

# 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.)

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Prepared By: Commerce and Consumer Services Committee

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BILL: SB 2564

SPONSOR: Senator Webster and others

SUBJECT: Civil Actions

DATE: April 11, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill requires a person who proposes to file an action against a person based on a violation of the Deceptive and Unfair Trade Practices Act to give 60 days written notice before filing a claim, and the alleged violator is also permitted an opportunity to cure the violation. This bill also provides that it is an “absolute defense” if the defendant did not receive the required written notice. This bill also requires notice if the claim is a class action, and requires the class action to be limited to Florida residents. Further, this bill provides that a class action plaintiff’s attorney is responsible for the defendant’s reasonable costs and attorney’s fees that are otherwise payable by the plaintiff.

This bill substantially amends sections 501.211 and 768.79 of the Florida Statutes. This bill also creates one undesignated section of the Florida Statutes.

## II. Present Situation:

### The Florida Deceptive and Unfair Trade Practices Act

Part II of ch. 501, F.S., the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), provides remedies and penalties for “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>1</sup> Remedies for acts prohibited by FDUTPA may include an action to enjoin a person from committing such acts<sup>2</sup> as well as the imposition of a civil penalty of not more than \$10,000.<sup>3</sup>

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<sup>1</sup> Section 501.204, F.S.

<sup>2</sup> Section 501.207(1)(b), F.S.

Actions may be brought by a state attorney or the Department of Legal Affairs<sup>4</sup> or by a consumer.<sup>5</sup>

Additionally, FDUPTA permits any person who has been aggrieved by a violation under FDUPTA to obtain a declaratory judgment and to enjoin a person who has or is violating FDUPTA.<sup>6</sup> Additionally, a person who has suffered a loss as a result of such violation may be able to recover actual damages, attorney's fees, and costs.<sup>7</sup>

By motion, if alleged that the action is frivolous, without legal merit, or brought for the purpose of harassment is filed, the court may require the party initiating the action to post a bond in an amount the court finds reasonable to indemnify the defendant against any damages incurred, including reasonable attorney's fees.<sup>8</sup>

Florida currently does not require a plaintiff to notify the defendant and give the defendant an opportunity to cure any injury prior to filing the class action. However, the Legislature has enacted presuit notice requirements for a variety of actions such as an action to obtain benefits under a personal injury protection policy of motor vehicle insurance,<sup>9</sup> for negligence involving a nursing home,<sup>10</sup> and for medical negligence.<sup>11</sup>

### **Offers of Judgment**

Current law provides that if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant is entitled to reasonable attorney's fees and costs under certain circumstances.<sup>12</sup> If the judgment is one of "no liability" or is at least 25 percent less than the offer, the court must offset the costs and attorney's fees incurred from the date of the offer against the award.<sup>13</sup> However, if the judgment is at least 25 percent more than the offer by the defendant, the plaintiff must be awarded reasonable attorney's fees and costs incurred from the date of the offer.<sup>14</sup> However, if the court determines the offer was not made in good faith, the court may disallow an award of attorney's fees.<sup>15</sup>

### **Class Action Lawsuits**

Currently, Florida does not limit class membership to Florida residents in class actions filed in Florida state courts. The Florida Supreme Court has adopted procedural requirements for class

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<sup>3</sup> Section 501.2075, F.S. Violations against a senior citizen or handicapped person may result in a penalty of not more than \$15,000 (s. 501.2077, F.S.).

<sup>4</sup> Section 501.207, F.S.

<sup>5</sup> *Id.*

<sup>6</sup> Section 501.211(1), F.S.

<sup>7</sup> Section 501.211(2), F.S.

<sup>8</sup> Section 501.211(3), F.S.

<sup>9</sup> Section 627.736(11), F.S.

<sup>10</sup> Section 400.0233, F.S.

<sup>11</sup> Section 766.106(2), F.S.

<sup>12</sup> Section 768.79, F.S.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

action litigation, including prerequisites for class certification, pleading and notice requirements, and dismissal or compromise.<sup>16</sup> The Florida Rules of Civil Procedure establish four prerequisites for a class action:

- The class is so numerous as to make joinder of the parties impracticable.
- The representative's claim or defense raises questions of law or fact common to the questions of law or fact raised by each class member.
- The class representative's claim or defense is typical of that of each class member.
- The representative can fairly and adequately protect and represent the interests of each class member.<sup>17</sup>

If these four prerequisites are satisfied, the court must conclude that the class fits into one of three categories: 1) that the prosecution of separate claims would create a risk of inconsistent or varying adjudications resulting in incompatible standards of conduct for the party opposing the class, or, as a practical matter, adjudications dispositive of the interests of other class members; 2) the party opposing the class has acted or refused to act on grounds generally applicable to all class members, making relief appropriate for the class as a whole; or 3) the claim is not maintainable under 1) or 2), but the common questions of law or fact predominate over any question affecting only individual members of the class.<sup>18</sup>

If the class is certified, due process requires all potential class members to be notified. These class members may be included in the class or take steps to "opt out."<sup>19</sup>

Florida currently only requires proof of nominal damages, not actual damages, for the recovery of monetary relief. Nominal damages are damages "where there is no substantial loss or injury to be compensated...or where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount."<sup>20</sup> In contrast, "actual damages" are damages awarded for "actual and real loss or injury."<sup>21</sup>

Recently, the federal Class Action Fairness Act of 2005 was signed into law. As a result, federal courts were granted diversity jurisdiction over these actions when the amount in controversy exceeds \$5 million in the aggregate, there are at least 100 class members (if a non-federal question class action), and any class member is a citizen of a state different from any defendant. The exercise of jurisdiction by the court is tied to the number of class members from the forum state.

### III. Effect of Proposed Changes:

**Section 1** amends s. 501.211, F.S., to provide that a person must give written notice 60 days before filing a claim against a person who is alleged to have violated the FDUTPA. The notice must include details of the complaint, whether damages are sought, and the amount of loss

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<sup>16</sup> Fla. R. Civ. Pro. 1.220.

<sup>17</sup> Fla. R. Civ. Pro. 1.220(a).

<sup>18</sup> Fla. R. Civ. Pro. 1.220(b).

<sup>19</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

<sup>20</sup> Black's Law Dictionary, 6<sup>th</sup> Ed., at 392.

<sup>21</sup> *Id.* at 390.

suffered as a result of the violation. If nonmonetary relief is sought, the notice should provide the remedial measures that the party is seeking. The written notice also provides the person alleged to have violated FDUPTA a reasonable opportunity to cure the violation. If a class action, the written notice should state that as well.

During the 60 day period, the person that allegedly violated the FDUTPA may request in writing to inspect the goods or other evidence relevant to the claim. It is an “absolute defense” if the defendant did not receive the required written notice, requested but was denied an opportunity to inspect the evidence, or tendered the damages sought or the remedial measure in response to the request to cure the violation.

A claim filed under the FDUPTA must “plead and prove” that the defendant was given a reasonable opportunity to cure the alleged violations, and that the defendant failed to cure those violations.

**Section 2** amends s.768.79, F.S., to provide that the plaintiff’s attorney in a civil class action for damages is “solely and personally” liable for all reasonable costs and attorney’s fees incurred by the defendant.

**Section 3** creates an undesignated section of the Florida Statutes to provide that the claimant class in a class action under Florida Rules of Civil Procedure is limited to residents of Florida as of the time of the alleged violation. The court may include non-residents prior to certifying the class if those non-residents cannot assert their rights in their state of residence.

In a class action, the order certifying the class must state how the claims and other issues affecting only individuals will be tried in a “manageable and time-efficient” manner.

Each claimant in a class action must allege and prove actual damages to obtain monetary relief. The trier of fact must determine the amount of money owed to each individual member of the class based upon the individual proof, and that the amount of money may not exceed the amount owed to all class members. Further, the judgment must identify each member’s individual monetary award.

**Section 4** provides an effective date of July 1, 2005.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**D. Other Constitutional Issues:****Access to Courts**

Placing limits on the use of Florida courts by nonresidents in a class action could implicate the right to access the courts.

Section 21, Art. I, of the State Constitution preserves a person's right to litigate in court. The Florida Supreme Court has provided that, where a right of access to the courts for redress for a particular injury has been provided by statutory or common law predating the 1968 Florida Constitution, the Legislature may not abolish a cause of action without providing a reasonable alternative, or overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity.<sup>22</sup>

The Legislature may not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."<sup>23</sup> In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has provided a reasonable alternative for redress, unless there is an "overpowering public necessity" for eliminating the right and no alternative method exists.<sup>24</sup>

In this bill, nonresidents are not barred completely from asserting their rights. The bill neither limits their ability to file an individual action in Florida or in their state of residence, nor file a separate class action in their state of residence. Further, the federal courts are now available to serve as a forum for many of the nationwide class action lawsuits.

**Separation of Powers**

This bill could violate the state constitution's separation of powers between the Legislature and judicial branches of government. The resolution of this issue will turn on whether the provisions affecting class membership are substantive or procedural. If considered to be substantive, the bill would likely survive a separation of powers challenge. If procedural, it may not.

Article II, Section 3, of the Florida Constitution, provides:

No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

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<sup>22</sup>*Kluger v. White*, 281 So.2d 1 (Fla. 1973)(the court invalidated a statute requiring a minimum of \$550 in property damages arising from an automobile accident before bringing an action); *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987)(the court ruled that a section of Tort Reform and Insurance Act, which placed absolute, \$450,000 cap on damages that tort victim could recover for noneconomic losses, violated victim's constitutional right to access to courts).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Section 1, Art. III, of the Florida Constitution, vests “legislative power” in the Legislature. Section 2(a), Art. V, of the Florida Constitution, directs the Supreme Court to adopt rules of “practice and procedure” for all courts.<sup>25</sup> The Legislature does have the power to repeal court rules. In *In re Rules of Criminal Procedure*, Justice Adkins defined “practice and procedure” to encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress....<sup>26</sup> Rules of practice and procedure include all rules governing the parties, their counsel and courts throughout the progress of the case from the time of its initiation until final judgment and its execution.<sup>27</sup> In contrast, Justice Adkins defined substantive law as consisting of the “rules and principles which fix and declare the primary rights of individuals as respects their persons and property.”<sup>28</sup> “Capacity to sue” is an absence of legal disability which would deprive a party of the right to come into court. It is considered a substantive right within the purview of the Legislature.<sup>29</sup>

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

Although indeterminate, there is a potentially recurring negative fiscal impact for the court system, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

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

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<sup>25</sup> Section 2(a), Art. V, Fla. Const.

<sup>26</sup> *Allen v. Butterworth*, 756 So.2d 52, 60 (Fla. 2000), Citing *In Re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *The Florida Bar, In Re Rule 1.220(b), Florida Rules of Civil Procedure*, 353 So.2d 95, 97 (Fla. 1977).

## **VIII. Summary of Amendments:**

None.

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