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Understanding the 2020 Update to Florida's Fireworks Statute

Until recently, buying fireworks for the Fourth of July often involved a unique Florida ritual. Customers seeking to buy fireworks sign a form claiming that they had read Chapter 791, Florida Statutes. Fair enough. But the form also states that the customer meets certain industrial or agricultural exemptions to buy fireworks in order to, say, light railroad crossings or scare birds from fish hatcheries. The incantation of the ritual is complete when the retailer and customer silently nod, with mistaken assumption that all legal requirements have been met. The result is a miracle. Twice a year, on Independence Day and New Years, Florida is supposedly overcome with industrial and agricultural hardships which arise at dusk and are quelled with a barrage of fireworks by dawn. That part is... probably not true. Beginning in April 2020, Florida law eliminated the cause for such a ruse. Florida lawyers should be aware how these changes affect different practices areas.

Designated Holidays Law

Effective April 8, 2020, Florida Statute 791.08 allows fireworks to be used on two designated holidays: July 4 and New Year's (December 31 and January 1). The three-paragraph statute offers two qualifications: it is not a comprehensive reform and it does not supersede stricter local regulations. Finally, the statute holds that a homeowner has a "right" to use fireworks on the Designated Holidays which cannot be abrogated by vote of an HOA board but could be limited by the declaration of covenants or a covenant running with the land.

Overview of Florida Fireworks Laws

Nestled between Florida Statutes governing "Weapons and Firearms" and "Sexual Battery," Chapter 791 remains a rarely amended or litigated provision entitled, "Sale of Fireworks." Since the 1940s, Florida had outlawed backyard fireworks but, as you likely witness around certain holidays, that prohibition suffers from at least three infirmities due loose wording, loopholes, and lawlessness.

First, there is a legal difference between the definition of "fireworks" and "sparklers." Aside from use on Designated Holidays, the sale of "fireworks" for personal use is prohibited. Confusingly, the legal definition of "sparklers" does not only refer to the hand-held sticks with the same name but also includes anything that emits a shower of sparks but does not explode. So, despite the fact that everyone calls them *fireworks*, and those large boxes in grocery stores are labeled fireworks, they are technically "sparklers."

Second, retailers can sell real "fireworks" under a number of exceptions. According to F.S. 791.04, fireworks can be publicly sold to a wholesaler or permit holder; if shipped directly out of state; if used by a railroad for "signal purposes or illumination"; for quarrying, blasting, "or other industrial use"; or for use during certain sporting, theatrical, and military performances. Added in 1955, F.S. 791.07 also allows the sale of fireworks for "frightening birds from agricultural works and fish hatcheries." According to a recent *Tampa Bay Times* article, the notion that fireworks would be used to scare birds from crops was dismissed by local farmers.

Third, consumers had typically purchased fireworks after signing the retailer's form claiming a statutory exemption. No one was fooled. According to one Florida Representative, "you're basically perjuring yourself every time you purchase fireworks..." According to *U.S. News*, under the new law, "Floridians [will] no longer have to lie about buying fireworks to scare birds away..."

Fireworks Laws and Lawsuits

Florida's fireworks prohibition had been described as "flimsy" and "widely considered absurd" but remained untouched for decades despite evidence from the judiciary and legislature that defects and gaps existed.

The most notable fireworks case is *State v. Miketa*, a Third District opinion from 2002

involving a Phantom fireworks manager in Key Largo who was charged with a crime for not verifying whether an undercover detective was being truthful in his signed Wholesale Verification Certificate in order to purchase fireworks. Unlike the requirements for retailers to sell alcohol, Chapter 791 did not "impose a due diligence requirement on sellers of fireworks." As Judge Cope observed in a footnote, "it would seem a matter of common sense that the sale of two firecrackers to a walk-in customer cannot be an exempt transaction, regardless of what the affidavit says... Two firecrackers is not a wholesale amount, nor an amount... to put on a fireworks show, nor a commercial quantity which might be employed by a railroad, quarry, or other enterprise."

Three years later, in a 2005 case regarding the "perceived abuse of the [fireworks] exemptions," Judge Altembernd of the Second District noted that "a stranger to our state would be forced to conclude that... a large population of fish-farmers and other agriculturalists [] are plagued by avian infestations... [which] became intolerable shortly after dark on July Fourth and immediately following midnight on January First." In 2009, the Florida Supreme Court approved that decision.

The Legislature was certainly aware of those court rulings and the questionable practice of retailers selling fireworks to customers with signed forms. In 2007, the Florida Legislature made certain findings regarding the need for clearer regulations to fix "insufficient definition[s]" and other problems. Despite the issuance of a task force report in 2008, the law largely remains unchanged. Affirming its own limitation, the Designated Holidays law specifically restrains itself from being "comprehensive reform."

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Peculiarities and Remaining Problems

Even after the enactment of the Designated Holidays law, Chapter 791 suffers from persistent deficiencies. In 1995, the Second District noted that Florida's fireworks regulations created a black market. Legislative staff analysis of the new law acknowledged other shortcomings: signed forms do not waive Florida law (e.g., current rules implementing the statutory exceptions require purchasers to file with the local sheriff); there is no age restriction under the "birds" exception; and possession of fireworks is not a crime.

In the new statute, there is no requirement that purchasers have to state that the fireworks are for use only on Designated Holidays. Presumably, the customer could

buy fireworks in, say, August and claim they were for use on New Years. Even after *Miketa*, retailers still do not need to verify a customer's statutory exemption. The law considers homeowners but not other community associations. Finally, the Legislature missed an opportunity to remove the discriminatory phrase, "dago bomb," from the definition section in F.S. 791.01.

Areas of Practice

The Designated Holidays law may affect several practice areas. First, fireworks caused 200 fires, nearly \$900,000 in property damage, and at least one death in Florida since 2017. The new law is expected to lead to increased sales which likely will result in additional claims for personal injury

lawyers. Second, criminal lawyers should be aware that, while fireworks-related arrests are rare, law enforcement often makes drug or alcohol-related arrests when responding to fireworks complaints. Third, landowners and homeowners associations may want to consider fireworks-related covenants on their property. According to local real estate attorney, John Metzger, "community associations need to review this new law and determine whether their existing covenants adequately address the legal use of fireworks or if they need to be updated."

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