

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 1171 Schemes to Defraud

SPONSOR(S): Judiciary Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Leshko	Kramer

SUMMARY ANALYSIS

Section 817.034, F.S., prohibits a person from committing organized fraud by engaging in a scheme to defraud and obtaining property thereby. A "scheme to defraud" is a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act. Under s. 817.034, F.S., if the amount of property obtained has an aggregate value of:

- \$50,000 or more, the offender commits a first-degree felony.
- \$20,000 or more, but less than \$50,000, the offender commits a second-degree felony.
- Less than \$20,000, the offender commits a third-degree felony.

Section 817.034, F.S., also prohibits a person from committing communications fraud by engaging in a scheme to defraud and, in furtherance of that scheme, communicating with any person with intent to obtain property from that person. If the value of the property obtained or endeavored to be obtained by the communication is valued at:

- \$300 or more, the offender commits a third-degree felony.
- Less than \$300, the offender commits a first-degree misdemeanor.

Section 540.08, F.S., prohibits the unauthorized publication of the name or likeness of a person. If proper consent is not obtained prior to publication, specified persons may bring a civil cause of action to enjoin the unauthorized use and recover damages, including an amount that would have been a reasonable royalty.

PCS for CS/HB 1171 amends s. 817.034, F.S., to prohibit a person from committing organized fraud by engaging in a scheme to defraud by utilizing false or fraudulent endorsements of nonconsenting parties; and from committing communications fraud by engaging in a scheme to defraud by utilizing false or fraudulent endorsements of nonconsenting parties and, in furtherance of that scheme, communicating with any person with the intent to obtain property from that person.

The bill reclassifies organized fraud and communications fraud offenses that are committed against a person 65 years of age or older, a minor, or a person with a mental or physical disability. Under the bill, such offenses will be reclassified as follows:

- A misdemeanor of the first-degree is reclassified to a felony of the third-degree.
- A felony of the third-degree is reclassified to a felony of the second-degree.
- A felony of the second-degree is reclassified to a felony of the first-degree.
- A felony of the first-degree is reclassified to a life felony.

The bill also provides for a civil cause of action for any person whose image or likeness was used without consent in a scheme to defraud and authorizes the person to recover an amount for damages caused by the use of his or her image or likeness.

The bill may have a positive indeterminate impact on jail and prison beds. See Fiscal Comments.

The bill provides an effective date of October 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Communications Fraud Act

Organized Fraud

Section 817.034, F.S., prohibits a person from committing organized fraud by engaging in a scheme to defraud and obtaining¹ property thereby.²

A “scheme to defraud” is a systematic, ongoing course of conduct with intent to defraud one or more persons, or with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act.³

Under s. 817.034, F.S., if the amount of property obtained has an aggregate value of:

- \$50,000 or more, the offender commits a first-degree felony.^{4, 5}
- \$20,000 or more, but less than \$50,000, the offender commits a second-degree felony.^{6, 7}
- Less than \$20,000, the offender commits a third-degree felony.^{8, 9, 10}

Communications Fraud

Section 817.034, F.S., also prohibits a person from committing communications fraud by engaging in a scheme to defraud and, in furtherance of that scheme, communicating¹¹ with any person with intent to obtain property from that person.¹²

If the value of the property obtained or endeavored to be obtained by the communication is valued at:

- \$300 or more, the offender commits a third-degree felony.¹³
- Less than \$300, the offender commits a first-degree misdemeanor.¹⁴

Notwithstanding any other provisions of law:

- Separate judgments and sentences for organized fraud and for each offense of communications fraud may be imposed when all such offenses involve the same scheme to defraud.¹⁵
- A criminal action or civil action or proceeding under s. 817.034, F.S., may be commenced at any time within five years after the cause of action accrues; however, in a criminal proceeding under this section, the period of limitation does not run during any time when the defendant is

¹ Section 817.034(3)(b), F.S., defines “obtain” to mean temporarily or permanently depriving any person of the right to property or a benefit therefrom, or to appropriate the property to one’s own use or to the use of any other person not entitled thereto.

² S. 817.034(4)(a), F.S.

³ S. 817.034(3)(d), F.S.

⁴ A first-degree felony is punishable by up to 30 years’ imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

⁵ Ranked as a Level 7 offense on the Criminal Punishment Code’s offense severity ranking chart (OSRC) under s. 921.0022, F.S.

⁶ A second-degree felony is punishable by up to 15 years’ imprisonment and a \$10,000 fine. *Id.*

⁷ Ranked as a Level 5 offense on the OSRC.

⁸ A third-degree felony is punishable by up to 5 years’ imprisonment and a \$5,000 fine. *Id.*

⁹ Ranked as a Level 3 offense on the OSRC.

¹⁰ S. 817.034(4)(a)(1.-3.), F.S.

¹¹ Section 817.034(3)(a), F.S., defines “communicate” to mean transmitting or transferring or causing another to transmit or transfer signs, signals, writing, images, sounds, data, or intelligences of any nature in whole or in part by mail, or by wire, radio, electromagnetic, photoelectronic, or photooptical system.

¹² S. 817.034(4)(b), F.S.

¹³ This offense is unranked on the OSRC, and as such, defaults to the statutorily assigned level as described in s. 921.0023, F.S. Accordingly, because the offense is punishable as a third-degree felony it is ranked as a Level 1 offense on the OSRC.

¹⁴ A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year and a \$1,000 fine. Ss. 775.082 and 775.083, F.S.

¹⁵ S. 817.034(4)(c), F.S.

continuously absent from the state or is without a reasonably ascertainable place of abode or work within the state, but the period of limitation otherwise applicable may not be extended by more than one year.¹⁶

Criminal Punishment Code

Felony offenses which are subject to the Criminal Punishment Code¹⁷ are listed in a single offense severity ranking chart (OSRC),¹⁸ which uses 10 offense levels to rank felonies from least severe to most severe. Each felony offense listed in the OSRC is assigned a level according to the severity of the offense.^{19, 20} A person's primary offense, any other current offenses, and prior convictions are scored using the points designated for the offense severity level of each offense.^{21, 22} The final score calculation, following the scoresheet formula, determines the lowest permissible sentence that a trial court may impose, absent a valid reason for departure.²³

Evidencing Prejudice While Committing an Offense

Section 775.085, F.S., reclassifies the penalty for any felony or misdemeanor to the next highest degree if the commission of the offense evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age²⁴ of the victim, as follows:

- A misdemeanor of the second-degree is reclassified to a misdemeanor of the first-degree;
- A misdemeanor of the first-degree is reclassified to a felony of the third-degree.
- A felony of the third-degree is reclassified to a felony of the second-degree.
- A felony of the second-degree is reclassified to a felony of the first-degree.
- A felony of the first-degree is reclassified to a life felony.²⁵

The offender must have perceived, known, or have had reasonable grounds to perceive or know that the victim was within one of the classes delineated above for the penalty reclassification to apply.²⁶

Civil Cause of Action

Additionally, a person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of s. 775.085, F.S., has a civil cause of action for treble damages,²⁷ an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney fees and costs.²⁸

Evidencing Prejudice While Committing an Offense Against a Person with a Mental or Physical Disability

¹⁶ S. 817.034(4)(d), F.S.

¹⁷ All felony offenses, with the exception of capital felonies, committed on or after October 1, 1998, are subject to the Criminal Punishment Code. S. 921.002, F.S.

¹⁸ S. 921.0022, F.S.

¹⁹ S. 921.0022(2), F.S.

²⁰ Felony offenses that are not listed in the OSRC default to statutorily assigned levels, as follows: an unlisted third-degree felony defaults to a Level 1; an unlisted second-degree felony defaults to a Level 4; an unlisted first-degree felony defaults to a Level 7; an unlisted first-degree felony punishable by life defaults to a Level 9; and an unlisted life felony defaults to a Level 10. S. 921.0023, F.S.

²¹ Ss. 921.0022 and 921.0024, F.S.

²² A person may also accumulate points for factors such as victim injury points, community sanction violation points, and certain sentencing multipliers. S. 921.0024(1), F.S.

²³ If a person scores more than 44 points, the lowest permissible sentence is a specified term of months in state prison, determined by a formula. If a person scores 44 points or fewer, the court may impose a nonprison sanction, such as a county jail sentence, probation, or community control. S. 921.0024(2), F.S.

²⁴ Section 775.085(1)(b)1., F.S., defines "advanced age" to mean that the victim is older than 65 years of age.

²⁵ S. 775.085(1)(a), F.S.

²⁶ S. 775.085(3), F.S.

²⁷ "Treble damages" are damages that, by statute, are three times the amount that the fact-finder determines is owed. Black's Law Dictionary (3d pocket ed. 2006).

²⁸ S. 775.085(2), F.S.

Section 775.0863, F.S., reclassifies the penalty for any felony or misdemeanor to the next highest degree if the commission of the offense evidences prejudice based on a mental or physical disability²⁹ of the victim, as follows:

- A misdemeanor of the second-degree is reclassified to a misdemeanor of the first-degree.
- A misdemeanor of the first-degree is reclassified to a felony of the third-degree.
- A felony of the third-degree is reclassified to a felony of the second-degree.
- A felony of the second-degree is reclassified to a felony of the first-degree.
- A felony of the first-degree is reclassified to a life felony.³⁰

The offender must have perceived, known, or have had reasonable grounds to perceive or know that the victim was within the class delineated above for the penalty reclassification to apply.³¹

Civil Cause of Action

Additionally, a person or organization that establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of s. 775.0863, F.S., has a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney fees and costs.³²

Unauthorized Publication of Name or Likeness

Florida courts recognize the common law tort of unauthorized publication of another's name or likeness (sometimes referred to as "appropriation").³³ Florida law also codifies this tort in s. 540.08, F.S., providing generally the same elements as the common law tort.³⁴ Specifically, s. 540.08, F.S., prohibits a person from publishing, printing, displaying, or otherwise publicly using for purposes of trade or for any commercial or advertising purpose³⁵ the name, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

- The natural person whose name or likeness is to be used;³⁶
- Any other person authorized in writing by such person to license the commercial use of his or her name or likeness; or
- If such person is deceased:
 - Any person authorized in writing to license the commercial use of the decedent's name or likeness; or
 - If no person is so authorized, then by the decedent's surviving spouse or any one of his or her surviving children.³⁷

If proper consent is not obtained, the person whose name or likeness was appropriated, or any person authorized to consent to the commercial use of the name or likeness, may sue under the statutory cause of action to enjoin the unauthorized use and recover damages, including an amount that would

²⁹ Section 775.0863, F.S., defines "mental or physical disability" to mean a condition of mental or physical incapacitation due to a developmental disability, organic brain damage, or mental illness, and one or more mental or physical limitations that restrict a person's ability to perform the normal activities of daily living.

³⁰ S. 775.0863(1)(a), F.S.

³¹ S. 775.0863(3), F.S.

³² S. 775.0863(2), F.S.

³³ *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp.2d 1299 (M.D. Fla. 2010).

³⁴ A plaintiff may plead an unauthorized publication cause of action under both the statutory and common law remedies. A cause of action may exist under the common law tort regardless of whether the unauthorized publication was for trade, commercial, or advertising purposes as required by statute. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

³⁵ A "commercial or advertising purpose" does not include publications which do not directly promote a product or service. It is not enough that a publication is offered for sale; rather, the liability inquiry turns on whether the plaintiff's name or likeness is associated with something else within the publication. *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So. 2d 802 (Fla. 2005); *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981); *Valentine v. CBS, Inc.*, 698 F. 2d 430 (11th Cir. 1983).

³⁶ Consent may only be given on behalf of a minor by his or her parent or guardian. S. 540.08(6), F.S.

³⁷ A person's "surviving spouse" is the person's surviving spouse under the law of his or her domicile at the time of his or her death, whether or not the spouse has later remarried, and a person's "surviving children" are his or her immediate offspring and any children legally adopted by the person. S. 540.08(1) and (6), F.S.

have been a reasonable royalty.^{38, 39} The court may also impose a civil penalty of up to \$1,000 per violation if the person whose name or likeness was appropriated is a member of the armed forces.⁴⁰ However, only the individual whose privacy was invaded may sue for unauthorized publication at common law.⁴¹

Further, the statutory cause of action does not apply to, and Florida courts generally recognize common law exceptions for:

- The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;
- The use of a name or likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other merchandise or property where the person has consented to the use of his or her name or likeness on or in connection with the initial sale or distribution of the items; or
- Any photograph of a person solely as a member of the public, where such person is not named or otherwise identified in or in connection with the use of such photograph.⁴²

Additionally, the statutory cause of action is not applicable to any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from the death of such person.⁴³

The statutory remedies provided for shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of his or her privacy.⁴⁴

Fake Reviews and Other Misleading Endorsements

In October 2021, the Federal Trade Commission (FTC) sent a Notice of Penalty Offenses⁴⁵ to more than 700 companies placing them on notice that they could incur significant civil penalties, of up to \$43,792 per violation, if they use endorsements in ways that run counter to prior FTC administrative

³⁸ S. 540.08(2), F.S.; *Coton*, 740 F. Supp. 2d at 1312.

³⁹ A claim for unauthorized publication of name or likeness is subject to the four-year catch-all statute of limitations. S. 95.11(3)(o), F.S.; *Miller v. Anheuser Busch, Inc.*, 591 F.Supp.2d 1377 (S.D. Fla. 2008).

⁴⁰ "Member of the armed forces" means an officer or enlisted member of the Army, Navy, Air Force, Marine Corps, Space Force, Coast Guard of the United States, the Florida National Guard, or the United States Reserve Forces, and includes any officer or enlisted member who died due to injuries sustained in the line of duty. S. 540.08(2) and (3), F.S.; *Coton*, 740 F. Supp. 2d at 1312.

⁴¹ *Loft*, 408 So. at 623-625.

⁴² S. 540.08(4), F.S.; see, e.g., *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34 (Fla. 1955); *Zim v. W. Publ'g Co.*, 573 F. 2d 1318 (5th Cir. 1978).

⁴³ S. 540.08(5), F.S.

⁴⁴ S. 540.08(7), F.S.

⁴⁵ Federal Trade Commission (FTC), *Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials*, https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty_offenses-endorsements.pdf (last visited Feb. 16, 2024).

cases.⁴⁶ FTC has determined a number of practices related to endorsements to be unfair or deceptive in prior administrative cases including, but not limited to:

- Falsely claiming an endorsement by a third party;
- Misrepresenting whether an endorser is an actual, current, or recent user;
- Using an endorsement to make deceptive performance claims;
- Failing to disclose an unexpected material connection with an endorser; and
- Misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience.⁴⁷

FTC cites the rise of social media as the catalyst for increasingly blurred lines between authentic content and advertising, leading to an explosion in deceptive endorsements, including fake online reviews, across the global online marketplace.⁴⁸

Effect of Proposed Changes

PCS for CS/HB 1171 amends s. 817.034, F.S., to prohibit a person from committing organized fraud by engaging in a scheme to defraud by utilizing false or fraudulent endorsements of nonconsenting parties. The bill also prohibits a person from committing communications fraud by engaging in a scheme to defraud by utilizing false or fraudulent endorsements of nonconsenting parties and, in furtherance of that scheme, communicating with any person with the intent to obtain property from that person.

The bill reclassifies organized fraud and communications fraud offenses that are committed against a person 65 years of age or older, a minor, or a person with a mental or physical disability, as defined in s. 775.0863(1)(b), F.S. Under the bill, such offenses will be reclassified as follows:

- A misdemeanor of the first-degree is reclassified to a felony of the third-degree.
- A felony of the third-degree is reclassified to a felony of the second-degree.
- A felony of the second-degree is reclassified to a felony of the first-degree.
- A felony of the first-degree is reclassified to a life felony.

The bill also provides for a civil cause of action for any person whose image or likeness was used without consent in a scheme to defraud and authorizes the person to recover an amount for damages caused by the use of his or her image or likeness. However, the bill specifies that the remedies provided within are in addition to and not in limitation of the remedies available to any person under the common law or any other law.

The bill provides an effective date of October 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 817.034, F.S., relating to Florida Communications Fraud Act.

Section 2: Provides an effective date of October 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁴⁶ FTC, *Penalty Offenses Concerning Endorsements*, <https://www.ftc.gov/enforcement/notices-penalty-offenses/penalty-offenses-concerning-endorsements> (last visited Feb. 16, 2024) (see for a list of FTC administrative decisions establishing penalty offenses concerning endorsements).

⁴⁷ FTC, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements*, (Oct. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements> (last visited Feb. 16, 2024).

⁴⁸ *Id.*

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate impact on the private sector as it creates a new civil cause of action, which may allow any person whose image or likeness is used without consent in a scheme to defraud to recover monetary damages from any entity or individual party to the suit.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference met on February 12, 2024, and reviewed a substantially similar bill and determined that the bill would have a positive indeterminate impact on jail and prison beds⁴⁹ by increasing the scope of activities which constitutes a scheme to defraud. The bill creates new misdemeanor and felony offenses for engaging in a scheme to defraud by false or fraudulent endorsements of nonconsenting parties. Additionally, the bill allows for these newly-created misdemeanor and felony offenses along with currently existing misdemeanor and felony offenses of organized fraud and communications fraud to be reclassified if the offense is perpetrated against a person 65 years of age or older, a minor, or a person with a mental or physical disability.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

⁴⁹ Florida Office of Economic and Demographic Research, Criminal Justice Impact Conference, *SB 1220 – Schemes to Defraud*, <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/SB1220.pdf> (last visited Feb. 16, 2024).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 25, 2024, the Criminal Justice Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified that the civil cause of action provided in the bill is in addition to and not in limitation of other remedies available to a person under the common law or any other law.
- Changed the effective date from July 1, 2024, to October 1, 2024.
- Made other technical changes.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.