

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – This bill creates civil penalties against persons who pretend to be affiliated with law enforcement agencies, public utilities, or firefighting agencies. It provides increased civil penalties for persons who violate laws relating to identity theft.

B. EFFECT OF PROPOSED CHANGES:

The Florida Deceptive and Unfair Trade Practices Act

Part II of Chapter 501, F.S., is known as the Florida Deceptive and Unfair Trade Practices Act (FDUPTA).¹ Section 501.204, 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 hereby declared unlawful.” The FDUPTA provides that it should be construed with “due consideration and great weight... given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).”²

Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive.³ A person willfully violating the provisions of the FDUPTA is liable for a civil penalty of not more than \$10,000 per violation.⁴ This penalty increases to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons.⁵ Individuals aggrieved by a violation of this act may seek to obtain a declaratory judgment that an act or practice violates this act and to enjoin a person from continuing the deceptive or unfair act.⁶ An individual harmed by a person who has violated this act may also seek actual damages from that person, plus attorney’s fees and court costs.⁷ The state attorneys and the Department of Legal Affairs are the enforcing authorities for the FDUPTA⁸ and section 501.207, F.S., specifies the actions that the enforcing authority may bring.

The First District Court of Appeal has described the FDUTPA as follows:

[The FDUTPA] is designed to protect not only the rights of litigants, but also the rights of the consuming public at large. When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

State Office of Atty. Gen. v. Wyndham Intern, Inc., 869 So. 2d 592, 598 (Fla. 1st DCA 2004)(citing Davis v. Powertel, Inc., 776 So. 2d 971, 974 (Fla. 1st DCA 2000). “An unfair practice under the federal

¹ Section 501.201, F.S.

² Section 501.204, F.S.

³ Section 501.2075, F.S.

⁴ Id.

⁵ Section 501.2077, F.S.

⁶ Section 501.211, F.S.

⁷ Id.

⁸ Section 501.203(3), F.S.

statute has been defined as one that ‘offends established public policy’ and one that is ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’”⁹

Privacy Protection Under Federal Law

Federal law provides some privacy protections to individuals. The Gramm-Leach-Bliley Financial Services Act covers privacy considerations for customers’ personal financial information applicable to all financial companies.¹⁰ These laws balance the right to privacy with a financial company’s need to provide information for normal business purposes. Companies involved in financial activities must send their customers privacy notices.

The federal act requires financial institutions to provide clear disclosure at the beginning of a customer relationship and not less than annually thereafter, of their privacy policy regarding sharing of nonpublic personal information with affiliates and third parties. The company must disclose how or whether it intends to share personal financial information. The act also gives a person the right to stop (opt out of) some sharing of nonpublic personal information. The act prohibits disclosures of account numbers or credit card account information to third parties for use in telemarketing, direct mail marketing or other marketing through electronic mail and provides criminal penalties. A person has the right to opt out of some information sharing with companies that are part of the same corporate group as the person’s financial company (or affiliates), or not part of the same corporate group as the person’s financial company (or non-affiliates).

HB 129

HB 129 w/CS creates s. 501.165, F.S., to provide that any person who uses deceptive practices or means to obtain another person’s address, telephone number, or social security number and uses it to engage in “commercial solicitation” commits an unfair or deceptive act or practice or unfair method of competition under the FDUTPA. A violator is subject to the penalties and remedies provided under the FDUTPA.

This bill creates s. 501.166, F.S. to prohibit the sale or transfer of “personal customer information” to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, unless the purchaser or transferee agrees to abide by the contract or published privacy policy. This bill permits a transfer to a third party if the third party is acting on behalf of the transferring person or entity for the purposes of commercial solicitation. The prohibition applies to any customer who resides in this state at the time of the sale or transfer. A violation of this prohibition is a violation of the FDUTPA. The transfer prohibitions do not apply to information produced pursuant to a court order, subpoena, or other legal process.

Section 501.167, F.S., relating to computerized personal information, is created. It prescribes the actions to be taken by those persons and businesses holding the information when a breach of security of the system is discovered. Notification must be made to any Florida resident whose unencrypted personal information has been, or is believed to have been, acquired by an unauthorized person. For the purposes of the section, definitions of the terms “breach of the security of the system”, “personal information”, and “unauthorized person” are provided.

HB 129 w/CS creates s. 501.2076, F.S., which provides a \$15,000 civil penalty per violation for engaging in a deceptive and unfair trade practice with the intent to deceive another person into believing that he or she is affiliated with a law enforcement agency, firefighting agency, or public utility.

⁹ Samuels v. King Motor Co. of Fort Lauderdale, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)(citations omitted).

¹⁰ 15 U.S.C. ss. 6821-6827

Currently, section 817.568, F.S., provides that a person using personal identification information, such as social security numbers, driver's license numbers, passport numbers, and credit card numbers, for fraudulent purposes, commits a third degree felony, punishable by up to five years in prison. The bill creates a new and unnumbered section providing that a person who violates or fails to comply with any provision of s. 817.568, F.S., commits an unfair or deceptive act or practice or unfair method of competition in violation of the FDUTPA. A violator would be subject to civil penalties under the FDUTPA in addition to the criminal penalties.

Current law makes violations of certain federal laws and Federal Trade Commission rules a violation of the FDUTPA.¹¹ However, current statutes only reference federal laws and rules as of July 1, 2001. This bill updates the year to "2005" in various provisions of the FDUTPA to capture within the act any changes in relevant rules or statutes any changes made between 2001 and 2005.

Section 501.207(3), F.S., provides a broad range of remedies that the court can grant to accomplish the purposes of the act. It permits the court to enter orders to appoint receivers, freeze assets, reimburse consumers or government entities, to limit the application of contracts to avoid unconscionable results, to order a defendant to divest itself of any interest in any enterprise, to impose restrictions on future activities, or grant "legal, equitable, or other appropriate relief." This bill strikes "legal" and "equitable" from the statute. This bill also permits the court to enter orders "to bring actions in the name of and on behalf of the defendant enterprise." This change will allow courts to enter orders permitting receivers to bring actions in the name of a defendant enterprise.

This bill contains a severability clause providing that if one part of the bill is held invalid, the court should attempt to give effect to other parts of the bill.

The bill takes effect July 1, 2005.

C. SECTION DIRECTORY:

Section 1. Creates s. 501.165, F.S., to provide that any person who uses deceptive practices or means to obtain another person's address, telephone number, or social security number and uses it to engage in commercial solicitation commits an unfair or deceptive act or practice.

Section 2. Creates s. 501.166, F.S., to prohibit the sale or transfer of personal customer information to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, provides exceptions and limitations; provides that transferring such protected information in violation of this section is an unfair or deceptive act or practice or unfair method of competition; provides penalties.

Section 3. Creates s. 501.167, F.S., to prescribe the duties of persons and businesses holding computerized personal information upon discovery of a breach of security of the system on which such data are maintained; defines terms; prescribes forms that notification of the breach must take; to provide exceptions and remedies.

Section 4. Amends s. 501.2075, F.S., to provide an exception to the maximum penalty of \$10,000 allowable per violation under part II of ch. 501, F.S. for violations of s. 501.2076, F.S.

Section 5. Creates s. 501.2076, F.S., to prohibit falsely representing oneself as being affiliated with a law enforcement agency, firefighter agency, or public utility; provides penalty of up to \$15,000 for each violation; provides that a violation of s. 817.568, F.S., is an unfair or deceptive act or practice or unfair method of competition in violation of part II of ch. 501, F.S.

¹¹ See e.g. 501.203(3), F.S.

Section 6. Creates a new and unnumbered section providing that a person who violates or fails to comply with any provision of s. 817.568, F.S., commits an unfair or deceptive act or practice or unfair method of competition.

Section 7. Updates obsolete date references to various federal and state laws in s. 501.203, F.S., (definitions) relevant to the Florida Deceptive and Unfair Trade Practices Act.

Section 8. Updates obsolete date references to various federal and state laws in s. 501.204, F.S., (unlawful acts and practices) relevant to the Florida Deceptive and Unfair Trade Practices Act.

Section 9. Amends s. 501.207, F.S., to allow the court to enter orders to bring actions on behalf of a defendant enterprise.

Section 10. Provides that if a portion of the act is held invalid, the invalidity shall not affect other portions of the act which can be given effect.

Section 11. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill could increase revenue due to increased fines but the amount of increase, if any, is unknown.

2. Expenditures:

The bill specifies violations relating to the FDUTPA that may be enforced by the Attorney General or the state attorneys. The cost is indeterminate because the number of cases that may arise is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill is not expected to have a fiscal impact on local governments.

2. Expenditures:

This bill is not expected to have a fiscal impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that a person who uses deceptive practices or means to obtain another person's address, telephone or social security number and uses it to engage in commercial solicitation commits a unfair or deceptive act. The term "commercial solicitation" is not defined in the bill or elsewhere in statute. If a term is not defined in statute, a court will first look to its "plain and ordinary meaning."¹²

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered the bill on February 9, 2005. The committee adopted an amendment to permit transfers of personal information if the third party agrees to abide by the transferring entity's privacy policy. It provided that a person or entity can transfer personal information for the purpose of allowing a third party to make commercial solicitations on behalf of the transferring person or entity. The bill was reported favorably, as amended, as a committee substitute.

On March 16, 2005, the Agriculture Committee adopted a "strike all" amendment to conform HB 129 w/CS to its Senate companion, SB 284. Section 501.166, F.S., is created to prohibit the sale or transfer of personal customer information to a third party if the information is protected from disclosure by law, contract, or a published privacy policy, unless the purchaser or transferee agrees to abide by the contract or published privacy policy. The prohibition applies to any customer who resides in this state at the time of the sale or transfer. The bill was reported favorably, as amended, as a committee substitute.

¹² Green v. State, 601 So. 2d 472, 473 (Fla. 1992)("One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature.").