The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL:	SB 292
INTRODUCER:	Senator Richter and others
SUBJECT:	Deceptive and Unfair Trade Practices
DATE:	February 18, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	**Pre-meeting**
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

SB 292 provides a procedure for addressing claims against motor vehicle dealers under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Specifically, it requires claimants to provide a written demand to motor vehicle dealers at least 30 days prior to filing suit under the established procedure for the filing and handling of such notices and claims.

This bill amends the following section of the Florida Statutes: 501.975, F.S.
This bill creates the following section of the Florida Statutes: 501.98, F.S.

II. Present Situation:

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA), found in part II of ch. 501, F.S., prohibits unfair methods of competition, as well as deceptive acts or practices, in the conduct of trade or commerce.[1] The expressed purpose of the act is to:

- Simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
- Protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce; and
- Make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.[2]

[1] Section 501.204, F.S.
[2] Section 501.202, F.S.

The statute provides that an enforcing agency may pursue violations of this law. Enforcing authority is defined as the office of state attorney if the violation occurs in or affects the judicial circuit under the office's jurisdiction, or the Department of Legal Affairs (department) if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.[3] The enforcing authority may bring:

- An action to obtain declaratory judgment that an act or practice violates the FDUTPA;
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate the FDUTPA; and
- An action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice in violation of the FDUTPA.[4]

Under the FDUTPA, aggrieved individuals may bring an individual action to obtain a declaratory judgment that a practice or act violates the FDUTPA and to enjoin a person who has violated, is violating, or is likely to violate the provisions of this act.

The statute further provides that a prevailing party may recover reasonable attorney fees and court costs from the nonprevailing party.[5] An individual may recover if he or she has suffered a loss; the enforcing authority may recover attorney fees and costs if the losing party is found to have active in bad faith or raised issues of law or fact that were not justiciable. However, no damages, fees, or costs may be recovered from a retailer, who in good faith disseminated the claims of a manufacturer or wholesaler without having actual knowledge that it violated the law.[6]

In 2001, the Legislature enacted legislation that directly addressed unfair or deceptive acts or practices perpetrated by a motor vehicle dealer.[7] The law provides a number of actions undertaken by a dealer that would constitute unfair or deceptive acts or practices and would be actionable under the FDUTPA. Some of those acts or practices include, but are not limited to:

- Representing the previous usage or status of a vehicle is something that it was not, or making usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.
- Representing the quality of care, regularity of servicing or general condition of a vehicle unless known by the dealer to be true and supportable by material fact.
- Representing orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer or his or her agent to determine whether the vehicle has incurred such damage.
- Altering or changing the odometer mileage of a vehicle.
- Failing to honor a provided express or implied warranty unless properly disclaimed.

[3] Section 501.203(2), F.S.
[4] Sections 501.207, F.S. Damages are not recoverable under this section against a retailer who, in good faith, disseminates the claims of a manufacturer or wholesaler without actual knowledge that it violated FTUDPA.
[5] Section 501.2105, F.S.
[6] Section 501.211, F.S.
[7] Chapter 2001-196, L.O.F., codified as part VI, ch. 501, F.S.

- Misrepresenting warranty coverage, application period, or any warranty transfer cost or conditions to a customer.[8]

Several states have mandated some form of pre-suit notice under their respective Unfair and Deceptive Acts statutes, and Mississippi requires a pre-suit dispute resolution process.[9]

III. Effect of Proposed Changes:

Section 1 provides for the substitution of the citation of s. 501.976, F.S.,to "this part," in the introductory clause of s. 501.975, F.S. This would allow this definition to apply to the statute created in section 2

Section 2 creates s. 501.98, F.S., to establish a procedure for filing a claim for unfair and deceptive trade practices against a motor vehicle dealer, including a pre-suit demand letter.

Demand Letter

Prior to initiating any civil litigation against a motor vehicle dealer[10] under ch. 501, F.S., a claimant must provide the dealer with written notice of the claimant's intent to initiate litigation at least 30 days prior to filing his or her lawsuit. The demand letter, which must be completed in good faith, must:

- State the name, address, and telephone number of the claimant.
- State the name, address, and telephone number of the dealer.
- Describe the underlying facts of the claim, including a comprehensive and detailed statement describing each item for which actual damages are claimed.
- To the extent available, be accompanied by all transaction or other documents upon which the claim is based.

The demand letter must contain sufficient information to put the dealer on notice as to the nature of the claim and the relief sought.

The demand letter must be delivered to the dealer by the United States Postal Service or other nationally recognized carrier, return receipt requested. If the dealer is a corporate entity, the demand letter must be sent to an officer, director, or manager of the corporation, as reported in its most recent annual report to the Secretary of State. The bill does not specifically specify that a registered agent may be served.

[8] For a complete list of practices or acts by a dealer that constitute unfair or deceptive acts or practices and are actionable under the FDUTPA, see s. 501.976, D.S.

[9] Carolyn L. Carter, *Consumer Protection in the States: A 50 State Report on UDAP Statutes*; National Consumer Law Center (February 2009). Those states requiring some form of pre-suit notice are Alabama, California, Georgia, Indiana, Maine, Massachusetts, Texas, West Virginia, and Wyoming. http://www.nclc.org/images/pdf/udap/report_50_states.pdf (last visited February 12, 2013).

[10] In this section, the term "dealer" refers to a dealer, its employees, agents, principals, sureties, or insurers.

Civil Litigation

The claimant is precluded from initiating civil litigation if, within 30 days of receipt of the demand letter, the dealer pays the claimant:

- The amount of actual damages claimed in the demand letter; and
- A surcharge equal to 10 percent of the amount requested or $500, whichever is less.

A dealer is not required to pay attorney fees in a civil action brought under the FDUTPA if:

- Within 30 days after receipt of the demand letter, the dealer notifies the claimant, in writing, and a court agrees, that the amount sought in the demand letter is not supported by fact or if the demand letter includes items not properly recoverable under the law; or
- The claimant fails to materially comply with the notice requirements; however, a demand letter will be deemed satisfactory if it contains sufficient information to adequately put the dealer on notice as to the nature of the claim and the relief sought.

The bill provides that a dealer's payment of actual damages or an offer to pay is not an admission of wrongdoing or liability by the dealer and is inadmissible as evidence under s. 90.408, F.S.,[11] and releases the dealer from liability.

Statute of Limitation

Any time limitation[12] on initiating civil litigation under ch. 501, F.S., is tolled for 30 days after the date of delivery of the demand letter or for such other period agreed to, in writing, by the parties.

Notice to Consumer

Under the provisions of the bill, the dealer must provide the consumer notice of requirements of the demand letter. If the dealer fails to provide the notice to the consumer, any civil litigation arising out of that transaction would not be subject to the demand letter provisions provided in the bill. The bill does not specify the manner in which the notice must be given to the consumer, such as whether the notice must be given in writing or when it must be given to the consumer.

Exemptions

The provisions of this bill do not apply to any action brought as a class action and ultimately certified as a class action. The bill also does not apply to any action brought by the enforcing authority.[13]

[11] Section 90.408, F.S., provides that "evidence or an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

[12] The specific time limitation associated with a specific cause of action can be found in s. 95.11, F.S.

[13] Section 501.503(2), F.S., defines enforcing authority as the office of the state attorney if the violation occurs in or affects the judicial circuit under the office's jurisdiction or the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.

Section 3 provides that this act shall take effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article 1, Section 21 of the Florida Constitution, provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Pre-suit notice requirements have been prescribed, by statute, for numerous causes of action.[14] Courts have upheld such pre-suit notice requirements[15] and have generally required that provisions be interpreted by the courts in a manner that favors access.[16]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Court Administrator's 2013 Judicial Impact Statement, SB 292 would facilitate pre-suit disposition of matters that are otherwise actionable in court. The bill will assist in diverting those court resources that would otherwise be engaged to other cases pending in the system.[17]

[14] See ss. 400.0233, 429.293, 558.004, 627.736(10) 766.106, F.S.
[15] *Lindberg v. Hospital Corp. of America*, 545 So.2d 1384 (Fla. 4th DCA 1989), *approved by* 571 So.2d 446 (Fla. 1990).
[16] *Weinstock v. Groth*, 629 So.2d 835, 838 (Fla. 1993).
[17] Office of State Courts Administrator, *2013 Judicial Impact Statement* (Jan. 18, 2013) (on file with the Senate Commerce and Tourism Committee).

VI. Technical Deficiencies:

SB 292 indicates, in the proposed s. 501.98(2)(c), F.S., that the demand letter must include a "comprehensive and detailed statement of the items for which damages are claimed"; however, in other sections, it states that the demand letter will be deemed satisfactory if it contains "sufficient information to adequately put the dealer on notice of the nature of the claim and the relief sought." Confusion may arise due to the two different standards offered in the bill.

Lines 79 of the bill uses the term "any;" however the term "an" is used in line 140, when referring to the persons to whom the demand letter must be delivered. The use of "an" may be interpreted to require that all principals of the dealer must receive the demand letter to comply with the notice provision; whereas "any" seems to denote only one of the principals need to receive the demand letter to comply with the provision.

VII. Related Issues:

SB 292 provides that the requirements, as created by this bill, for filing a civil lawsuit against a dealer under parts II or VI, of ch. 501, F.S., will not apply to a claim for actual damages brought and certified as a maintainable class action. However, because the language limits this exclusion to only a certified class action, concern exists that this will continue to encourage the "picking off" of the named class representative[18] during the pre-certification phase of a class-action suit."[19,20] The consequence for removing the class representative by a tender or offer of payment for his or her damages results in the class representative's claim becoming moot, which will result in a dismissal of the entire class action.[21]

Federal case law has developed with respect to this issue and some courts have implemented legal tests for averting the dismissal of a class action during the pre-certification stage.[22] In Florida, the state of the current law remains unclear; however, the Third District Court of Appeal has briefly stated "a [defendant] cannot simply try to 'pick off' a named class representative."[23]

The bill only requires an offer of payment to release a dealer from liability.

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[18] The named class representative refers to the plaintiff filing on behalf of members of the class that are similarly situated.
[19] The four prerequisites for maintaining a class action are as follows: (1) the members of the class must be so numerous that is impractical to join each member; (2) the claim or defense must raise questions of law or fact that are common to the individual members; (3) the claim or defense of the representative parties must be typical of those that would be asserted by individual members; and (4) the representative party must be able to fairly and adequately protect and represent the interest of each member of the class. Fla. R. Civ. P. 1.220(a).
[20] "The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court." *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So.2d 58, 60 (Fla. 1994).
[21] *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So.2d 1004, 1006 (Fla. 3d. DCA 1997) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)) ("If none of the named plaintiffs purporting to represent a class establishes a requisite case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class.") (holding trial court could rule on standing before considering whether to certify class).
[22] *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d. Cir. 2004) (holding that where a defendant makes an offer for an individual claim that has the effect of mooting class relief asserted in the complaint, absent undue delay in filing a motion for class certification, the appropriate course is to relate the certification motion back to the filing of the class complaint).
[23] *Allstate Indemnity Co. v. De la Rosa*, 800 So.2d 245, 246 (Fla. 3d DCA 2001), *review denied*, 823 So.2d 122 (Fla. 2002).

Additionally, it is unclear whether the settling of one claim arising out of a specific transaction will foreclose future claims relating to a separate grievance that arose from the same transaction by the fact that an earlier matter was previously settled under the provisions created by this section.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.