HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1545 Warranty Associations
SPONSOR(S): Llorente and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2498

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee		Sayler	Cooper
2) Civil Justice Committee			
3) Commerce Council			
4)			
5)			

SUMMARY ANALYSIS

Since April 23, 2002, a vehicle protection product, like "etch," have been defined a motor vehicle service agreement, regulated under part I, chapter 634, F.S. Prior to that, this product was considered an insurance product to be regulated under the Department of Insurance (predecessor to the Office of Insurance Regulation). However, the determination that a vehicle protection product was an insurance product was not officially made until June 12, 2000, in a memorandum by the department. Vehicle protection products, like "etch," have been sold since 1998.

According to statutes in effect at the time, when a vehicle protection product was defined to be a motor vehicle service agreement, an insurance product sold to a purchaser or lessee of a motor vehicle had to be properly disclosed on a statutorily specified form. If the disclosure on the incorrect form was intentional or the insurance product was intentionally not disclosed to the buyer, the potential existed for a cause of action under the penalty provisions of Chapters 520 and 521, F.S. The liability exposure for dealers selling this product prior to April 23, 2002, is potentially enormous. These dealers could be potentially liable to pay millions of dollars in penalties arising from class action law suits about a product no longer defined as insurance. Currently, some law suits have been filed to enforce the statutorily provided penalty provisions against the dealers.

This bill applies to the period running from April 23, 2002, to January 1, 1998. It sets aside penalty provisions of sections 520.12; 521.006; and 634.271(1), F.S. It requires these penalties provisions do not apply for any violation arising out of Chapters 520, 521, and 634 of the Florida Statutes, if the vehicle protection product, contract, or agreement was disclosed to the consumer in writing at the time of purchase in a retail installment contract or lease. The provisions of this bill are effective so long as these conditions are met. This bill requires that if there is a violation where statutory penalties do not apply, the court shall award actual damages and costs, including a reasonable attorney's fee. This bill requires that nothing in this newly created subsection trigger the penalty provisions listed in Chapters 520, 521, and 634, F.S.

This bill provides that, upon becoming law, the provisions shall apply retroactively to January 1, 1998. It is intended that provisions of this bill retroactively apply to close the window period from April 23, 2002 to January 1, 1998, when vehicle protection products might be alleged to have been "insurance products."

This bill is likely to have a significant fiscal impact upon the private sector, as it may discourage law suits filed against motor vehicle dealers for failure to disclose the vehicle protection product as insurance prior to April 23, 2002.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill retroactively applies to January 1, 1998 and attempts to close a window for filing a cause of action potentially arising from a determination by the Office of Insurance Regulation in 2000 that a vehicle protection product was an insurance product. In 2002, the Legislature amended s. 634.011(7), F.S., to define a vehicle protection product as a motor vehicle service agreement for the purposes of regulation under Ch. 634, Part 1, F.S. This bill is intended to retroactively protect sellers of vehicle protection products who sold these products prior to April 23, 2002, and who sold them in good faith not knowing that they were insurance products.

B. EFFECT OF PROPOSED CHANGES:

Background

Vehicle Protection Product

A vehicle protection product (VPP) is a motor vehicle service agreement that is regulated under Ch. 634, Part 1 of the Florida Statutes. According to s. 634.011(7)(b)(1)(b), F.S., a VPP is defined as "a product or system installed or applied to a motor vehicle or designed to prevent the theft of the motor vehicle or assist in the recovery of the stolen motor vehicle."

Vehicle protection products include car alarms, window-etching of vehicle identification numbers, and other applications that deter theft of automobiles.[1] Ordinarily, consumers purchasing this product are required to have comprehensive automobile insurance[2] and may receive certain benefits in the event their car is stolen and not returned within a specific time period or is completely destroyed. Such benefits may include the costs above what an automobile insurer pays as the actual cash value and the amount of the actual cost of a new or used replacement vehicle, and may also include payment of incidental expenses such as a rental vehicle, vehicle registration and sales tax. These benefits generally exclude the cash value of the stolen vehicle itself and cannot duplicate any benefits or expenses paid to the service agreement holder by the insurer providing comprehensive motor vehicle insurance coverage on the stolen motor vehicle. Alternatively, some products pay a flat dollar amount. The theory behind classifying a theft prevention product as a "warranty" is that the product did not function as originally intended, and the service agreement company honors its warranty on the product by paying the costs to "make the consumer whole" by assuring there are no out of pocket expenses the consumer would have to pay. Consumers pay for anti-theft guarantees depending on the year and mileage of the vehicle.

Vehicle Protection Product Defined as Insurance Product in 2000

In 2000, the Florida Department of Insurance (now known as the Office of Insurance Regulation or OIR) was asked by an out-of-state corporation to make a determination about whether a vehicle protection product it planned to sell was an insurance product or a manufacturer's warranty.[3] This company wanted to sell a "window-etching" product commonly called "etch." Etch products engrave the vehicle identification number into vehicle's windows and are designed to deter theft and aid in recovery of the vehicle. In a memorandum, OIR determined that the "etch" vehicle protection product was an

[1] The following paragraph adapted from 2002 Senate Bill 2102 Staff Analysis, February 18, 2002.
[2] Comprehensive insurance pays for losses from incidents other than a collision, such as theft, fire, windstorm, vandalism, or flood. It also covers damages caused by falling objects or hitting an animal. Such insurance is not a mandatory coverage in Florida.
[3] See Department of Insurance Memorandum of June 12, 2000, RE: Window Etching Theft Guard Registration Forms – Foresight Group.

insurance product and not a manufacturer's warranty. It based its conclusion upon the 1999 statutory definition of insurance in s. 624.02, F.S., and upon five insurance criteria outlined in Professional Lens Plan, Inc. v. Department of Insurance, 387 So.2d 548 (Fla. 1st DCA 1980).

Prior to the redefinition of a vehicle protection product in 2002, OIR had the authority to regulate them as an insurance product.[4] As an insurance product, the seller would have to be licensed to sell insurance and all such products would be regulated as insurance. According to the 2002 staff analysis for SB 2102, OIR had not received any consumer complaints as to the sale of the vehicle protection agreements and had not initiated any administrative actions in this area.[5]

Vehicle Protection Product Defined as Motor Vehicle Service Agreement in 2002

In response to the precursor of the Office of Insurance Regulation's determination that "etch" was an insurance product, the Legislature in 2002 passed SB 2102 which amended s. 634.011(7), F.S., to include vehicle protection products, like "etch," within the definition of motor vehicle service agreements. This statutory definition of "etch" as motor vehicle service agreement took effect on April 23, 2002, when the Governor signed SB 2102 into law. From that date, a vehicle protection product would be regulated as a motor vehicle agreement.

Motor Vehicle Service Agreement

Motor vehicle service agreement companies are regulated under part I, chapter 634, F.S.[6] A motor vehicle service agreement (MVSA) means a contract or agreement indemnifying the service agreement holder (purchaser) for the motor vehicle listed on the service agreement against loss caused by failure of any mechanical or other component part.[7] Such service agreements are generally considered *not* to be insurance products because a warranty promises to indemnify against defects in the article sold, while insurance indemnifies against loss or damage resulting from perils outside of and unrelated to defects in the article itself. Motor vehicle service agreement companies must be licensed through the Office of Insurance Regulation to conduct business in the state. Such companies must meet financial solvency, marketing and sales requirements and are examined by the department every 3 years.

Motor vehicle service agreement forms must be filed with and approved by OIR; however, a company's rates need only be filed with OIR.[8] Under the provisions of s. 634.282, F.S., the unfair or deceptive act provisions apply to motor vehicle service agreement companies and to persons who market and sell the service agreements. The deceptive act provisions apply to the advertising, sale, or delivery of motor vehicle service agreements. According to the Office of Insurance Regulation, as to information reported on February 13, 2002, of the 162 warranty or service agreement companies in Florida, 50 were motor vehicle service agreement companies.[9]

Potential Exposure to Law Suits

According to a representative of the Florida Automobile Dealers Association, the proponents of this bill, motor vehicle dealers who sold VPP to consumers prior to April 23, 2002, (when the definition was changed to motor vehicle service agreements) could potentially be liable for severe statutorily penalties under s. 520.12, F.S. or s. 521.006, F.S., depending if alleged violation related a motor vehicle sale or lease. For instance, proponents argue that under s.520.12, F.S., automobile dealers are facing enormous liability because many dealers routinely sold the Etch vehicle protection product and disclosed it on the Buyer's Order, instead of disclosing it on the Retail Installment Sales Contract (RISC) as a form of insurance product as required by s. 520.07(3)(d), F.S. Since it was not properly

[4] See Department of Insurance Memorandum of June 12, 2000, RE: Window Etching Theft Guard Registration Forms – Foresight Group.
[5] 2002 Senate Bill 2102 Staff Analysis, February 18, 2002.
[6] The following paragraph adapted from 2002 Senate Bill 2102 Staff Analysis, February 18, 2002.
[7] S. 634.011, F.S.
[8] The following paragraph adapted from 2002 Senate Bill 2102 Staff Analysis, February 18, 2002.
[9] The other warranty associations are home warranty associations (18), and service warranty associations (94).

disclosed on the RISC and if it can be proved that the non-discloser was a "willful violation," then according s. 520.12(2), F.S., "the buyer may recover from the person committing such violation…an amount equal to any finance charge and any fees charged to the buyer by reason of delinquency, plus attorney's fees and costs incurred by the buyer to assert rights under this part."

In a hypothetical example provided by the proponents, the finance charges potentially recoverable under 520.12, F.S., from a medium-sized dealer are extraordinary. If this dealer sold 100 cars at an approximate cost of $18,000 each that were financed with an 8% interest rate, the finance charge recoverable per car would be approximately $3,898. If extrapolated over a four-year period, a dealer's exposure to an Etch VPP class action law suit could exceed $18,7 million.[10] This $18.7 million does not include the attorney's fees and costs that the statute also provides.[11]

According to both opponents and proponents of this bill, some of these suits have been filed in Florida. The actual number of filed law suits is not known, but according to conversations with both sides, the number low.

Retroactive Application of Statutes Discussion

Opponents of this bill, such as the Academy of Florida Trial Lawyers (AFTL), are generally opposed to the Legislature retroactively changing Florida statutes, for this creates a measure of uncertainty and could potentially effect currently filed cases and foreclose the future filing of cases.

The courts generally do not interpret substantive changes in law as having retroactive effect absent clear intent by the Legislature. R.A.M. of South Florida, Inc. v. WCI Communities, Inc. 869 So.2d 1210, 1216 (Fla. 2nd DCA 2004); Promontory Enterprises, Inc v Southern Engineering & Contracting, Inc. 864 So.2d 479, 483 (Fla. 5th DCA 2004). However, if the change in the law is remedial in nature, then the Courts generally interpret it as having retroactive effect, unless the "statute accomplishes a remedial purpose by creating new substantive rights or imposing new legal burdens…." R.A.M. at 1217.

If a statute is intended or interpreted to have a retroactive effect, it must then be determined to be constitutionally permissible. Promontory at 483. The constitutional analysis involves whether the retroactive change impairs or abrogates a vested right; if so, then there are Due Process concerns to be addressed. If a statutory change impairs or abrogates an expectant or contingent right, then it is less likely to trigger a constitutional question. See generally: R.A.M. at 1218; Promontory at 483, other citations omitted.

Whether this bill affects vested rights or unvested rights cannot be determined by this staff analysis. That is a matter for the courts to decide.

The proponents of this bill, generally motor vehicle dealers who sold vehicle protection products prior to April 23, 2002, argue that the retroactive change will discourage the filing of new law suits. They also argue that this bill will affect even currently filed law suits by changing the remedy that a plaintiff could receive. Opponents of this bill are uneasy about the Legislature doing such things. Whether this bill has that actual affect intended by the proponents on current and future law suits is not determinable at this time. This also is a matter for the judicial process to determine.

The Change in the Law

This bill applies to the period running from April 23, 2002, to January 1, 1998. It sets aside penalty provisions of s. 520.12, F.S. (Chapter on Retail Installment Sales), s. 521.006, F.S. (Chapter on Motor Vehicle Lease Disclosure), and s. 634.271(1), F.S. (Chapter on Warranty Associations). It requires these penalties provisions do not apply for any violation arising out of Chapters 520, 521, and 634 of the Florida Statutes, if those violations relate to or connected with sale of a VPP on the retail

[10] Calculation base upon $3,898 per contract x 100 financed vehicles per month x 48 months.
[11] Hypothetical example on file with the Insurance Committee.

installment contract or lease, or the failure to disclose a VPP on the retail installment contract or lease. The vehicle protection product could be the product, contract, or agreement that provides for the payment of vehicle protection expenses as defined by s. 634.011(7), F.S. The bill states that there is no violation if the product, contract, or agreement was disclosed to the consumer in writing at the time of purchase in a retail installment contract or lease. The provisions of this bill are effective so long as these conditions are met.

This bill requires that if there is a violation where statutory penalties do not apply, the court shall award actual damages and costs, including a reasonable attorney's fee. However, it is not clear by the language of the bill, what situation would constitute a "violation for which such statutory damages do not apply." Perhaps this provision is triggered and would provide these penalties if the seller did not somehow disclose the sale of a VPP to the buyer at all.

This bill requires that nothing in this newly created subsection trigger the penalty provisions listed in Chapters 520, 521, and 634 of the Florida Statutes.

Section 2 of the bill requires that it retroactively applies to January 1, 1998. It is intended that provisions of this bill retroactively apply to the window period from April 23, 2002 to January 1, 1998, when vehicle protection products might be alleged to be "insurance products." The likely intent is to foreclose and/or minimize the potential of current and future law suits brought under Florida Statutes against the sellers of vehicle protection products who did not disclose those VPP as an "insurance product" in accordance with Chapters 520 and 521, F.S.

C. SECTION DIRECTORY:

Section 1 – amends s. 634.271, F.S., to forestall the application of statutorily provide penalties relating to the sale of vehicle protection products sold prior to April 23, 2002.

Section 2 – provides that the bill shall apply retroactively to January 1, 1998, upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   No anticipated impact.

2. Expenditures:

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   No anticipated impact.

2. Expenditures:

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill intends to minimize the fiscal impact arising from liability law suits by statutorily changing what remedies are potentially available to holders of vehicle protection products purchased prior to April 23, 2002. These changes are to apply retroactively to January 1, 1998, and intended to enclose the statutory limitation period in which potential law suits could be filed.

According to the proponents of this bill, many motor vehicle dealers who sold such products prior to April 23, 2002, could be potentially liable to pay millions of dollars in penalties arising from class action law suits about a product no longer defined as insurance (see example above). The proponents would argue that it was a technical, unintended oversight on the part of these dealers. They would also argue that if OIR had been concerned about Florida dealers improperly selling this particular "insurance product," that OIR would have pursued some enforcement actions against them.

D. FISCAL COMMENTS:

See above comment.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The municipal/county mandates provision in section 18 of article VII of the Florida Constitution does not appear to applicable since the bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill applies retroactively. As a result, constitutional due process concerns could be triggered if this bill is adjudicated to adversely affect or abrogate a vested right. See above: Retroactive Application of Statutes Discussion.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As mentioned above, it is not clear by the language of the bill, what situation would constitute a "violation for which such statutory damages do not apply" and trigger the remedy "the court shall award actual damages and costs, including a reasonably attorney's fee."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES