HOUSE OF REPRESENTATIVES STAFF ANALYSIS - Revised

BILL #: HB 293 CS Pilot RV Mediation and Arbitration Program
SPONSOR(S): Jordan
TIED BILLS: **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N, w/CS	Lammers	Billmeier
2) Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 293 makes numerous changes to the RV mediation and arbitration pilot program and establishes that it shall become a permanent program for the mediation of disputes between RV manufacturers and consumers. The bill requires that:

- Qualifying programs must contain safeguards against undue influence by the manufacturers and must provide for regular training of the mediators and arbitrators; mediators and arbitrators must be fair and impartial and may not be employees of the manufacturer; program administration must be sufficiently insulated from undue influence by the manufacturers.
- The program administrator is to determine which disputes are eligible for participation in the program, and consumers whose disputes do not qualify may file civil causes of action.
- The program provides for mediation of all qualifying disputes arising between the consumers and manufacturers.
- If any manufacturer involved in an eligible consumer dispute is not qualified to participate in the program, the consumer shall not be required to participate.
- The Department of Legal Affairs shall revoke or refuse to grant qualification to any program that fails to comply with the rules of the department and the requirements of sections 681.1096 and 681.1097, F.S.
- The program administrator is responsible for maintaining all records relating to disputes and must provide copies of settlement agreements and decisions to the department.
- Claims must be filed with the program and an application is considered filed when it is date-stamped as received by the program. For disputes that are not deemed eligible by the program administrator, the consumer may file a civil cause of action.
- Mediation and arbitration may be expanded, at the consent of the parties, to include warranty claims against the manufacturer that do not fall within the scope of the chapter.
- Manufacturers are required to respond to each allegation in a consumer complaint in writing.
- Arbitrators are required to consider all legal and equitable factors relevant to reaching a fair and just decision.
- If necessary, a consumer may apply to a court of competent jurisdiction for entry of an order confirming an arbitration award.

The program reports to and is supervised by the Attorney General's office.

The fiscal impact of this bill is unknown. See Fiscal Analysis.

This bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—This bill establishes the pilot program as a permanent program and reduces the amount of resources provided by the Attorney General's office for the program.

B. EFFECT OF PROPOSED CHANGES:

Pilot RV Mediation and Arbitration Program

In 1997, chapter 681, F.S., Florida's "Lemon Law," was amended to create substantive changes in the coverage of recreational vehicles (RVs) and to create a privately operated pilot dispute resolution program.[1] Pursuant to s. 681.1096(2), F.S., all RV manufacturers, including manufacturers of chassis and other components, are required to participate in the pilot RV arbitration and mediation program. The RV pilot program is required to meet certain qualifications and be approved by the Attorney General (AG), at which time, participation became mandatory for consumers who bought new RVs on or after October 1, 1997.[2] A consumer with rights under the Lemon Law is also required to participate in the program before resorting to a civil action or any other dispute resolution program.[3] If a department rejects a consumer's claim, the consumer has the right to file a lawsuit to enforce the remedies provided in chapter 681.[4]

Section 681.1097(3), F.S., sets forth the general guidelines for mediation under this section, while s. 681.1096, F.S., establishes the basic qualifications for both mediation and arbitration done in the program. The mediators and arbitrators for the program are required to be "insulated" from the manufacturers, in order to ensure that the mediation and arbitration services are impartial.[5] The administration fees of the program are shouldered entirely by the manufacturers, with no fees paid by the consumers.[6] Several other provisions of s.681.1096 set forth guidelines to ensure the neutrality of the program, including a prohibition forbidding the mediators and arbitrators from being employees of the RV manufacturers or dealers, and a requirement that all mediators complete an approved mediation training program. All mediation and arbitration of eligible claims must be completed within seventy days of receipt of the claim, although failure to resolve a claim within that time period would not affect the validity of the subsequent decision.[7] The number of cases resolved within seventy days increased each year from 2002 to 2004, from fifty-six percent in 2002 to seventy-nine percent in 2004 being timely resolved.[8] The Lemon Law arbitration board of the AG'S office monitors the program's compliance with chapter 681.[9]

Mediation is mandatory for the consumer and manufacturer, unless a settlement occurs prior to mediation, and mediation discussions are inadmissible in any future litigation.[10] Mediation is limited to the parties and their attorneys, if any, and the manufacturers must be represented by a person with settlement authority.[11] If mediation ends in an impasse, the dispute proceeds to arbitration.[12] Section 681.1097(5) generally sets forth the requirements of arbitration conducted pursuant to this section.

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[1] Report of the Attorney General 1, Feb. 7, 2005.
[2] Section 681.1096(1), F.S.
[3] Section 681.1097, F.S.
[4] Id. at (3)(d).
[5] Section 681.1096(3)(a), F.S.
[6] Id. at (3)(b).
[7] Id. at (3)(k).
[8] Attachment A, Attorney General's Report.
[9] Section 681.1096(4), F.S.; Report of the Attorney General at 1.
[10] Section 681.1097(4), F.S.
[11] Id.

Pursuant to section 681.1096(1), the AG's office has issued a report on the Florida Pilot RV Mediation/Arbitration Program regarding the effectiveness of the program, which is scheduled to expire on September 30, 2006. This program is similar to the Lemon Law Arbitration Program the AG's office already supervises. The RV industry funds the pilot program, the goal of which is to resolve Lemon Law disputes between consumers of new RVs and the RV manufacturers, including chassis and major component manufacturers.[13] Rather than having numerous programs sponsored by the various RV manufacturers, the Recreational Vehicle Industry Trade Association (RVIA) decided to develop a program for all of its member manufacturers.[14] Prior to the creation of the pilot program, eligible RV disputes were arbitrated by the state's New Motor Vehicle Arbitration Board, administered by the AG's office.[15]

Because an RV claim generally involves multiple manufacturers, although an RV is sold to the consumer under the name of the end-stage manufacturer, it can be difficult for a consumer to determine which manufacturer is liable when warranty repairs are needed.[16] The first approved pilot program was administered by the American Arbitration Association (AAA) from 1998 until late 2001, when the AAA relocated its offices out of the state and declined to continue the program.[17] In January 2002, the Collins Center for Public Policy in Tallahassee, Florida, became the approved program administrator.[18]

Claims Resolution and Consumer Feedback

During the calendar years from 1998 to 2004, 272 consumers filed eligible claims with the pilot program.[19] Sixty-seven percent of these claims were resolved by settlements between the parties, and twenty-four percent were resolved in arbitration.[20] When the Collins Center began administering the program, it began sending out questionnaires to consumer participants in the pilot program, to determine the perceived fairness and effectiveness of the program.[21] Forty-six percent of the questionnaires have been returned, for a total of 61 responses out of 134 questionnaires.[22] On the issue of mediation, eighty-four percent of the respondents whose claims were resolved in mediation felt that the mediation was conducted in a fair and impartial manner, although fifty percent of the respondents were unsatisfied with the settlements they reached with the manufacturers.[23]

According to data from the Collins Center, for the years 2002 to 2004, seventy percent of claims reached a settlement at mediation.[24] The consumers whose claims went to arbitration were considerably less satisfied with the results they received, although it should be noted that seventy-six percent of the claims sent to arbitration were dismissed.[25] Twenty-five percent of these respondents felt that the arbitrator was not knowledgeable about the Lemon Law, and forty percent felt the arbitrator did not conduct the hearing in an impartial manner.[26] Fifty-four percent felt that they were not given a full and fair opportunity to present their evidence at the hearing, and the same number also reported

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[12] Id. at (4)(e).
[13] Report of the Attorney General at 1.
[14] Id.
[15] Id. at 2.
[16] Id.
[17] Id.
[18] Id.
[19] Id. at 3.
[20] Id.
[21] Id.
[22] Id.
[23] Id.
[24] Attachment A, Attorney General's Report.
[25] Report of the Attorney General at 3.
[26] Id.

that they did not understand the reasons the arbitrator gave for the written decision.[27] Finally, fifty-nine percent of these respondents would not recommend the pilot program to others.[28]

For the entire program period, sixteen percent of cases have received a full settlement, six percent resulted in an arbitration award, and fifty-one percent resulted in a partial settlement.[29]

Attorney General's Perspective on Problems with the Pilot Program

When the pilot program began, the manufacturers were usually represented by attorneys at the mediation conferences, while the consumers were unrepresented.[30] This imbalance, together with the limited protection provided by the statutes, led to few effective resolutions.[31] To remedy this, the AG's office requested that the manufacturers stop sending attorneys to mediation unless the consumers were similarly represented.[32] The RVIA agreed to this and also agreed to mediate all consumer complaints, including those that would not qualify for arbitration, which is limited by statute solely to claims arising under the Lemon Law.[33] The AG noted that this could "salvage the relationship" and allow the manufacturers to hear directly from consumers about various complaints.[34] It is also significant to note that the Lemon Law often does not address many of the consumers' primary complaints about their RVs, because defects in components that are part of an RV's "living facilities" are not eligible for Lemon Law protection.[35]

One problem with the settlements from the mediation program is that since 2002, forty-two percent of the settlements have contained confidentiality clauses, drafted by the manufacturers, that render the agreements voidable under the Lemon Law.[36] Settlements have also been contingent upon the consumer giving up all potential rights to pursue other remedies against not only the manufacturer, but also against the dealers and other related entities who are not parties to the Lemon Law claims.[37] The AG has unsuccessfully attempted to persuade the manufacturers to desist from these practices.[38]

When a claim goes to arbitration, the remedies available are more limited because only the Lemon Law and related rules can be applied.[39] In arbitration, the consumer's claim is either denied in total, or the consumer may receive an award ordering the manufacturer to provide either a refund of the RV's purchase price or a replacement vehicle, and the consumer must pay a statutory offset for the time for which they used the "lemon" RV.[40] Manufacturers are always represented by attorneys in the arbitration proceedings, although consumers usually are not.[41] An additional problem with arbitration is that the arbitrators only receive one day of training on the Lemon Law, and little of the information is retained by time a hearing occurs.[42] Because the arbitrators have little independent knowledge of the relevant law and no source of independent legal advice, they tend to rely heavily on the arguments made by the manufacturer's attorney.[43] As a result, arbitration looks more like a trial court, several

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[27] Id.
[28] Id.
[29] Id.
[30] Attorney General's Report at 3-4.
[31] Id. at 4.
[32] Id.
[33] Id.
[34] Id.
[35] Id.
[36] Id.
[37] Id.
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Id.

decisions issued by the arbitrators have wrongly applied the law, and the AG believes that "arbitration has not proven to be effective for consumers."[44]

The AG has determined that the program would be more effective for dispute resolution if settlements were not conditioned on overreaching disclaimers and releases of consumers' rights, and if consumers and manufacturers agreed to expand the scope of mediation and arbitration to include all warranty disputes, regardless of whether such claims fall within the scope of the Lemon Law.[45] The AG also recommends both that its office retain qualification and oversight authority for the program and that all pilot program functions carried out by its office be transferred to the RVIA.[46]

HB 293

This bill makes the pilot program permanent, by removing the sunset clause from s. 681.1096(1) and removing the requirement that the Attorney General present reports on the effectiveness of the pilot program. The bill amends s. 681.1096(3), F.S., to provide that to be deemed qualified by the Department of Legal Affairs (department), the program's administration must be sufficiently insulated from the manufacturer to ensure that a manufacturer is not making the decision as to whether a consumer's dispute proceeds to mediation or arbitration. Also, program administration fees are required to be timely paid by the manufacturer, and the program must have competent and adequately funded staff. The requirement that program arbitrators have a minimum of one day of training in the application of the chapter and rules is removed. Instead, the program must now ensure that the mediators and arbitrators are sufficiently trained in the program rules and procedures every other year and as a precondition to serving in the program. The program is required to monitor the mediators and arbitrators to ensure that they are performing competently and impartially.

The bill also provides for consumer's claims to be sent directly to the program, rather than being directed to the program through the department. The program is required to gather all documents from the parties necessary for the complete consideration of the dispute, and the program is responsible for distributing copies of all the documents submitted to all parties involved in the dispute, including the mediator and arbitrator. If a program is not qualified or if a program's qualification is revoked, disputes are to be resolved pursuant to ss. 681.109, F.S. and 681.1095, F.S. If a program is not qualified or qualification is revoked with respect to one manufacturer, then all manufacturers potentially involved in the dispute must submit to arbitration by the division pursuant to s. 681.109. A consumer shall not be required to submit a dispute to the program when one or more manufacturers has been determined not qualified, regardless of whether the program may be qualified as to some of the manufacturers potentially involved in the dispute.

The bill provides that a program failing to meet the requirements of this section, s. 681.1097, F.S., and the rules adopted thereunder by the department, shall not be qualified by the department, and the department may revoke qualification of a program for failure to maintain compliance with the above-stated requirements. The department may revoke a program's qualification as to one or more manufacturers for conduct to be specified by rules made by the department pursuant to s. 120.536(1) and 120.54. If a program qualification is revoked as to a particular manufacturer, the department shall notify the program administrator and any involved manufacturer of any deficiencies in the program. If program qualification is revoked as to a particular manufacturer, the manufacturer shall be notified of its wrongful conduct and shall be given an opportunity to correct its deficiencies, except as set forth by departmental rule, and the manufacturer shall also be informed that it is entitled to a hearing pursuant to ch. 120, F.S.

The bill further provides that the program administer shall maintain records of each dispute submitted to the program, including recordings of arbitration hearings, and that those records shall be maintained

[44] Id.
[45] Id.
[46] Id. at 5.

separately from other unrelated records of the program. All records shall be maintained for at least five years after a dispute and shall be available for inspection by the department upon reasonable notice. The program shall provide the department with copies of all settlement agreements and decisions within thirty days of such agreements and decisions, and the program shall provide the department with quarterly and annual reports. The department is granted authority pursuant to ss. 120.536(1) and 120.54, F.S., to implement the provisions of this section.

The bill also amends s. 681.1097, F.S., to provide that a consumer who acquires an RV must first submit the dispute to the program if the dispute is deemed eligible. The claim is considered filed when the application is date-stamped as received by the program. The program administrator shall determine whether a consumer's application is eligible for participation in the program. The program administrator shall notify the consumer and manufacturer in writing if an application is rejected. If an application is rejected, the consumer may file a lawsuit to enforce the remedies provided by this chapter. Mediation is mandatory for the consumer and manufacturer, and the parties may agree to expand the scope of a mediation conference in order to resolve warranty claims that may not be covered under this chapter, provided such claims were reported by the consumer to the manufacturer or its authorized service agent during the term of the manufacturer's express warranty.

Upon determining that an application is eligible, the program administrator shall notify the consumer and all involved manufacturers. The program administrator shall provide all involved manufacturers with a copy of the completed application and shall obtain a written response to the consumer's allegations from each manufacturer.

A complete statement of the terms of the agreement between the consumer and the manufacturers must include the date, time, location, and nature of any agreed upon repair or replacement of a component part or accessory and an estimate as to the anticipated length of time for such repair or replacement. If a manufacturer fails to comply with the time requirements of the settlement agreement, the program administrator shall determine whether the dispute is eligible for arbitration. If the dispute is ineligible, the dispute shall be rejected pursuant to s. 681.1097(3).

In a program arbitration proceeding, the technical rules of evidence shall not apply. The parties may give mutual written consent to expand the scope of the arbitration to allow the arbitrator to consider warranty claims by the consumer that may not be covered under this chapter, so long as the consumer reported those claims to the manufacturer or its service agent during the term of manufacturer's express warranty. The arbitrator shall take into account all legal and equitable factors relevant to providing a fair and just decision, including, but not limited to, the warranty and the provisions of this chapter.

If a manufacturer fails to comply with the arbitration award, and no appeal has been filed, the consumer shall notify the program administrator of such failure within thirty days, a consumer may apply to a court of competent jurisdiction for entry of an order confirming the award within forty days of the manufacturer's failure to comply. In any civil dispute arising under this chapter related to an arbitrated dispute, the decision of the arbitrator is admissible in evidence.

This bill shall take effect upon becoming a law.

C. SECTION DIRECTORY:

Section 1. Amends s. 681.1096, F.S., removing the termination date for the Pilot RV Mediation and Arbitration Program and setting forth guidelines for program administration and the selection and training of mediators and arbitrators.

Section 2. Amends s. 681.1097, F.S., to change some of the procedures involved in mediation and arbitration under the program, relieving the department of its responsibility for administration of the program.

Section 3. Provides that the bill shall become effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The pilot program involved approximately one-third of the work time of a full-time attorney to monitor the program for compliance with statute, including traveling to observe mediations and arbitration hearings, responding to consumer and RV program staff requests, and enforcing manufacturer compliance with arbitration awards.[47] The recurring salary and benefits expenses for the pilot program were $29,000. The department also incurred annual expenses of $10,000, for the administration of the RV program.[48]

   This fiscal analysis was developed prior to the agreement between the AG and the RVIA as to the terms of the amendment contained in the CS to this bill. Although the department will still monitor the program and manufacturers for compliance with statute and rules, this bill provides that the RV program is now solely responsible for administration of the program, including handling all interactions with consumers. Thus, the recurring expenses listed in this fiscal report provide limited insight as to the future cost of the department's involvement in the program, as it is amended by this bill. The department's administration expenses for the program should be significantly reduced. The department's recurring salary and benefit expenses should decrease, although how much the expenses related to attorney time and oversight of the program are expected to decrease is unknown. The department does not anticipate a significant reduction in salary expenses.[49]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   The RVIA will have some expenses connected with the continued financial support of the RV arbitration and mediation program.[50]

D. FISCAL COMMENTS:

   None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

[47] Id.
[48] Id.
[49] Conversation with the Attorney General's Office, March 15, 2005.
[50] Department of Legal Affairs, Fiscal Impact Statement.

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:

   This bill delegates rule-making authority to the Attorney General.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee heard HB 293 on March 9, 2005, and adopted one amendment to the bill, which removes the department's responsibility for administrative oversight of the mediation and arbitration programs, requires additional training and impartiality of program arbitrators and mediators, provides certain consumer protections, and retains department oversight of final settlements and awards, requiring regular reports to the department.

The Civil Justice Committee reported the bill favorably as HB 293 with a committee substitute.