

**STORAGE NAME:** h0059.jud

**DATE:** December 17, 1998

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

**BILL #:** HB 59

**RELATING TO:** Fictitious names (misrepresentation of geographic location of supplier in local telephone directory or directory assistance database)

**SPONSOR(S):** Representative Lynn

**COMPANION BILL(S):**

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

- (1) JUDICIARY
  - (2) BUSINESS REGULATION AND CONSUMER AFFAIRS
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

This bill prohibits a person, under certain circumstances, from misrepresenting the geographic location of the supplier of a service or product by listing a fictitious business name or an assumed business name in a local telephone directory. The bill also prohibits a person from listing the name in a directory assistance data base, under specified circumstances. Violation of either prohibition would constitute a deceptive and unfair trade practice, and subject the violator to any and all penalties under Florida's Deceptive and Unfair Trade Practices Act, ss. 501.201 *et seq.* Florida Statutes. However, absent exceptional circumstances, a telephone company, or other telephone service provider or directory assistance service provider, would be immune from liability under the bill.

## II. SUBSTANTIVE ANALYSIS:

- A. **PRESENT SITUATION:** The language of this bill is virtually identical to a 1997 Indiana law (section 1 of Public Law 174-1997), which was enacted to amend the Indiana Code concerning trade regulation and consumer sales and credit (Indiana Code 24-5-0.5-2.) The substance of the language of this bill was offered as an amendment by Senator Holzendorf to Senate Bill No. 744 (1998), the companion bill for carried-over House Bill No. 1731 (1997-1998). HB 1731 was pending on the House Consent Calendar on March 3, 1998, when it was referred back to, and later died in, the Financial Services Committee.

The present applicable law is divided into two primary areas: regulation of business names and telephone listings.

(1) **Regulation of business names.**--Various Florida statutory sections regulate use of business names, including fictitious or assumed business names. By statute and under the common law, businesses currently may protect their business name against deceptive use of deceptively similar business names by others. The legal remedies currently available, whether through tort or other civil action or criminal prosecution, address such recurring situations as when a person infringes upon another's rights to use a corporate or other business name, or when a person commits a fraudulent misrepresentation or intentional deception. Generally, a business may operate using a fictitious name, provided the intent behind use of the name is not to injure or carry out fraud on those dealing with the business. However, statutory regulations governing the use of such names have been enacted in a majority of states. Such statutory provisions usually are to be construed strictly, with their coverage applied to situations and facts clearly within the parameters of the statute. (See 57 Am.Jur 2d *Name* ss. 65-67 (1988); Op. Fla. Att'y Gen., No. 057-283 (1957).)

(a) *Fictitious Names Act.*---The Fictitious Names Act (section 865.09, Florida Statutes) requires statewide public notice of the true identity of a business owner intending to transact business in this state under a name other than its legal name. Before beginning operations under the assumed name, the business owner must register with the Division of Corporations in the Department of State, and provide the legal name, mailing address of the business, Florida incorporation or registration number, and certification that the registered name has been advertised in the county where the business owner's principal place of business is located. Most applicants are sole proprietors who do not wish to use their legal names in a company name for marketing purposes, or corporations looking to market a line of business under a name other than the corporation's legal name. Presently, a fictitious name may not contain the words "corporation" or "incorporated," or their abbreviations, unless the applicant is incorporated in Florida.

Registration ensures that the public can tie the business activity to the legal entity. It does not convey any ownership interest in the fictitious name, nor does it reserve the name for the exclusive future use of that business. Fictitious name registration cannot interfere with rights to a name if previously reserved by incorporation under chapters 607 or 617, Florida Statutes.

Prior to 1991, fictitious names were registered with the clerk of court in the county where the principal place of business was located. In Chapter 90-267, Laws of Florida, the Legislature required a statewide notice. According to the Division of Corporations, this change recognized the expanding scope of most business activity beyond county boundaries, making a county-level notice less effective.

The statewide registration is valid for 5 years with a right of renewal for an additional 5 years. There is no regulation of the business activities that can be engaged in under the fictitious name, by virtue of the registration. It is a second degree misdemeanor to operate under a fictitious name without complying with the act. It is also a second degree misdemeanor to submit false information to the Department of State in any capacity.

The primary sanction for a company's failure to register a fictitious name is forfeiture of the right of the business owner to proceed in court under the fictitious name. However, legal documents entered into under the fictitious name are not voided if the business owner does not comply with the act.

The purpose of the statute is to provide constructive, public notice to a person dealing with a business of the name and address of the real party in interest; thus this statute does not give rise to any presumption of the registrant's rights to own or use the name registered, nor does it affect trademark, service mark, trade name, or corporate name rights previously acquired by others in the same or a similar name. See 37 Fla. Jur. 2d *Names* s. 5.

(b) *Corporate names.*--- Generally, a corporation may prevent another business from using the same or similar name, if that use is misleading and likely to injure the corporation in the exercise of its corporate functions, regardless of the other's intent. The corporation may protect its name by suing for an injunction to prevent the unauthorized use of its name. A new corporation thus may not adopt a name so similar to that of another corporation, association, or firm that the name would result in confusion or deception, under a longstanding line of cases (e.g., *Children's Bootery v. Sutker*, 91 Fla. 60 (1926)). By statute, both the Florida Business Corporation Act (in s. 607.0401(4), Florida Statutes) and the Florida Not For Profit Corporation Act (in section 617.0401(1)(e), Florida Statutes) provide that, except for fictitious name registrations pursuant to statute, a corporate name must be distinguishable from the names of all other entities or filings registered or on file with the Division of Corporations. However, even apart from statutory protections, a corporation is entitled to protection against the use of an identical or similar name by another corporation, based on common-law principles analogous to those applied to trademarks and trade names. See 8 Fla. Jur 2d *Business Relationships* s. 29.

(c) *Trademark and service mark registration.*---Section 495.021(1)(e)2., Florida Statutes, prohibits the registration of a mark by the Department of State which, when applied to the goods or services of the applicant, is primarily geographically descriptive or "deceptively misdescriptive of them or their source or origin." Section 495.121, Florida Statutes, imposes liabilities for damages for fraudulent registration, recoverable by the injured party. Section 495.151, Florida Statutes, provides for injured parties to proceed by suit to seek injunctive and other remedies when there has been a wrongful use of "any similar mark, label, or other form of advertisement if it appears to the court that there exists a likelihood of injury to business reputation or of the dilution of the distinctive quality of the mark, trade name, label, or form of advertisement of the prior user."

(d) *Fraudulent practices involving misleading advertisements.*---Chapter 817, relating to fraudulent practices, imposes criminal penalties for various offenses which might involve use of misleading names. Such offenses include making or disseminating misleading advertisements in violation of s. 817.06 or 817.41. Section 817.40(5), Florida Statutes, provides a broad definition of "misleading advertising" for purposes of specified sections in the chapter; however, section 817.43 would exempt certain publishers from the application of some of these prohibitions.

(e) *Limited liability partnership names.*---Section 620.78(1)(a), Florida Statutes, and 620.784(1), Florida Statutes, 1998 Supplement, provide registration and content requirements for names of limited liability partnerships, including permissible abbreviations and designations. Section 620.789, Florida Statutes, provides for the applicability of the chapter to foreign and interstate commerce, to the extent that the Legislature has expressed this intent: that such partnerships which are registered in Florida and doing business outside the state be granted the protection of full faith and credit under Article IV, section 1 of the United States Constitution.

(f) *Other general considerations.*---Generally, however, the many statutory provisions relating to the doing of business under assumed or fictitious names, or designations not showing the names of the partners, do not apply to transactions constituting interstate commerce or to nonresidents of the state. See 57 Am Jur 2d *Name* s. 73. The "commerce clause" of Article I, section 8 of the United States Constitution provides for Congress to regulate commerce "with foreign Nations, and among the several states," by preempting state law when necessary and proper to carry out such regulation. The privileges and immunities, due process, and equal protection clauses of the Fourteenth Amendment (in Article XIV, section 1) of the United States Constitution prohibits a state from making laws abridging the privileges or immunities of United States citizens, depriving any person of life liberty or property without due process of law, or denying any person within its jurisdiction the equal protection of the laws. The Florida Constitution offers related protections, in part through the provisions in Article I, entitled "Declaration of Rights," such as section 2, which includes equality before the law among its "basic rights;" and section 9, which provides for due process.

(2) **Telephone listings.**---Florida Public Service Commission Rule 25-4.040, Florida Administrative Code, currently provides for telephone directories to list subscribers' names, addresses, and telephone numbers, unless certain exceptions like those for unlisted numbers apply. By rule also, telephone companies are required to file tariff documentation with the commission, setting forth certain information as to rates and general terms and conditions of service. Such information would include whether the telephone company would reserve the right to reject listings on whatever grounds.

Public Service Commission staff have advised that there is not any commission rule which would impose content restrictions or prohibitions upon what may be included in directory information, whether in the directory's white or yellow pages. The yellow-page advertising sections of the telephone directory are not specifically required by rule, but have become a convenient convention for both subscribers and directory publishers alike.

Such advertising may constitute a form of free speech subject to constitutional protection under the First Amendment (Article I) of the United States Constitution or Article I, section 4 of the Florida Constitution, which prohibits the passage of any law "to restrain or abridge the liberty of speech or of the press." As to advertising in telephone directories, generally, the Public Service Commission is specifically directed by statute to consider revenues derived from advertising when establishing rates for telecommunications services. Section 364.037, Florida Statutes, sets forth a statutory formula for calculation of earnings for ratemaking purposes, which provides for inclusion of the gross profits derived from directory advertisements.

Public Service Commission staff also have advised that, in current usage, the term local "subscriber" probably would include any person or business that maintained a local number

in the directory. However, a person or business that maintains only a toll-free or other special prefix number in the white or yellow pages of the directory may not necessarily be a subscriber. (The bill language itself does not refer specifically to subscribers, but rather to the person who lists the fictitious or assumed business name misrepresenting the "geographic location" of the service or product "supplier.")

Currently, many businesses located outside of a directory calling area do maintain a local listing for calls, which are then forwarded to another business location which is in a different state or county, outside of those counties in the directory calling area.

B. EFFECT OF PROPOSED CHANGES:

(1) *Creation of additional civil statutory prohibitions.*---The bill would create two new statutory prohibitions, violation of either of which would constitute a deceptive and unfair trade practice. First, the bill would prohibit a person from misrepresenting the geographic location of the supplier of a service or product by listing a fictitious or assumed business name "in a local telephone directory" when all four of the following four circumstances apply: (1) the name misrepresents the supplier's geographic location; (2) the listing does not identify the address and state of the supplier's business; (3) calls to the local telephone number are routinely forwarded or transferred to a business location that is outside the calling area covered by the local telephone directory; and (4) the supplier's business location is located in a county that is not contiguous to a county in the calling area covered by the local telephone area.

Secondly, the bill would prohibit a person from listing a fictitious or assumed business name" in a directory assistance database" when all three of the following circumstances apply: (1) the misrepresentation of the supplier's geographic location, as described; (2) the routine forwarding or transferral of the local-number calls to a business location outside the local calling area, as described; and (3) the business location of the supplier in a noncontiguous county, as described. (The fourth circumstance applicable in the case of local telephone directory listings, that the listing fails to identify the address and state of the supplier's business, is not specified in the case of directory assistance database listing, inferably because addresses normally are not accessible through directory assistance.)

A violator of either prohibition would be subject to civil penalties under the Florida Deceptive and Unfair Trade Practices Act in part II of chapter 501, Florida Statutes. However, the bill provides immunity from liability to a telephone company or other provider of a telephone or directory assistance service unless the telephone company or other provider itself is the supplier who committed the "deceptive act."

(2) *Expansion of legal remedies for name misrepresentation in listings.*---HB 59 creates a remedy for those injured by deceptive use of geographical terms in telephone directory and database listing. The bill specifically targets and provides a statutory remedy for a limited situation involving telephone listings, i.e., misrepresenting the geographic location of the service or product supplier by listing a fictitious or assumed business name as described in a local telephone company directory or in a directory assistance database.

The remedies this bill would provide are those under part II of chapter 501, the Deceptive and Unfair Trade Practices Act. These remedies include actions by the enforcing authority for declaratory judgments, injunctive relief and/or damages on behalf of consumers. Section 501.207 Florida Statutes. They also include civil penalties up to \$10,000 for willful

violations. Section 501.2075 Florida Statutes. These remedies likely would not preclude or otherwise affect any other currently existing forms of remedies. Section 501.213 of that act expressly provides that: (1) any of its remedies for deceptive and unfair trade practices would be additional and supplemental to any remedies otherwise available for the same conduct under state or federal law; and (2) that act would not preempt local consumer protection ordinances which were not inconsistent with the act.

(3) *Creation of new enforcement authority.*---To enforce the new prohibitions proposed by the act, the "enforcing authority" (as defined by section 501.203(2) with respect to other deceptive and unfair trade practices) might be the office of the state attorney in the circuit where the violation occurred. Alternatively, if more than one circuit were involved or certain other circumstances applied, the Department of Legal Affairs would enforce the bill's provisions.

However, it is not clear what effect, if any, the current statutory placement of the bill's provisions in part V of chapter 501 may have upon the enforcement of the provisions. The substance of HB 59 appears in the bill as new statutory section 501.97, to be included in part V of chapter 501 (entitled "Miscellaneous Provisions"), although the Florida Deceptive and Unfair Trade Practices Act itself comprises part II of chapter 501, consisting of sections 501.201-213, Florida Statutes. Yet HB 59 specifically refers and links itself to part II of chapter 501, by providing that any person who violates the bill provisions would be "guilty of a deceptive and unfair trade practice and subject to any and all penalties under part II of chapter 501."

There are a number of other statutes which designate particular civil offenses as deceptive and unfair trade practices. To avoid piecemeal amendments to the Florida Deceptive and Unfair Trade Practices Act in part II, various civil offenses designated as deceptive and unfair trade practices have been codified outside of part II of chapter 501 (e.g., ss. 496.416, 501.34(2), 509.511, 509.3906, and 559.934.)

Staff of the Public Service Commission and Department of Legal Affairs have questioned the clarity of the particular linking provision in HB 59, providing that any person who violates the act is guilty of a deceptive and unfair trade practice, and subject to any and all penalties under part II of chapter 501 (the Florida Deceptive and Unfair Trade Practices Act.) The bill as filed may be at variance with the other statutory precedents for this kind of provision. (For example, those other linking provisions typically avoid phrases which express legal conclusions about the "guilty" status of the person violating the prohibition, while the linking provision in HB 59 does use this conclusory term.)

The bill as filed also may be at variance with section 501.212(1),(4) in part II of chapter 501. That section provides that the Florida Deceptive and Unfair Trade Practices Act does not apply to either of the following categories: "[a]n act or practice required or specifically permitted by federal or state law;" or "[a]ny person or activity regulated under laws . . . administered by the Florida Public Service Commission." As seen, fictitious names currently are permitted by state law, and directory listings are regulated in specified ways by commission rule. Thus some or all of the listing activities prohibited by the bill thus might be exempted from the application of the Florida Deceptive and Unfair Trade Practices Act, should the activity be deemed to be within an exempt category under section 501.212.

Such construction issues may be particularly significant in the particular context of the bill. This bill creates statutory penalties and remedies in derogation of the common law, which

conventionally are construed strictly. Without an express construction clause in the bill, it may be questionable whether the bill's civil penalties for making misrepresentative listings could operate in effect to decriminalize the same conduct, despite the presence of such a construction clause in part II of chapter 501 itself (e.g., any such conduct which might already be prohibited under chapter 817, relating to fraudulent practices, or chapter 865, the Fictitious Names Act.)

**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?

Since the Public Service Commission already has promulgated rule provisions relating to content of telephone directories, the bill may affect this arena of the commission rulemaking, to the extent that the bill might impliedly amend or otherwise supersede such rule provisions.

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

New enforcement authority may be granted to the Department of Legal Affairs, state attorneys, and the court system. The Division of Corporations in the Department of State might screen the content of fictitious names in light of the new prohibitions .

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

N/A

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?

N/A

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

N/A

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

N/A

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

N/A

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

N/A

3. Personal Responsibility:

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

N/A

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

N/A

4. Individual Freedom:

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

N/A



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

In certain situations, in order to avoid deception, companies doing business in Florida under a fictitious name or assumed business name would be prohibited from using certain names, without additional disclosure in directory listings published out of their local area.

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

C. STATUTE(S) AFFECTED:

Section 501.97, Florida Statutes, as created.

D. SECTION-BY-SECTION RESEARCH:

N/A

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

Consumers would be less likely to be misled with respect to the geographic location of a business with which they are doing business.

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

Interstate competition between local and out-of-state suppliers and intrastate competition between suppliers in a county and suppliers in noncontiguous counties may be impacted.

The costs to outside businesses of advertising in local telephone directories and databases may be affected by the bill's implied requirement for listing of the "address, including the state" of a supplier.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

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V. COMMENTS:

On the technical side, the bill language might be improved by expanding the title provisions and adding definitions or other clarifying provisions. The bill does not specifically define either what content in a fictitious or assumed business name, or what conduct, constitutes misrepresentation of "geographic location." Also, since the bill language derives from the practically identical Indiana law, the wording of the bill could be reworded to conform more closely to Florida's own statutory vocabulary. For example, the parallel Indiana statutory chapter relating to "deceptive practices" defines the term "supplier," whereas part II of chapter 501, the Florida Deceptive and Unfair Trade Practices Act, does not define "supplier."

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More substantively, there may be constitutional implications to the bill involving free speech, interstate commerce, and equal protection. By prohibiting certain telephone directory advertisements, the bill may affect the use of fictitious or assumed names by nonlocal businesses, with potential effects upon interstate commerce.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

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Sondra Lee Turner

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Don Rubottom