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DATE: April 17, 2001

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS**

BILL #: HB 1787
RELATING TO: Warranty Associations
SPONSOR(S): Representative Berfield

TIED BILL(S):

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

- (1) INSURANCE YEAS 13 NAYS 0
 - (2) AGRICULTURE & COMSUMER AFFAIRS (W/D)
 - (3) COUNCIL FOR COMPETITIVE COMMERCE YEAS 12 NAYS 0
 - (4)
 - (5)
-

I. SUMMARY:

House Bill 1787 revises chapter 634, F.S., relating to warranty associations. This bill amends and creates sections within all three parts of chapter 634, F.S., relating to the regulation of motor vehicle service agreements companies, home warranty associations, and service warranty associations, respectively.

This bill would generally:

- Create and amend sections defining certain methods, acts or practices as unfair methods of competition and unfair or deceptive acts or practices as those methods, acts or practices relate to the advertising, sale, or delivery of motor vehicle service agreements, home warranty agreements, or service agreements;
- Prohibit the advertising, offering, or providing of a free home warranty or free service warranty as an inducement to purchase real property or merchandise;
- Provide that entities doing business as motor vehicle service agreements companies, home warranty associations, and service warranty associations would be exempt from having to be licensed as a salesperson under the respective parts of this chapter to solicit, offer, sell, or otherwise transact the agreements issued by that entity;
- Provide the Department of Insurance with investigative and enforcement authority relative to motor vehicle service agreements companies;
- Revise provisions relating to the determination of the financial condition of entities offering warranties under this chapter; and
- Make certain other definitional and administrative changes.

There does not appear to be a fiscal impact on the State.

The bill would take effect upon becoming law.

There is one amendment traveling with the bill. Please see Section VI. of this analysis for details.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

A warranty is a form of insurance that pays for repairs to goods after the expiration of the manufacturer's warranty. According to the Department of Insurance (DOI) information reported in 1999, there were 162 warranty associations in Florida: 52 motor vehicle service agreement companies, 15 home warranty associations, and 95 service warranty associations. Warranty associations are regulated by the DOI under chapter 634, Florida Statutes. However, s. 634.281, F.S., provides that the provisions of part IX, Ch. 626, F.S., the Unfair Insurance Trade Practices Act, apply to service agreement companies and their salespersons.

The Unfair Insurance Trade Practices Act

The "Unfair Insurance Trade Practices Act" regulates Florida's insurance businesses by defining practices that constitute unfair or deceptive methods of competition. All Florida insurers licensed under chapter 624, F.S., and associated agents are subject to the Unfair Insurance Trade Practices Act. Currently, motor vehicle service agreement associations, licensed under part 1 of chapter 634, F.S., are also subject to the Act.

The act generally prohibits insurers from utilizing methods of competition that are fraudulent, unfair to the consumer, or unfair to other insurers participating in the insurance market. Among other things, insurers are prohibited from:

- Using false advertising that misrepresents the benefits, advantages, conditions, dividends or share of the surplus to be received, or terms of any insurance policy, or using any name or title of any insurance policy or class of insurance policies that misrepresents its true nature;
- Knowingly publishing an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading;
- Making false or maliciously critical statements calculated to injure a person;
- Using unfair claim settlement practices such as making material misrepresentations about coverage, denying claims without proper investigation, failing to promptly ask for additional information when needed, and failing to promptly provide a reasonable explanation for claim denials;
- Making false or fraudulent statements inducing, or tending to induce, any person to convert any insurance policy or take out an insurance policy of another insurer;

- Advertising, offering, or providing free insurance as an inducement to the purchase or sale of real or personal property or of services directly or indirectly connected with real or personal property;
- Not stating the amount charged for the insurance when the premium is included in the overall purchase price or financing of property;
- Increasing cost of merchandise, property, or financing for not purchasing insurance;
- Refusing to insure based solely on race, color, creed, marital status, sex, national origin, residence, age, lawful occupation of the individual, location of the risk, or the insured's or applicant's failure to purchase noninsurance services or commodities; and
- Practicing sliding (representing that a coverage is required by law or that a charge is not required under a policy option) or churning (cycling insurance policies within a company to charge more commission).

Motor Vehicle Service Agreement Companies

Motor vehicle service agreement companies are regulated under part I, chapter 634, F.S. A motor vehicle service agreement is defined in s. 634.011, F.S., as a contract or agreement indemnifying the service agreement holder for the motor vehicle listed on the service agreement against loss caused by failure of any mechanical or other component part. Section 634.095, F.S., provides for a limited listing of prohibited acts by motor vehicle service agreement companies. As mentioned previously, the Unfair Insurance Trade Practices Act is also applied to these companies and their salespersons.

Motor vehicle service agreement companies must be licensed through the DOI to conduct business in the state. A motor vehicle service agreement company must maintain an unearned premium reserve consisting of assets equal to a minimum of 50 percent of unearned gross written premium on each service agreement and a ratio of gross written premium to net assets of 10 to 1. A motor vehicle service agreement company does not have to maintain reserves of 50 percent of unearned gross written premium if the company purchases and maintains a contractual liability insurance policy to insure 100 percent of its service contract obligations. Motor vehicle service agreement forms must be filed with the DOI to be used in the state.

Home Warranty Associations

Home warranty associations are regulated under part II, chapter 634, F.S. A home warranty is defined in s. 634.301, F.S., as a contract or agreement offered in connection with the sale of a home, a loan of \$5,000 or more secured by residential property, or a home improvement of \$7,500 or more.

A home warranty may not be issued in the state unless the company is licensed by the DOI under s. 634.306, F.S., and the warranty form has been filed with the DOI.

A home warranty may provide coverage during the period in which a home is listed for sale. The warranty company must charge the purchaser of the warranty a separate charge that equals at least 15 percent of the annual premium charged for the home warranty for coverage during the listing period.

Section 634.336, F.S., provides for a limited listing of methods, acts or practices defined as unfair methods of competition and unfair or deceptive acts or practices as applied to home warranty associations and their salespersons.

Service Warranty Associations

Service warranty associations are regulated under part III, chapter 634, F.S. A service warranty is defined under s. 634.401, F.S., as a warranty or contract agreement to repair or replace a consumer product in return for payment by the consumer. Maintenance service contracts written for one year, which do not contain provisions for indemnification, are not included in the definition of service warranty.

Section 634.436, F.S., provides for a limited listing of methods, acts or practices defined as unfair methods of competition and unfair or deceptive acts or practices as applied to service warranty associations and their salespersons.

C. EFFECT OF PROPOSED CHANGES:

House Bill 1787 revises chapter 634, F.S., relating to warranty associations. This bill takes provisions found in part IX, chapter 626, F.S., relating to unfair insurance trades practices, and amends those relevant provisions into all three parts of chapter 634, F.S. This provides additional authority within each part of that chapter for the regulation of motor vehicle service agreements companies, home warranty associations, and service warranty associations, respectively. This bill does not materially change the standards for practice of the entities and their salespersons licensed under chapter 634, F.S.

Please see Section D., below, for details.

D. SECTION-BY-SECTION ANALYSIS:

Sections 1-14 amend part I; sections 15-21, part II; and sections 22-24, part III, of chapter 634, F.S.

Section 1. Creates a new subsection (2) of s. 634.011, F.S., to provide for a definition of “additive product.” Amends s. 634.011(7) to provide that a “motor vehicle service agreement” includes any contract or agreement which provides the coverage or protection defined in this subsection and is issued or provided in conjunction with an additive product applied to the motor vehicle which is the subject of such contract or agreement.’ Amends s. 634.011(13) to provide that the term “salesperson” also include any dealership, corporation, partnership or sole proprietorship employed for the purpose of soliciting or retaining other salespersons.

Section 2. Amends s. 634.044(1), F.S., to provide that part inventories may be counted as assets for determining the financial condition of a service agreement company. Provides the method for valuing these inventories.

Section 3. Creates subsection (5) of s. 634.137, F.S., authorizing the department by rule to require motor vehicle service companies to submit information contained in financial reports electronically.

Section 4. Amends s. 634.171, F.S., to provide that a motor vehicle service agreement company does not need to be licensed as a salesperson to solicit, sell, issue, or otherwise transact such agreements. Such companies are required to be licensed pursuant to s. 634.031, F.S. A company would be exempt from having to be licensed as a salesperson to sell its own products.

Section 5. Repeals s. 634.281, F.S., which provided that service agreement companies and their salespersons were subject to the provisions of part X, chapter 626 (actually, part IX, as it was redesignated in ch. 98-89, LOF) relating to the regulation of insurance field representatives and

operations. This section applied the standards for practice for insurance field representatives to those salespersons licensed under chapter 634, F.S.

The repeal of this section does not relieve warranty associations and their salespersons of the requirement to adhere to the standards for practice found in part XI, chapter 626. This bill recreates the relevant provisions of that part within each of the parts of chapter 634, F.S., to apply those provisions to warranty associations and their salespersons. Sections 6-9, 11-14, 21, and 24 create the comparable sections in chapter 634 that are current statutory requirements found in chapter 626.

Section 6. Creates s. 634.2815, F.S., to provide that no person may engage in an unfair method of competition or unfair or deceptive act or practice that involves the business of motor vehicle service agreements.

This section is comparable to s. 626.9521(1), F.S., relating to the prohibition on the use of unfair methods of competition or unfair or deceptive acts or practices by persons licensed under that chapter, to motor vehicle service agreements. However, s. 634.9521(2), F.S., which provides penalties for violation of the Unfair Insurance Trade Practices Act, was not created in s. 634.2815, F.S. That subsection provided for a penalty in an amount not greater than \$2,500 for each nonwillful violation, not to exceed an aggregate amount of \$10,000, and a penalty in the amount of \$20,000 for each willful violation, not to exceed an aggregate amount of \$100,000, for violations arising out of the same action

Section 7. Creates s. 634.282, F.S., to define certain methods, acts or practices as unfair methods of competition and unfair or deceptive acts or practices as they relate to the advertising, sale, or delivery of motor vehicle service agreements. Unfair trade practices or acts applying to motor vehicle service agreements would include misrepresenting motor vehicle service agreements; making false advertising; making false statements regarding motor vehicle service agreements; discriminating unfairly; offering unlawful rebates; engaging in unfair claim settlement practices; failing to maintain complaint procedures; refusing to issue contracts solely on the basis of race, color, creed, marital status, sex or national origin of an applicant; offering free motor vehicle service agreements; making false claims; or sliding. This section extends the relevant provisions of s. 626.9541, F.S., defining certain methods, acts or practices as unfair methods of competition and unfair or deceptive acts or practices, to motor vehicle service agreements.

Section 8. Creates s. 634.2825, F.S., to provide that where a motor vehicle service agreement is included in the overall purchase price of property or merchandise or financing of the same, that amount of the agreement is to be identified separately along with any classifications applied to that agreement. Provides that the inclusion or exclusion of the cost of an agreement in the purchase price or financing shall not increase, reduce, or otherwise affect any other factor involved in the cost or the merchandise, property, or financing as to the purchaser or borrower. Provides that the section does not apply to transactions subject to part I, chapter 520, F.S., the Motor Vehicle Rental Sales Finance Act.

This language is taken directly from s. 626.9541(1)(p), F.S., and appears designed to put purchasers on notice of the inclusion of the purchase price of the warranty in the total purchase price of the item.

Section 9. Creates s. 634.283, F.S., to provide that the department has the power to examine and investigate the affairs of those persons involved in the business of motor vehicle service agreements to determine whether those persons have engaged in any unfair or deceptive act or practice as found in s. 634.2815 (section six, above). This section is comparable to s. 626.9561,

F.S., relating to powers of the department to investigate allegations of violations of the Unfair Insurance Trade Practice Act.

Section 10. Creates s. 634.284, F.S., to provide authority to the department to conduct proceedings under chapter 120, F.S., where it has reason to believe that a person is engaged in any unfair or deceptive act or practice as defined in s. 634.282 (section seven, above), or is not properly licensed to sell motor vehicle service agreements. Provides authority for hearing officers to conduct hearings under s. 120.569, F.S., but limits the penalty for failure to comply with a subpoena or discovery order to \$1,000 per violation. Provides for service of process. This section is comparable to s. 626.9571, F.S.

Sections 10 – 13 create in chapter 634 those provisions found in ss. 626.9571 - .9601, F.S. Those sections provide for hearings upon a determination of violation of the Unfair Insurance Trade Practices Act; for department authority to issue penalty orders, and cease and desist orders; for appeal of those orders; and for penalties for violation of the Act as well as a cease and desist order issued pursuant to the Act. Again, the provisions found in chapter 626, F.S. currently apply to companies and salespersons licensed under chapter 634, F.S.; this bill creates that authority in chapter 634, F.S.

Section 11. Creates s. 634.285, F.S., to provide authority to the department, after issuance of a final order finding violation with the provisions of this part, to issue a cease and desist order. Provides for the suspension or revocation of a salesperson's license. Provides for an administrative fine not to exceed \$1,000 for each agreement offered or effectuated by an unlicensed salesperson. This section is comparable to s. 626.9581, F.S.

Section 12. Creates s. 634.286, F.S., to provide for the appeal from an order made pursuant to s. 634.285 (section eleven, above) to the District Court of Appeal pursuant to s. 120.68, F.S. This section is comparable to s. 626.9591, F.S.

Section 13. Creates s. 634.287, F.S., to provide for a fine of not more than \$50,000 or a suspension or revocation of license after notice and hearing, as provided for in s. 634.284 (section ten, above), if a person is found in violation of a cease and desist order. This section is comparable to s. 626.9601, F.S.

Section 14. Creates s. 634.288, F.S., to provide that the provisions under part I, chapter 634, F.S., are cumulative to rights under general civil or common law, and no action of the department will abrogate such rights to damages or other relief in any court. This section is comparable to s. 626.9631, F.S.

Section 15. Amends s. 634.301(4), F.S., to provide that the definition of "home warranty" as it is applied in part II, chapter 634, F.S., does not apply to those agreements offered by a service warranty association in compliance with part III, chapter 634, F.S., where those contracts relate only to the systems and appliances and not the structure of a covered residence.

Section 16. Removes s. 634.3077(3), F.S., which provided that certain assets were to be deducted from the net assets of the company for purposes of computing the net assets requirement. These assets included certain intangible assets such as goodwill, franchises, customer lists, patents or trademarks; receivables from or advances to officers, directors, employees, salespersons, or affiliated companies; and assets deposited outside the United States. This listing is recreated and expanded in s. 634.3078 (section 17, below) as a list of assets expressly excluded from a determination of the financial condition of a company.

Section 17. Creates s. 634.3078 to provide a listing of those assets and liabilities that can be used to determine the financial condition of a home warranty association. The assets may include cash, interest due on certain instruments and notes, declared and unpaid dividends, rents on real property not in arrears for more than 3 months, personal property originally valued over \$200 and to be amortized over a period of not more than 5 years, part inventories related to servicing products warranted, the liquid value of prepaid expenses, and other assets as deemed to be available for payment of claims and losses. Provides for the reassessment or replacement of an asset the department determines is unqualified within 30 days of written notification of the determination.

Provides that "in addition to assets impliedly excluded by the provisions of subsection (1)"(describing admitted assets, above), assets expressly excluded are certain intangible assets such as company goodwill and trade names agreement holder lists, patents and trademarks, agreements not to compete; notes or accounts receivable from or advances to a company officer, director, shareholder as well as advances to employees, agents, or other person made on personal security; stock of the home warranty company owned or controlled by an entity which in come way controls more than a 25 percent ownership interest; certain leasehold improvements and other tangible personal property items; certain financial notes or instruments that are in default or past the period for curing the default; and notes or other evidence of indebtedness in the parent of the home warranty association, the parent's controlling entity, affiliates or officers in the company. This listing includes those assets listed in s. 634.3077(3), F.S., (section 16, above) but does not allow these assets to be included in the computation of the net assets requirement, as was previously allowed.

Liabilities that may be charged against these admitted assets include those amounts that would be necessary to pay off all unpaid losses and claims incurred for or on behalf of an agreement holder within the reporting period, taxes, expenses, or another obligations due or accrued a the date of the statement, the reserve for unearned premiums, and liabilities the department determines the home warranty association has failed to report but should have reported and are then reported under a corrected copy of the report within 10 days of written notification by the department.

Section 18. Creates subsection (5) of s. 634.313, F.S., authorizing the department by rule to require motor vehicle service companies to submit information contained in financial reports electronically.

Section 19. Amends s. 634.318, F.S., to provide that a home warranty association is not required to be licensed as a sales representative to solicit, sell, issue or otherwise transact home warranty agreement issued by the association. Such companies are required to be licensed pursuant to s. 634.303, F.S. A company would be exempt from having to be licensed as a salesperson to sell its own products.

Section 20. Corrects a grammatical error in s. 634.331, F.S.

Section 21. Creates subsection (9) of s. 634.336, F.S. to provide that advertising, offering, or providing a free home warranty as an inducement to the purchase or sale of real or personal property is prohibited. Defines what constitutes a free home warranty. This language is comparable to s. 626.9541(1)(n), F.S., which prohibits the advertising, offering, or providing of a free insurance as an inducement to the purchase or sale of real or personal property.

Section 22. Creates subsection (6) of s. 634.415, F.S., authorizing the department by rule to require motor vehicle service companies to submit information contained in financial reports electronically.

Section 23. Amends s. 634.419, F.S., to provide that a service warranty association need not be licensed and appointed a sales representative to advertise, solicit, sell, or issue its products. Such

companies are required to be licensed pursuant to s. 634.403, F.S. A company would be exempt from having to be licensed as a salesperson to sell its own products.

Section 24. Creates s. 634.436(8) to provide that the advertising, offering, or providing of a free service warranty as an inducement to the purchase or sale of real or personal property or services directly or indirectly connected with that property is defined as an unfair method, act, or practice. Defines what constitutes a free service warranty. This language is comparable to s. 26.9541(1)(n), F.S., which prohibits the advertising, offering, or providing of a free insurance as an inducement to the purchase or sale of real or personal property.

Section 25. Amends s. 624.124 to correct a cross-reference.

Section 26. Amends s. 628.4615 to correct a cross-reference.

Section 27. Provides that the act takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There does not appear to be a sizable impact on the private sector. Provisions relating to the electronic reporting of financial information could provide cost savings.

D. FISCAL COMMENTS:

There does not appear to be a fiscal impact on the State.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The department would be granted authority to adopt rules for the electronic transmission of certain financial information contained in required reports.

C. OTHER COMMENTS:

Section 8 of this bill creates a disclosure requirement when the purchase of a motor vehicle service warranty is included in the total cost of purchasing the vehicle. It is unclear whether the language relating to "classifications" has any effect, or how the provisions regarding the inclusion or exclusion of the cost of the agreement, as it impacts on other factors related to the purchaser or borrower, is to be applied.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

At its April 11, 2001, meeting, the Committee on Insurance adopted one amendment. It is traveling with the bill.

This amendment made these changes to the bill:

- Further amends the newly created s. 634.282, F.S., to prohibit the use of advertisements that would be defined as an unfair or deceptive practice when that advertisement would mislead or mistakenly lead a reasonable person to believe that the federal or state governments in any way stand behind the operation of the motor vehicle service agreement or would guarantee any returns on the agreement or the payment of obligations arising under the agreement;
- Amends section 634.312 to provide that all home warranty contracts must include on the front page in bold type a disclaimer similar to this one: "Certain items and event are not covered by this contract. Please refer to the exclusions listed on page ____ of this document;"

- Removes from s. 634.336, F.S., which defines for home warranty associations the unfair methods of competition and unfair or deceptive acts or practices that are a violation of the part, the proposed prohibition on the offering of a free home warranty;
- Removes the proposed exception to the definition of home warranty, found at s. 634.318(4), F.S., for contracts or agreements operated by a service warranty association licensed under part III, chapter 634, F.S.;
- Clarifies s. 634.419, F.S., that service warranty associations need not be licensed as salespersons to, among other things, solicit, negotiate, or effectuate their own products;
- Amends ss. 634.302 and 634.402, F.S., and creates s. 634.289, F.S., to provide specific rulemaking authority to the department in each of the three parts of the chapter to interpret the sections of the chapter that describe the methods, practices, or acts that are defined as unfair competition or unfair or deceptive acts or practices;
- Delays the effective date until January 1, 2002, of the sections of the bill amending s. 634.3077 and creating s. 634.3078, F.S., which delineate the assets and liabilities that may be used to determine the financial condition of a home warranty association; and
- Makes scrivener's corrections and technical changes to the bill and its title.

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

David M. Greenbaum

Staff Director:

Stephen Hogge

AS FURTHER REVISED BY THE COUNCIL FOR COMPETITIVE COMMERCE:

Prepared by:

David M. Greenbaum

Staff Director:

Hubert "Bo" Bohannon