or fireworks according to national standards.

10. Increase the penalty provisions (to a third degree felony) for persons who violate specific fireworks code provisions a second or subsequent time; and,

11. Clarify that the state does not preempt the regulation of fireworks and sparklers so long as local jurisdictions enact ordinances or rules which are more stringent, or provide a higher degree of safety, than provided under chapter. 791, F.S.