

STORAGE NAME: h3703.tu
DATE: March 10, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
TOURISM
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3703
RELATING TO: Travel Agencies
SPONSOR(S): Representatives Melvin and Ogles
COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) TOURISM
- (2) CIVIL JUSTICE AND CLAIMS
- (3)
- (4)
- (5)

I. SUMMARY:

House Bill 3703 provides legislative intent which cites the public need for information and services provided by travel agencies to the state's citizenry and cites the impending threat to the provision of such services by the "predatory actions of travel service suppliers." The bill then creates the Travel Agency Fair Treatment Act as a means of preserving the availability of comprehensive and unbiased travel service information.

The provisions of this act make it illegal for a travel service supplier to actively or constructively terminate, cancel, fail to renew, or substantially change the competitive circumstances of the supplier's appointment or contract with a travel agency without good cause. A definition is provided for the phrase "good cause" and the bill places the burden of proving such on the supplier.

The travel service supplier is required to notify the travel agency in writing at least 90 days in advance of the supplier's termination, cancellation, nonrenewal or substantial change in the appointment. The reasons for such action must be included in the notice and the supplier must give the agency at least 60 days to rectify any claimed deficiency. If the agency rectifies the deficiencies within that time, the notice is void. If the supplier's reasons for noticing the agency relate to insolvency, bankruptcy or assignment to creditors, the notice requirements do not apply. However, if the supplier's reason for noticing the agency is for nonpayment of sums due, the agency is given at least 10 days from the date of notification to remedy any default.

This bill also provides for release from the notification provisions if the travel agency has engaged in fraudulent activity to the point of creating a clear and present danger of substantial loss to the travel service supplier. The bill does provide for damages of triple the actual damage, plus court costs and attorney's fees, in the event an agency suffers as a result of a violation of this act. However, if a travel agency suffers damages, sues the supplier and is not found to have committed fraud, the agency is entitled to five times the actual damage or at least \$5,000, plus court costs and attorney's fees. Additionally, during the time of litigation, the agency's appointment is not subject to abeyance. Finally, the bill provides that temporary injunctions may be granted in an action by an agency against a

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supplier if any violation of this act by the supplier causes irreparable injury to the travel agency.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The travel agency business is based on the selling of travel and travel-related services by the agency on behalf of a travel supplier for a commission. The way in which an agency bargains for and receives this commission varies with the type of supplier. For the most part, cruise lines, rental car companies, tour operators, and lodging facilities advertise a particular rate of commission to agents for specific, often time-sensitive travel and travel-related services. Consequently, these suppliers compete with each other for the travel agency referrals and the commission rates reflect this competition. The agency's method of receiving this commission is normally by collecting the total price of the travel service and the advertised commission from the client, keeping the amount of the commission and remitting the cost of the service to the supplier.

Due to the limited number of airline companies (145 worldwide) and the high volume of airline travel being sold through over 40,000 agencies, airline ticketing is processed in another manner. The Airline Reporting Corporation (ARC) acts as a clearinghouse for collecting payments from travel agencies for airline tickets sold, transferring those funds, minus the commission, to the appropriate airlines, and then distributing commissions back to the travel agencies. The airlines issue plates with verification numbers which must be stamped on each ticket for the ticket to be valid. When the travel agency sells an airline ticket, the agency reports the sale to ARC weekly, which then, once a week, automatically debits the agency's account for that amount. Travel agencies must be bonded for \$20,000 with the ARC in order to write tickets.

The fraud division of the ARC reports that the system for collecting and distributing payment and commissions works well until an unscrupulous agency "busts" out. This situation occurs when such an agency begins to write a large volume of tickets at deeply discounted prices with no intention of reporting those sales to the ARC or submitting payment for them. The ARC reports cases where such agencies have written anywhere from \$100,000 to \$1 million worth in a day's time and, therefore, "hours count."

The American Society of Travel Agents (ASTA) reports that there are approximately 2,539 travel agencies in Florida that are associated with the ARC. Also according to ASTA, these agencies wrote about \$4.5 billion in airline sales and \$1.6 billion in non-air travel services in 1997. According to an October 12, 1997, article in the *Atlanta Journal Constitution*, written by Clark Howard, from 1982 to February of 1995, travel agencies received an unlimited 10 percent commission on each airline ticket sold. At that time, one airline imposed a \$50 cap or 10 percent commission, whichever was less, on agency commissions. The other airlines followed suit, and the travel agencies sued the airlines for violation of antitrust laws. The suit was settled out of court, but the application of caps was not discontinued. In September of 1997, the article reports that another airline then reduced its commission to 8 percent and was followed immediately by the other airlines.

Travel agency representatives report that the bulk of an agency's income is derived from airline commissions. Consequently, any abrupt contractual action such as termination or substantial change in competitive issues on the part of an airline has an immediate and potentially harmful impact on the ability of the agency to conduct its business. Another

current impact on travel agencies is the increasing occupancy of airlines issuing electronic or e-tickets directly to travel clients through the Internet.

Florida law does govern certain contractual situations. Article 2 of the State's Uniform Commercial Code (Chapter 672, F.S.) provides statutory requirements for construction, performance and remedies relating to sales contracts; however, the appointment (contractual) arrangement between travel service suppliers and travel agencies does not usually involve the direct sale of anything from one to the other. Therefore, either party's seeking a remedy under Chapter 672, F.S., does not appear appropriate.

Since Article 1, Section 10 of the Florida State Constitution provides that no bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed, any legislation relating to control of contractual arrangements is subject to constitutional scrutiny.

B. EFFECT OF PROPOSED CHANGES:

House Bill 3703 creates the Travel Agency Fair Treatment Act as a means of preserving the availability of comprehensive and unbiased travel service information as provided by travel agencies.

The provisions of this act make it illegal for a travel service supplier to actively or constructively terminate, cancel, fail to renew, or substantially change the competitive circumstances of the supplier's appointment or contract with a travel agency without good cause. A definition is provided for the phrase "good cause" and the bill places the burden of proving such on the supplier. "Constructive" action is considered any action on the part of the contractor which would ultimately have the same effect on the contractee that the "actual" action did. In relation to the circumstances presented in this act, any action on the part of the travel service supplier which made it competitively impossible for a travel agency to continue to do business would have the same effect as terminating, substantially changing, or failing to renew the agency's appointment with the supplier.

The travel service supplier is required to notify the travel agency in writing at least 90 days in advance of the supplier's termination, cancellation, nonrenewal or substantial change in the appointment. The reasons for such action must be included in the notice and the supplier must give the agency at least 60 days to rectify any claimed deficiency. If the agency rectifies the deficiencies within that time, the notice is void. If the supplier's reasons for noticing the agency relate to insolvency, bankruptcy or assignment to creditors, the notice requirements do not apply. However, if the supplier's reason for noticing the agency is for nonpayment of sums due, the agency is given at least 10 days from the date of notification to remedy any default.

This bill also provides for release from the notification provisions if the travel agency has engaged in fraudulent activity to the point of creating a clear and present danger of substantial loss to the travel service supplier. The bill does provide for damages of triple the actual damage, plus court costs and attorney's fees, in the event an agency suffers as a result of a violation of this act. However, if a travel agency suffers damages, sues the supplier and is not found to have committed fraud, the agency is entitled to five times the actual damage or at least \$5,000, plus court costs and attorney's fees. Additionally, during the time of litigation, the agency's appointment is not subject to abeyance.

Finally, the bill provides that temporary injunctions may be granted in an action by an agency against a supplier if any violation of this act by the supplier causes irreparable injury to the travel agency.

The provisions of this bill would affect all travel service suppliers and appears to effectively compel such suppliers to continue whatever appointment arrangements the supplier has with an agency at the time the provisions of this act became law. The only apparent opportunity for a supplier to terminate, cancel, substantially change the competitive circumstances, or fail to renew such an appointment would be if the agency were proven to have committed fraud, were in bankruptcy, or failed to substantially comply with the same essential and reasonable requirements imposed by the supplier on itself or similar agencies. Additionally, this bill places the burden of proof for any negative action by the agency on the supplier. Finally, by stipulating that any appointment existing at the time this act becomes law would be subject to the provisions of this act appears to be contrary to the provisions of Article 1, Section 10 of the Florida State Constitution.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes, the provisions of this bill appear to reduce the ability of a travel service supplier to settle any appointment disputes the supplier may have with a travel agency.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes, if the passage of this legislation resulted in increased litigation between travel service suppliers and travel agencies, both private sector entities and the State's courts would have increased work loads.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No, however, the objects of the legislation (travel service suppliers) who have judgments against them are required to pay legal fees and court costs.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

The bill increases the allowable options of one group of private businesses at the expense of another group.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, the bill provides legal remedies against certain current free market activities.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates a new section of law.

E. SECTION-BY-SECTION RESEARCH:

Section 1 provides that this act will be entitled, "Travel Agency Fair Treatment Act."

Section 2 provides definitions for a number of terms and phrases to be used in the act and provides that those terms and phrases shall carry the definitions stipulated by the act unless they are used in a context which requires a more common meaning. These terms and phrases are generally defined as follows:

1. "Appointment" - refers to the contract or agreement between the travel service supplier and the travel agent. The definition provides that such an appointment may be express, implied, written, or oral and may be granted by the supplier to the agent directly or through an intermediary. The definition further provides an inclusive list of activities relating to the selling or distributing of travel or travel-related services.
2. "Community of interest" relates to the ongoing financial agreement between the travel service supplier and the travel agency.
3. "Good cause" as a phrase describes the acceptable reasons for which a travel service supplier may cease its relationship with a travel agency. Specifically noted are the failure of the agency to substantially comply with essential and reasonable requirements imposed by the supplier which requirements are not more onerous for the agency in their terms or enforcement than they would be for other agencies or the supplier.
4. "Travel service supplier" is described as the entity granting appointments for the right to sell or distribute travel or travel-related services or use a travel or travel-related services commercial mark. This term appears to be inclusive of all travel or travel-related service suppliers.
5. "Person" is described as an individual, a partnership, a joint venture, corporation, or other entity.

6. "Travel agency" is described as a seller of travel (further defined under s. 559.927(10), F.S.) whose principle place of business is in Florida or whose business is organized under Florida law and who is the grantee of one or more of the appointments previously described.

Section 3 establishes that, in general, the purposes for the remedial provisions of this act are:

1. To promote the public's interest in fair business practices between travel service suppliers and travel agencies.
2. To protect travel agencies against unfair treatment by travel service suppliers.
3. To provide travel agencies with rights and remedies beyond those provided by contract or common law.
4. To govern the appointment, appointment renewal, and appointment amendment within the confines of the State and U.S. Constitutions.
5. To effect the preservation of travel agency services to the public.
6. To protect the travel agency investments of time and effort expended on behalf of travel service providers.

This section then provides that the act is to be liberally interpreted and applied to support those purposes. This section further provides that the effects of the provisions of this act may not be affected by any contract or agreement.

Section 4 prohibits a travel service supplier from canceling, substantially amending, or failing to renew an appointment with a travel agency without providing proof of good cause. This section also provides that the act of canceling, terminating, or failing to renew an appointment may be a deliberate action or may be accomplished by constructing situations in which it becomes unprofitable for the other party to continue in business.

Section 5 requires a travel service supplier to notify an agency in writing of its intent to terminate, cancel, fail to renew or substantially change the conditions of the appointment by at least 90 days prior to initiating such action. The supplier must include in this notification all reasons for its intended action and must give the travel agency 60 days to rectify any claimed deficiency. This section also provides that if the agency rectifies the deficiency within the 60 days, the notice for action is void.

This section further provides that if the reason for the supplier's intended action is insolvency, assignment for the benefit of creditors, or bankruptcy, the notice does not apply. However, if the reason for notice is nonpayment of sums due under the appointment, the agency is entitled to written notice of such default and at least 10 days from the date of delivery of that notice to remedy the default.

The notice provisions of this section are not applicable in the event the travel service supplier asserts that the agency has engaged in fraudulent conduct and there is a "clear and present danger" that the supplier would sustain substantial losses if unnoticed action were not taken. This section then provides that if a travel agency files for damages against a supplier under section 7 of this act and is found not to have committed fraud and there was no "clear and present danger" of substantial loss to the supplier, the damages due the agency will be 5 times the actual damages or \$5,000, whichever is greater, and court costs and attorney's fees.

Section 6 stipulates that the provisions of this act are not to affect the provisions contained in an appointment for a binding arbitration of disputes between a supplier agency if those provisions include criteria for determining the existence of good cause for canceling or substantially changing the appointment and include relief comparable to that provided in this act.

Section 7 authorizes a travel agency that suffers damages as a result of a violation of this act to file a petition or complaint in court. If the agency is successful, this section provides for the award of 3 times the damages or \$1,000, whichever is greater, in addition to court costs and reasonable attorney's fees. This section also provides that until a final determination is made in the suit, the agency's appointment will continue to be in effect.

Section 8 provides that in any action brought by an agency against a supplier, any violation by the supplier is considered to cause irreparable injury to the agency for the purposes of determining whether to issue a temporary injunction against the intended actions of the supplier.

Section 9 provides that the provisions of this act are severable.

Section 10 provides that the provisions of this act will take effect upon becoming law and will govern appointments in existence on that date.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate at this time.

3. Long Run Effects Other Than Normal Growth:

Indeterminate at this time.

4. Total Revenues and Expenditures:

Indeterminate at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate at this time.

3. Long Run Effects Other Than Normal Growth:

Indeterminate at this time.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

Private sector travel service suppliers that are victims of fraudulent travel agencies could lose substantial amounts of money during the time frames provided by this bill that the supplier must wait for the required notification to reach the agency. Although the bill does make provisions for not applying the notification requirements in the event of a clear and present danger to the supplier, the burden of proof and subsequent damages for lack thereof could deter the supplier from taking immediate action.

2. Direct Private Sector Benefits:

Private sector travel agencies would benefit from being able to stabilize and continue in virtual perpetuity the appointment conditions such agencies operate under in their relationships with travel service suppliers.

3. Effects on Competition, Private Enterprise and Employment Markets:

Travel agencies maintain that without the provisions of this act the travel service suppliers can inflict competitive disadvantages on them to the point of driving them out of business. Travel service suppliers contend that varying the competitive conditions of their appointments according to market conditions helps to keep their rates competitive.

D. **FISCAL COMMENTS:**

If the provisions of this bill result in an increase in litigation, there could be an increase in court administration costs for state or local governments.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

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A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenue.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties and municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON TOURISM:
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