

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 208

SPONSOR: Committee on Commerce and Economic Opportunities and Senator Geller

SUBJECT: Consumer Protection

DATE: March 22, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Birnholz</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This committee substitute:

- codifies some of the recommendations of the legislatively created Information Service Technology Development Task Force regarding consumer protection for businesses and governmental entities from unfair or deceptive acts or practices over or through the Internet;
- incorporates the specific changes to various sections of ch. 501, part II, F.S., the Florida Deceptive and Unfair Trade Practices Act, recommended by the task force; and
- amends certain sections of statute in order to capture changes to applicable federal law that may have occurred subsequent to the sections' most recent publications.

This committee substitute substantially amends the following sections of the Florida Statutes: 501.202, 501.203, 501.204, 501.207, 501.2075, 501.211, and 501.212. The committee substitute also repeals s. 501.2091, F.S.

II. Present Situation:

Computer access and the ability to disseminate information with the click of a button through the Internet are rapidly expanding each day. E-mail and electronic commerce (e-commerce) are becoming as prevalent in the public realm as in the private sector.¹ The opportunities for use of the Internet for research and commerce are unlimited. While the vast majority of information

¹ The term "e-commerce" refers to the buying or selling of products and services by businesses and consumers over the Internet. Three typical e-commerce transactions take place over the Internet: business-to-business; business to consumer; and consumer-to-consumer.

sources and commercial sites are responsible entities, the Internet provides a new method for wrongdoers to engage in illegal activities to deceive or defraud.

Information Service Technology Development Task Force

The 1999 Legislature created the Information Service Technology Development Task Force within the Department of Management Services (ch. 99-354, L.O.F.). The task force, whose two-year term expires on July 1, 2001, is composed of 34 bipartisan members from the public and private sectors. The task force is directed to develop policies benefiting state residents by fostering free-market development and beneficial use of advanced communication networks and information technologies within Florida.

To achieve its purposes, the task force divided its stated directives among nine subcommittees. Each subcommittee developed policy recommendations according to its stated directive.² The elaws: Civil & Criminal Subcommittee was directed to evaluate state laws, agencies, rules, procedures, and policies to determine if there is a need to create new laws or amend or repeal existing laws, rules, procedures, and policies to reflect the impact of technological advancement in the state of Florida, particularly regarding the public, private, and commercial use of the Internet. The task force recommended amending various sections of ch. 501, part II, F.S., the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).³

Florida Deceptive and Unfair Trade Practices Act

Florida has numerous laws on the books 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 reason for enacting the FDUTPA was to 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. (s. 501.202, F.S.)

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under the FDUTPA. The statutory definitions in the FDUTPA include coverage of any non-exempt activity in "any trade or commerce." The FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium, including the Internet. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to the medium of the trade or commerce. The plain language of the definition applies to all transactions in any medium, including the Internet.

² *1999 Annual Report to the Legislature*, Information Service Technology Development Task Force, February 14, 2000, p. 81, and *2001 Annual Report to the Legislature*, Information Service Technology Development Task Force, February 14, 2001, p. 106.

³ *1999 Annual Report to the Legislature*, Information Service Technology Development Task Force, February 14, 2000, p. 81-88, and *2001 Annual Report to the Legislature*, Information Service Technology Development Task Force, February 14, 2001, p. 113-116.

The task force, however, noted that most of Florida's laws were created prior to the rapid proliferation of the Internet and e-commerce and stressed that it was important to ensure that the many protections against fraud and other criminal activity apply in the new world of e-commerce. As the task force wrote in 1999:

Sellers of goods and services to businesses and individuals in Florida should be regulated in the same manner, regardless of the method used to contact or deliver the goods or services to that business or individual. The person's right to equal protection under the laws of this state should not be diminished because of the type of sales transaction having changed due to technological advances.⁴

The task force also recognized the importance of the Florida courts maintaining jurisdiction over perpetrators of crimes in order to protect Florida businesses and residents. In addition to the need for changes to criminal laws, the task force stressed that Florida needed to amend its civil laws to protect its citizens and businesses. The task force addressed five key issues more specifically: the definition of "consumer," governmental entity protection, venue (with regard to stays of FDUPA proceedings), remedies available to businesses, and FDUPA exemptions.

Definition of "Consumer"

One mandate of the task force is to promote a free and fair marketplace in Florida for all types of businesses that may be involved in e-commerce. Since 1979, the FDUTPA has contained a definition of "consumer" which includes corporations and other businesses. (s. 501.203, F.S.) Because the remedies under the FDUPA were intended by the Legislature to be available to all persons, including businesses, the Legislature has several times amended the definition of "consumer" in the FDUTPA to clarify the intent to include businesses.⁵ Notwithstanding these amendments, courts have been inconsistent in their interpretations of the statute and its protections of businesses.

Governmental Entity Protection

Like legitimate businesses, governmental entities should receive protection from those who use the Internet or any other method to deceive or defraud. E-mail and e-commerce are becoming as prevalent in the public realm as they are in the private sector. The protections for governmental entities need to keep step with protections afforded under the FDUTPA for private parties. The Office of the Attorney General currently seeks protection for governmental units under the FDUTPA in antitrust-related matters. The FDUTPA, however, does not specifically mention protections for governmental entities.

⁴ *1999 Annual Report to the Legislature*, Information Service Technology Development Task Force, February 14, 2000, p. 82.

⁵ For example, a 1979 amendment to the FDUTPA (s. 1, ch. 79-386, L.O.F.) added business organizations to the definition of "consumer."

Venue (With Regard to Stay of FDUPTA Proceedings)

When Florida consumers (individuals or businesses) suffer a loss because of a commercial transaction, they can avail themselves of the protections of Florida law through the use of various consumer protection statutes. Usually, the harmed party is allowed to bring the legal action to recover from the wrongdoer where the injury occurred, thus keeping expenses to a minimum. The issue of venue has recently arisen under the FDUTPA based on an outdated venue provision, which existed in tandem with an administrative enforcement scheme that has been repealed. According to the task force, the “administrative venue provision” (s. 501.2091, F.S.) was erroneously left in the FDUTPA and, at least in one instance, has posed difficulties for the State Attorney’s enforcement of the statute in circuit court.^{6, 7} The task force’s concern with the statutory language is that it may be misused in the future by someone from out-of-state, such as an Internet provider, to argue that the proper venue for hearing a case brought against it for allegedly harming a Florida customer is the provider’s home state.

Remedies Available To Businesses

As stated previously, the remedies under the FDUPTA were intended by the Legislature to be available to all persons, including businesses. Due to inconsistent court interpretations of the statute and its intended protection of businesses, the remedies available to individual consumers have not always been available to business consumers.

Exemptions

A current exemption to the FDUTPA relating to persons and activities regulated by the Public Service Commission and other state and federal regulatory agencies may impact the ability of the act to cover a growing number of Internet operators and merchants. The exemption, which is codified in s. 501.212(4), F.S., provides that the FDUPTA does not apply to “[a]ny person or activity regulated under laws administered by the Department of Insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance or banks or savings and loan associations regulated by federal agencies.”

This exemption was part of the original 1973 version of the FDUTPA, which predated the era of deregulation of the telecommunications, insurance, and financial industries, among others. The FDUTPA also predated the advent of the Internet and the other technological advances of the last 15 to 20 years.

Today’s companies are more diversified than in the past, often conducting business in multiple industries. Many of the entities that are regulated by the Public Service Commission (PSC) or the Department of Insurance (DOI) are engaging in activities, some Internet-related, which are not regulated by those agencies. The words “person or activity” in the exemption provides a person

⁶ 2001 Annual Report to the Legislature, Information Service Technology Development Task Force, February 14, 2001, p. 114.

⁷ See *Maddox v. State*, 709 So. 2d 611 (Fla.1st DCA 1998). Although the State of Florida argued that s. 501.2091, F.S., was only meant to apply to a stay of administrative proceedings brought by an enforcing authority, the Court held that “the limitation urged by the state is not supported by the statutory language,” noting that the statute “applies to ‘any [emphasis added] proceeding brought under the provisions of this act [sic] by any enforcing authority.’”

regulated by the PSC or the DOI with a blanket exemption from the provisions of the FDUTPA, even if the activity in which the person is engaging is not regulated by the agency. Thus, a person asserting an exemption from the FDUTPA as a regulated “person” could engage in an activity, act, or practice not regulated by the agency and escape any scrutiny or potential enforcement action.

III. Effect of Proposed Changes:

This committee substitute:

- codifies some of the recommendations of the legislatively created Information Service Technology Development Task Force regarding consumer protection for businesses and governmental entities from unfair or deceptive acts or practices over or through the Internet;
- incorporates the specific changes to various sections of ch. 501, part II, F.S., the Florida Deceptive and Unfair Trade Practices Act, recommended by the task force; and
- amends certain sections of statute in order to capture changes to applicable federal law that may have occurred subsequent to the sections’ most recent publications.

The following is a section-by-section analysis of this committee substitute.

Section 1. This section amends s. 501.202, F.S., relating to the rules of construction for ch. 501, part II, F.S. An effective date of July 1, 2001, is added to s. 501.202(3), F.S., in order to provide a date of applicability for conforming state consumer protection and enforcement with federal law.

Section 2. This section amends s. 501.203, F.S., relating to definitions for the FDUTPA. The definition of “consumer” is modified to include a “business” and “any commercial entity, however denominated.” The effect of this change is that, wherever the word “consumer” appears in the FDUTPA regarding protections and remedies under the act, those protections and remedies will clearly extend to consumers, as defined by this committee substitute. Additionally, an effective date of July 1, 2001, is added to s. 501.203(3), F.S., in order to incorporate revisions to applicable regulations relating to the Federal Trade Commission Act.

Section 3. This section amends s. 501.204, F.S., relating to unlawful acts and practices under the FDUTPA. An effective date of July 1, 2001, is added to s. 501.204(2), F.S., in order to incorporate revisions to applicable regulations and interpretations relating to the Federal Trade Commission Act.

Section 4. This section amends s. 501.207, F.S., relating to remedies of the FDUTPA “enforcing authority,” which is the Office of State Attorney or the Department of Legal Affairs, depending on such factors as where the violation occurred. [s. 501.203(2), F.S.] Current law does not mention governmental entities in connection with certain actions the enforcing authority may take. By including the phrase “governmental entities,” this committee substitute provides the enforcing authority with the power to take the same actions on behalf of governmental entities that it now takes on behalf of consumers. Additionally, this committee substitute adds the

granting of “legal” and “equitable” relief to the list of orders that a court may make upon motion of the enforcing authority or any interested party in any action brought under s. 501.207(1), F.S.

Section 5. This section amends s. 501.2075, F.S., relating to civil penalties under the FDUTPA. By adding a reference to “governmental entities,” this committee substitute provides that the court may waive the civil penalties for violations of the FDUTPA if a governmental entity has been made whole. Under current law, this is the case with consumers who have received full restitution, have been reimbursed, or have recovered actual damages. The addition of a reference to “governmental entities” appears to be related to the changes in section 4 of this committee substitute and the task force’s rationale for those changes.

Section 6. This section repeals s. 501.2091, F.S., relating to stay of proceedings brought under the FDUTPA. Section 501.2091, F.S., currently provides that:

Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party’s residence. All parties shall be bound by the final order of the circuit court.

According to the task force, s. 501.2091, F.S., is antiquated. It once existed in tandem with an administrative enforcement provision that has since been repealed. The task force was concerned “that this provision may be misused in the future by someone from out-of-state, such as an Internet provider, to argue the proper venue for hearing a case brought against him for allegedly harming a Florida consumer is only proper in the provider’s home state.”⁸

Section 7. This section amends s. 501.211, F.S., relating to other remedies available to someone suffering a loss under the FDUTPA, including the right to recover directly actual damages plus attorney’s fees and costs. The committee substitute strikes the word “consumer” where it appears in the text of the statute and substitutes the word “person.” Under s. 1.01(3), F.S., a “person” is understood to include a business. Thus, this change appears to be intended to clarify that the remedies available to individuals under the FDUTPA are also available to businesses that are harmed by a violation of the FDUTPA.

Section 8. This section amends s. 501.212, F.S., to update the exemptions to the FDUTPA under subsection (4). By removing the reference to the Public Service Commission (PSC) in subsection (4) and creating a separate subsection (5) to add a new exemption for “[a]ny activity regulated under laws administered by the Florida Public Service Commission,” the exemptions to the FDUTPA pursuant to s. 501.212, F.S., will include the following:

- any person or activity regulated under laws administered by the Department of Insurance;

⁸ 2001 Annual Report to the Legislature, Information Service Technology Development Task Force, February 14, 2001, p. 115-116.

- banks and savings and loan associations regulated by the Department of Banking and Finance;
- banks or savings and loan associations regulated by federal agencies; and
- any activity regulated under laws administered by the Florida Public Service Commission.

The task force considers it necessary to update the exemptions in order to ensure that they reflect changes in business scope and technology that have occurred since the adoption of the original FDUTPA in 1973.

Section 9. This section provides that the effective date of the act is July 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:

Venue (With Regard to Stay of FDUPTA Proceedings)

This committee substitute repeals s. 501.2091, F.S., relating to stay of proceedings brought under the FDUTPA. Section 501.2091, F.S., currently provides that:

Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party's residence. All parties shall be bound by the final order of the circuit court.

According to the task force, s. 501.2091, F.S., is antiquated. It once existed in tandem with an administrative enforcement provision that has since been repealed. The Information

Service Technology Development Task Force is concerned “that this provision may be misused in the future by someone from out-of-state, such as an Internet provider, to argue the proper venue for hearing a case brought against him for allegedly harming a Florida consumer is only proper in the provider’s home state.”⁹

Exemptions

This committee substitute amends s. 501.212(4), F.S., and creates a new s. 501.212(5), F.S., so that the exemptions to the FDUTPA pursuant to s. 501.212, F.S., will include any person or activity regulated under laws administered by the Department of Insurance; banks and savings and loan associations regulated by the Department of Banking and Finance; banks or savings and loan associations regulated by federal agencies; and any activity regulated under laws administered by the Public Service Commission (PSC). The task force considers it necessary to update the exemptions in order to ensure that they reflect changes in business scope and technology that have occurred since the adoption of the original FDUTPA in 1973.

C. Government Sector Impact:

By including the phrase “governmental entities” within the enforcement provisions of the FDUTPA, this committee substitute provides the enforcing authority with the power to take the same actions on behalf of governmental entities that it now takes on behalf of consumers.

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.

⁹ 2001 Annual Report to the Legislature, Information Service Technology Development Task Force, February 14, 2001, p. 115-116.