

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill as drafted appears to eliminate the role that the Florida Department of Legal Affairs/Office of Attorney General and that state attorneys have in enforcing Florida's Deceptive and Unfair Trade Practices Act, relating to complaints filed against motor vehicle dealers.

Safeguard Individual Liberty: The bill requires a vehicle buyer or lessee who believes he or she may have been the victim of deceptive or unfair trade practices by a motor vehicle dealer to file notice of damages and participate in a claims resolution process with the dealer. If the dealer agrees to the amount of damages sought, then no further legal action can be brought by the customer.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Part II of chapter 501, F.S.

Florida has numerous laws on the books to protect consumers. One of the most significant of these is Part II of chapter 501, F.S., known as the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Created by the Legislature in 1973, the act's purposes, according to s. 501.203, F.S., are:

(1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.

(2) 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.

(3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

Consumers and businesses are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. It prohibits such acts in "any trade or commerce," except as its own provisions may specifically exempt pursuant to s. 501.212, F.S.

The Department of Legal Affairs/Office of Attorney General has extensive rulemaking authority to "set forth with specificity" acts or practices which constitute deceptive or fraudulent activity, pursuant to s. 501.205, F.S. That section of law also specifies that the agency's rules shall not be inconsistent with rules promulgated by the Federal Trade Commission.

Claims under FDUTPA are generally brought either by the state through the Department of Legal Affairs/Office of Attorney General or a state attorney acting as "the enforcing authority," or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation. The Department of Legal Affairs/Office of Attorney General has developed a "Consumer Contact Form" that individuals who believe they have been victims of a deceptive or unfair trade practice can fill out and submit to the agency explaining the complaint. Anyone who makes a false statement on this complaint is guilty of a second-degree misdemeanor.

The Department of Legal Affairs/Office of Attorney General or a state attorney, where applicable, may seek either a declaratory judgment, legal action to enjoin, or legal action on behalf of consumers against a business accused of a FDUTPA violation. The enforcing authority also can seek a cease-and-desist order against a business, and can assess a \$10,000 civil penalty, generally, against business entities that willfully violate Part II. If the violations were against senior citizens, handicapped persons, or persons with educational or mental impairment, the civil penalty is \$15,000.

Persons who have suffered losses from deceptive or unfair trade practices may recover the actual damages they incurred, plus attorney's fees and court costs. However, such damages and costs are not recoverable against a retailer who operated in good faith and was unaware that the manufacturer or wholesaler that provided the original product or service was in violation of FDUPTA.

The law also addresses frivolous claims against businesses, by giving courts the authority to make such claimant post a bond in an amount adequate to compensate the defendant for his or her damages and legal fees.

The legal remedies available under Part II of Chapter 501, F.S., are in addition to any other remedies available under state and local law.

Currently there are seven exemptions from FDUPTA:

- An act or practice required or specifically permitted by federal or state law.
- A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated Part II of Chapter 501, F.S.
- A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.
- Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission; banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission or by federal agencies; or any person or activity regulated under the laws administered by the former Department of Insurance which are now administered by the Department of Financial Services.
- Any activity regulated under laws administered by the Florida Public Service Commission.
- Certain violations involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475, F.S.
- Certain causes of action pertaining to commercial real property located in Florida.

The last six exemptions cover activities that already are heavily regulated through other state or federal laws or regulations, which is why they were exempted, according to the Department of Legal Affairs/Office of Attorney General.

Part VI of Chapter 501, F.S.

Prior to 1997, the Department of Legal Affairs/Office of Attorney General had rules that specifically listed acts by motor vehicle dealers that violated the FDUTPA. That year, the agency repealed the last of its motor-vehicle dealer rules (and those affecting many other businesses) in part because the Federal Trade Commission and federal courts were taking the lead in determining and addressing deceptive or unfair businesses practices.

As the agency stated in chapter 2-2.001, Florida Administration Code (Repeal of Rules Regarding Unfair and Deceptive Trade Practices):

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: Title 2, Chapters 2-7, 2-9, 2-10, 2-11, 2-12, 2-13, 2-14, 2-15, 2-16, 2-17, 2-18, 2-19, 2-20, 2-22, and 2-28, F.A.C.

This broad approach to FDUPTA regulation began to raise concerns among the motor vehicle industry and others. In 2001, the Legislature created Part VI of chapter 501, F.S., that codified the previously repealed Department of Legal Affairs/Office of Attorney General rules pertaining to actions by motor vehicle dealers constituting deceptive or unfair trade practices.

Part VI of ch. 501, F.S., currently consisting of only ss. 501.975 and 501.976, F.S., applies FDUPTA specifically to motor vehicle dealers, whom s. 501.975(2), F.S., defines as being “motor vehicle dealers” as defined in s. 320.27, F.S.:

any person in 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). Any person who buys, sells, or deals in three or more motor vehicles in any 12-month period or who offers or displays for sale in any 12-month period shall be prima facie presumed to be engaged in such business. The terms “selling” and “sale” include lease-purchase transactions.....

Section 501.976, F.S., lists 19 activities that constitute deceptive or unfair trade practices. They range from misrepresenting the previous usage or status of a vehicle, to misrepresenting warranty coverage, to increasing the price of a vehicle after accepting an offer or contract from the buyer.

Part VI claims are handled pursuant to the requirements in Part II, the original FDUPTA. The Department of Legal Affairs/Office of Attorney General and state attorneys are the enforcing authorities, and can act on behalf of consumers, as well as consumers filing civil litigation against dealers they believe have used deceptive or unfair trade practices.

Effect of Proposed Changes

One of the key elements of HB 1341 is the creation of a new complaint resolution process for individuals who believe they are the victims of deceptive or unfair trade practices by a motor vehicle dealer. The intent of this new procedure is to try and settle complaints quickly and with minimal legal costs.

Basically, the process is:

- A vehicle purchaser or lessee who believes he or she is the victim of deceptive or unfair trade practices must notify the motor vehicle dealer at least 40 days before filing a claim.
- The notification form, which is specified in the bill, requests specific information about the type of vehicle purchased or leased, documentation of the transaction, the alleged violation, and the amount of damages suffered by the purchaser or lessee.
- The dealer has 40 days after receiving the notice to respond. If the dealer agrees to pay the damages, or offers to rescind the sale or lease, or otherwise return the customer to the same financial condition he or she was in prior to the transaction, then the matter is deemed settled.
- The settlement proceeds must be made to the purchaser or lessee within 10 days after the date of acceptance.
- The acceptance releases the dealer from all other claims from the customer under all Florida laws in connection with or arising from that specific transaction.
- Any false statements made by the purchaser or lessee are considered perjury.
- Payment of the actual damages, or rescission of the original transaction, does not constitute an admission of wrongdoing by the dealer.

In those instances where the customer and the dealer do go to court, the prevailing party, after all appeals are exhausted, may receive reasonable attorney’s fees and costs, based on guidelines typically used by courts to determine them. (The bill does not specify the circumstances under which this would occur, although they likely would include when the dealer disputes the damages sought by the customer during the claims resolution process, and if there is a dispute on legal fees pertaining to the claim.) No multipliers shall be used to determine the final amount of damages or legal fees

awarded. If the court determines that the lawsuit was frivolous, it shall require the plaintiff to post a bond in the amount reasonable to compensation the defendant's legal costs incurred.

Other provisions in the bill, however, are contradictory as to the continued applicability of the FDUTPA to alleged violations by motor vehicle dealers. For example, the bill's first section amends s. 501.212, F.S., to add claims against motor vehicle motor dealers, except as described in s. 501.976, F.S., to the list of activities exempt from FDUPTA regulation. The next section amends s. 501.976, F.S., which lists the 19 current deceptive or unfair trade activities by motor vehicle dealers, to delete the the provision saying that deceptive or unfair trade practices by motor vehicle dealers are actionable under FDUPTA.

The sponsor and the bill's supporters say it is not their intent to exempt the motor vehicle dealer provisions from FDUTPA, and thus from regulation by the Department of Legal Affairs/Office of Attorney General. They have worked with committee staff to draft a strike-everything-after-the-enacting-clause amendment to clarify their intent.

HB 1341 takes effect October 1, 2005.

C. SECTION DIRECTORY:

Section 1: Exempts motor vehicle dealers from Part II of chapter 501, F.S., the Florida Deceptive and Unfair Trade Practices Act," except for any claims as described in Part VI of the act specifically related to vehicles.

Section 2: Amends s. 501.976, F.S., to make numerous changes throughout. Deletes reference to the Florida Deceptive and Unfair Trade Practices Act. Relieves certain burdens of proof on the part of dealers concerning the vehicles they are selling. Specifies no civil action shall be filed against a motor vehicle dealer except as pursuant to this section. Creates a notice-of-complaint process prior to filing of litigation. Creates complaint form. Provides that if the complaint is settled, there will be no further litigation. Provides that if matter is litigated, non-prevailing party will pay prevailing party's reasonable attorney's fees and costs. Provides process for trial judge to rule on frivolous claims. Provides this section shall not apply to any action filed by the enforcing authority.

Section 3: Provides this act shall take effect October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. It is possible that HB 1341 may alleviate some potential litigation costs to motor vehicle dealers.

There should be no economic impact on persons who purchase or lease automobiles, and who believe they have been victims of deceptive or unfair trade practices, since even under the notice process created in the bill, they will still recover actual damages – just as they would under a claim brought on their behalf by the Attorney General or state attorney.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This mandates provision is not applicable to HB 1341 because the legislation does not require counties or municipalities to expend local funds or to raise local funds, nor does it reduce their state revenue-sharing.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As mentioned above, HB 1341 as drafted appears to be contradictory or internally inconsistent. The sponsor plans to offer a strike-all amendment when the bill is considered by the Transportation Committee to clarify these issues.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES