

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1956

SPONSOR: Commerce and Economic Opportunities Committee and Senators Latvala and Sanderson

SUBJECT: Motor Vehicle Dealers

DATE: April 19, 2001

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Vickers</u>	<u>Meyer</u>	<u>TR</u>	<u>Favorable</u>
2.	<u>Bimholz</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

By codifying most of the violations proscribed in a repealed Department of Legal Affairs rule regarding motor vehicle sales, this committee substitute provides that certain motor vehicle dealer practices are actionable under the Florida Deceptive and Unfair Trade Practices Act. This committee substitute also requires a trial court to consider certain information when awarding attorney's fees to a person in civil litigation resulting from a violation of the provisions established in this committee substitute.

This committee substitute creates unnumbered sections of the Florida Statutes. This committee substitute repeals s. 320.27(9)(n), F.S.

II. Present Situation:

Although s. 320.27, F.S., provides for civil fines and/or the denial, suspension, or revocation of a motor vehicle dealer license for certain violations, current law does not appear to specifically address the violations referenced in this committee substitute within the context of the Florida Deceptive and Unfair Trade Practices Act, or "FDUTPA" (ch. 501, part II, F.S.). This committee substitute codifies most of the violations proscribed in a repealed Department of Legal Affairs (DLA) rule (originally adopted under the specific authority of FDUTPA) regarding motor vehicle sales.

Motor Vehicle Dealers

Section 320.27(1)(c), F.S., defines the term "motor vehicle dealer" to mean any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to

an agreement as defined in s. 320.60(1), F.S.¹ No person may engage in business as, serve in the capacity of, or act as a motor vehicle dealer in this state without first obtaining a license from the Department of Highway Safety and Motor Vehicles (DHSMV). [s. 320.27(2), F.S.]

Section 320.27(9), F.S., provides that DHSMV may deny, suspend, or revoke any license upon proof that a licensee has failed to comply with any of the following provisions with sufficient frequency so as to establish a pattern of wrongdoing on the part of the licensee:

- (a) willful violation of any other law of this state related to dealing in or repairing motor vehicles, willful failure to comply with any administrative rule promulgated by DHSMV, or, in the case of used motor vehicles, the willful violation of certain federal law;
- (b) commission of fraud or willful misrepresentation in application for or in obtaining a license;
- (c) perpetration of a fraud upon any person as a result of dealing in motor vehicles, including, without limitation, the misrepresentation to any person by the licensee of the licensee's relationship to any manufacturer, importer, or distributor;
- (d) representation that a demonstrator is a new motor vehicle, or the attempt to sell or the sale of a demonstrator as a new motor vehicle without written notice to the purchaser that the vehicle is a demonstrator;²
- (e) unjustifiable refusal to comply with a licensee's responsibility under the terms of the new motor vehicle warranty issued by its respective manufacturer, distributor, or importer;
- (f) misrepresentation or false, deceptive, or misleading statements with regard to the sale or financing of motor vehicles which any motor vehicle dealer has, or causes to have, advertised, printed, displayed, published, distributed, broadcast, televised, or made in any manner with regard to the sale or financing of motor vehicles;
- (g) requirement by any motor vehicle dealer that a customer accept equipment on his or her motor vehicle which was not ordered by the customer;
- (h) requirement by any motor vehicle dealer that any customer finance a motor vehicle with a specific financial institution or company;
- (i) failure by any motor vehicle dealer to provide a customer with an odometer disclosure statement and a copy of any bona fide written, executed sales contract, or agreement of purchase connected with the purchase of the motor vehicle;
- (j) failure of any motor vehicle dealer to comply with the terms of any bona fide written, executed agreement, pursuant to the sale of a motor vehicle;
- (k) requirement by the motor vehicle dealer that the purchaser of a motor vehicle contract with the dealer for physical damage insurance;

¹ Section 320.60(1), F.S., defines the term "agreement" to mean a contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer, and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make.

² Section 320.60(3), F.S., defines the term "demonstrator" to mean any new motor vehicle which is carried on the records of the dealer as a demonstrator and is used by, being inspected, or driven by the dealer or his or her employees or prospective customers for the purpose of demonstrating vehicle characteristics in the sale or display of motor vehicles sold by the dealer.

- (l) violation of any of the provisions of s. 319.35, F.S., (regarding unlawful acts in connection with motor vehicle odometer readings) by any motor vehicle dealer;
- (m) either a history of bad credit or an unfavorable credit rating as revealed by the applicant's official credit report or by investigation by DHSMV;
- (n) "[f]ailure to disclose damage to a new motor vehicle as defined in s. 320.60(10) [, F.S..] of which the dealer had actual knowledge if the dealer's actual cost of repair, excluding tires, bumpers, and glass, exceeds 3 percent of the manufacturer's suggested retail price; provided, however, if only the application of exterior paint is involved, disclosure shall be made if such touch-up paint application exceeds \$100";
- (o) failure to apply for transfer of a title as prescribed in s. 319.23(6), F.S.;
- (p) use of the dealer license identification number by any person other than the licensed dealer or his or her designee;
- (q) conviction of a felony;
- (r) failure to continually meet the requirements of the licensure law;
- (s) when a motor vehicle dealer is convicted of a crime which results in his or her being prohibited from continuing in that capacity, the dealer may not continue in any capacity within the industry;
- (t) representation to a customer or any advertisement to the general public representing or suggesting that a motor vehicle is a new motor vehicle if such vehicle lawfully cannot be titled in the name of the customer or other member of the general public by the seller using a manufacturer's statement of origin as permitted in s. 319.23(1), F.S.;
- (u) failure to honor a bank draft or check given to a motor vehicle dealer for the purchase of a motor vehicle by another motor vehicle dealer within 10 days after notification that the bank draft or check has been dishonored; or
- (v) sale by a motor vehicle dealer of a vehicle offered in trade by a customer prior to consummation of the sale, exchange, or transfer of a newly acquired vehicle to the customer, unless the customer provides written authorization for the sale of the trade-in vehicle prior to delivery of the newly acquired vehicle.

Section 320.27(12), F.S., provides that DHSMV may levy and collect a civil fine, in an amount not to exceed \$1,000 for each violation, against any licensee if it finds that the licensee has violated any provision of this section or has violated any other law of this state or the federal law and administrative rule set forth in s. 320.27(9)(a), F.S., related to dealing in motor vehicles.

Florida Deceptive and Unfair Trade Practices Act

Purpose

Florida has numerous laws to protect individual and business consumers. One of these laws is ch. 501, part II, F.S., known as the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The purposes of FDUTPA are 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. (s. 501.202, F.S.)

Violations

Section 501.201, F.S., provides that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. It is the intent of the Legislature that due consideration and great weight shall be given to the interpretations of the Federal Trade Commission (FTC) and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).

Section 501.205, F.S., further provides that the Department of Legal Affairs (DLA) may adopt rules which set forth with specificity acts or practices that violate FDUTPA and which prescribe procedural rules for the administration of FDUTPA. All substantive rules promulgated under FDUTPA must not be inconsistent with the rules, regulations, and decisions of the FTC and the federal courts in interpreting the provisions of s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).

However, the method by which violations have been brought under FDUTPA has changed since FDUTPA was enacted in 1973. As noted in a 1999 *Florida Bar Journal* article:

Until 1993, a FDUTPA violation had been a violation of any provision of the act [Florida Deceptive and Unfair Trade Practices Act] or any rule promulgated by the Department of Legal Affairs (DLA) pursuant to its authority to specify unfair or deceptive acts or practices thereunder. The 1993 amendments [to FDUTPA made by ch. 93-38, L.O.F.] expanded the definition to make it current with developing FTC jurisprudence, so as to provide that a violation may be based on of [sic] any of the following:

- 1) Any rules promulgated pursuant to the FTC act or FDUTPA;
- 2) The standards of unfairness or deception set forth and interpreted by the FTC or the federal courts; or
- 3) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

This expansion was highly significant and timely. Since 1973 the FTC has set forth coherent standards of both unfairness and deception, and promulgated numerous rules proscribing unfair practices on an industry-wide basis. Those FTC rules have effectively become Florida law.

The 1993 amendments marked a substantial change in approach to defining FDUTPA's substantive scope. Originally, the legislature and courts apparently contemplated that the DLA would specifically identify most unfair or deceptive business practices through administrative rulemaking. The amendments' incorporation of the FTC's standards and

rules, however, combined with the DLA's subsequent repeal of most of the rules it had previously promulgated under FDUTPA, have made such FTC precedent the preeminent determinant of what constitutes "unfair or deceptive acts or practices."³

The DLA rule that this committee substitute substantially codifies (Rule 2-19.005, F.A.C., Motor Vehicle Sales) was part of one of the chapters of the Florida Administrative Code repealed (as referenced above) in 1996 and 1997. (Rule 2-2.001, F.A.C.) In making this repeal, Rule 2-2.001, F.A.C., states:

It is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II, Chapter 501, Florida Statutes. (See *Department of Legal Affairs v. Father & Son Moving & Storage*, 643 So. 2d 22 (Fla. 4th DCA 1994)). The repeal by the Department of Legal Affairs of the following rule chapters shall not modify or restrict the application of Part II, Chapter 501, Florida Statutes, to deceptive and unfair trade practices ...

Notwithstanding this statement, there are some provisions in current law "which do not have their own remedy provisions but rather tie into FDUTPA's remedies," including, the Commercial Weight-Loss Practices Act (s. 501.0579, F.S.) and the provision in s. 320.27(2), F.S., regarding a person selling or offering a motor vehicle for sale in violation of the licensing requirements of this subsection, or who misrepresents to any person its relationship with any manufacturer, importer, or distributor.⁴

Penalties and Remedies

Section 501.203, F.S., defines the term "enforcing authority" to mean the office of the state attorney if a violation of FDUTPA occurs in or affects the judicial circuit under the office's jurisdiction, or DLA if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to DLA in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney. Section 501.207, F.S., provides that the enforcing authority may bring:

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

However, no damages shall be recoverable under this section against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated FDUTPA.

³ David J. Federbush, "The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act," *Florida Bar Journal*, May 1999, p. 26, 28.

⁴ *Id.*

Section 501.2075, F.S., provides that, except as provided in s. 501.2077, F.S., (violations regarding senior citizens or handicapped persons), any person who is willfully using, or has willfully used, a method, act, or practice declared unlawful under s. 501.204, F.S., or who is willfully violating any DLA rules promulgated under FDUTPA, is liable for a civil penalty of not more than \$10,000 for each such violation.⁵ Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. If civil penalties are assessed in any litigation, the enforcing authority is entitled to reasonable attorney's fees and costs.

Section 501.211, F.S., provides that, in any individual action brought by a consumer who has suffered a loss as a result of a violation of FDUTPA, such consumer may recover actual damages, plus certain attorney's fees and court costs. However, no damages, fees, or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

III. Effect of Proposed Changes:

By codifying most of the violations proscribed in a repealed Department of Legal Affairs rule regarding motor vehicle sales, this committee substitute provides that certain motor vehicle dealer practices are actionable under the Florida Deceptive and Unfair Trade Practices Act. This committee substitute also requires a trial court to consider certain information when awarding attorney's fees to a person in civil litigation resulting from a violation of the provisions established in this committee substitute. The following is a section-by-section analysis of this committee substitute:

Section 1. This section provides definitions for use in this committee substitute, including:

- "Vehicle" means any automobile, truck, bus, recreational vehicle, or motorcycle required to be licensed under ch. 320, F.S., for operation over the roads of Florida, but does not include trailers, mobile homes, travel trailers, or trailer coaches without independent motive power;
- "Replacement item" means a tire, bumper, bumper fascia, glass, in-dashboard equipment, seat or upholstery cover or trim, exterior illumination unit, grill, sunroof, external mirror and external body cladding. The replacement of up to three of these items does not constitute repair of damage if each item is replaced because of a product defect or damaged due to vandalism while the "new motor vehicle" is under the control of the dealer and the items are replaced with original manufacturer equipment, unless an item is replaced due to a crash, collision, or accident; and
- "Threshold amount" means 3 percent of the manufacturer's suggested retail price of a motor vehicle or \$650, whichever is less.

⁵ Any person who victimizes or attempts to victimize a senior citizen or handicapped person under FDUTPA is liable for a civil penalty of not more than \$15,000 for each such violation. [s. 501.2077(2), F.S.]

Section 2. This section provides that:

It is an unfair or deceptive act or practice, actionable under the Florida Deceptive and Unfair Trade Practices Act, for a dealer to:

- (1) Represent directly or indirectly that a motor vehicle is a factory executive vehicle or executive vehicle unless such vehicle was purchased directly from the manufacturer or a subsidiary of the manufacturer and the vehicle was used exclusively by the manufacturer, its subsidiary, or a dealer for the commercial or personal use of the manufacturer's, subsidiary's, or dealer's employees.
- (2) Represent directly or indirectly that a vehicle is a demonstrator unless the vehicle was driven by prospective customers of a dealership selling the vehicle and such vehicle complies with the definition of a demonstrator in section 320.60(3), Florida Statutes.
- (3) Represent the previous usage or status of a vehicle to be something that it was not, or make usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.
- (4) Represent 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.
- (5) Represent 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 agent to determine whether the vehicle has incurred such damage.
- (6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions that the dealer or manufacturer has given to the buyer. If the warranty obligations are to be shared by the dealer and the buyer, the method of determining the percentage of repair costs to be assumed by each party must be disclosed. If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in layman's terms in accordance with chapter 672, Florida Statutes, and the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act.
- (7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).
- (8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.
- (9) Obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect

accurately the negotiations and agreement between the customer and the dealer.

- (10) Require or accept a deposit from a prospective customer prior to entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt that states how long the dealer will hold the vehicle from other sale and the amount of the deposit, and clearly and conspicuously states whether and upon what conditions the deposit is refundable or nonrefundable.
- (11) Add to the cash price of a vehicle as defined in section 520.02(2), Florida Statutes, any fee or charge other than those provided in that section and in Rule 3D-50.001, Florida Administrative Code. All fees or charges permitted to be added to the cash price by Rule 3D-50.001, Florida Administrative Code, must be fully disclosed to customers in all binding contracts concerning the vehicle's selling price.
- (12) Alter or change the odometer mileage of a vehicle.
- (13) Sell a vehicle without disclosing to the customer the actual year and model of the vehicle.
- (14) File a lien against a new vehicle purchased with a check unless the dealer fully discloses to the purchaser that a lien will be filed if purchase is made by check and fully discloses to the buyer the procedures and cost to the buyer for gaining title to the vehicle after the lien is filed.
- (15) Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, notwithstanding subsequent receipt of an official price change notification. The price of a vehicle may be increased after a dealer accepts an order of purchase or a contract from a buyer if:
 - (a) A trade-in vehicle is reappraised because it subsequently is damaged, or parts or accessories are removed;
 - (b) The price increase is caused by the addition of new equipment, as required by state or federal law;
 - (c) The price increase is caused by the revaluation of the U.S. dollar by the Federal Government, in the case of a foreign-made vehicle;
 - (d) The price increase is caused by state or federal tax rate changes; or
 - (e) Price protection is not provided by the manufacturer, importer, or distributor.
- (16) Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name. The advertised price must include all fees or charges that the customer must pay, including freight or destination charge, dealer preparation charge, and charges for undercoating or rustproofing.

State and local taxes, tags, registration fees, and title fees, unless otherwise required by local law or standard, need not be disclosed in the advertisement. When two or more dealers advertise jointly, with or without participation of the franchiser, the advertised price need not include fees and charges that are variable among the individual dealers cooperating in the advertisement, but the nature of all charges that are not included in the advertised price must be disclosed in the advertisement.

- (17) Charge a customer for any pre-delivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the manufacturer, distributor, or importer.
- (18) Charge a customer for any pre-delivery service without having printed on all documents that include a line item for pre-delivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."
- (19) Add an additional charge for pre-delivery service other than those shown on a conspicuous label attached to the window of the vehicle specifying any charge for pre-delivery services and describing the charges as pre-delivery services, delivery and handling, dealer preparation, or in similar terms the dealer's charge for each dealer-installed option, and a total price line.
- (20) Fail to disclose damage to a "new motor vehicle," as defined in subsection 320.60(10), Florida Statutes," of which the dealer had actual knowledge, if the dealer's actual cost of repairs exceeds the threshold amount, excluding replacement items.

It should be noted that s. 320.60(10), F.S., defines the term "motor vehicle" rather than "new motor vehicle."⁶ However, the definition of the term "motor vehicle" in s. 320.60(10), F.S., does appear to capture new motor vehicles by referencing "any new automobile, motorcycle, or truck."

Additionally, definitional differences within this committee substitute might allow for varying interpretations of the term "new motor vehicle." In subsection (20) of section 2 of this committee substitute, the term "new motor vehicle" is defined via a reference to s. 320.60(10), F.S.⁷ No such reference exists, though, when the term is used within the definition of the term "replacement item" in subsection (3) of section 1 of this committee substitute; instead, the phrase "new motor" could be construed in this instance to be modifying the term "vehicle" as defined in

⁶ Section 320.60(10), F.S., defines the term "motor vehicle" to mean "any new automobile, motorcycle, or truck the equitable or legal title to which has never been transferred by a manufacturer, distributor, importer, or dealer to an ultimate purchaser; however, when legal title is not transferred but possession of a motor vehicle is transferred pursuant to a conditional sales contract or lease and the conditions are not satisfied and the vehicle is returned to the motor vehicle dealer, the motor vehicle may be resold by the motor vehicle dealer as a new motor vehicle, provided the selling motor vehicle dealer gives the following written notice to the purchaser: 'THIS VEHICLE WAS DELIVERED TO A PREVIOUS PURCHASER.' The purchaser shall sign an acknowledgment, a copy of which is kept in the selling dealer's file."

⁷ *Id.*

subsection (5) of section 1. The Legislature might want to consider using a consistent definition of the term “new motor vehicle” throughout this committee substitute in order to avoid any ambiguity.

Section 2 of this committee substitute further provides that, in any civil litigation resulting from a violation of this section, when evaluating the reasonableness of an award of attorney’s fees to a private person, the trial court shall consider the amount of actual damages in relation to the time spent.

Section 3. This section repeals s. 320.27(9)(n), F.S., regarding a dealer’s failure to disclose damage to a new motor vehicle. This paragraph appears to be replaced by subsection (20) of section 2 of this committee substitute.

Section 4. This section provides that this act applies to any vehicle sold after October 1, 2001.

Section 5. This section provides that this act shall take effect October 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This committee substitute appears to provide additional protection for consumers who purchase motor vehicles from motor vehicle dealers. This committee substitute also provides that in any civil litigation resulting from a violation of section 2 of this committee substitute, when evaluating the reasonableness of an award of attorney’s fees to a private person, the trial court shall consider the amount of actual damages in relation to the time spent.

Additionally, motor vehicle dealers might incur greater costs in selling motor vehicles in order to comply with the various disclosure requirements provided for in this committee substitute.

C. Government Sector Impact:

Implementation of this committee substitute may increase the number of dealer complaints that would be processed by the Department of Highway Safety and Motor Vehicles staff. However, the department reports that any workload increase or related costs would be absorbed within existing resources.

Furthermore, by increasing the number of Florida Deceptive and Unfair Trade Practices Act violations in statute, this committee substitute might increase civil litigation in the state, thus affecting the workloads of the Department of Legal Affairs and the judicial system. However, the magnitude of this effect is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
