

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the procedural requirements related to prosecuting a civil action under the Florida Deceptive and Unfair Trade Practices Act.

B. EFFECT OF PROPOSED CHANGES:

General Background on the Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")¹ was enacted "[t]o 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."²

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to medium or subject matter. FDUTPA prohibits such acts in "any trade or commerce,"³ except as its own provisions may specifically exempt.⁴

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"⁵ or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.⁶

¹ Sections 501.201-501.213, F.S.

² Section 501.202(2), F.S.

³ Section 501.204(1), F.S.

⁴ FDUTPA expressly exempts from its provisions: retailers acting in good faith without actual knowledge of a violation, see s. 501.211(2), F.S.; acts or practices "required or specifically permitted by federal or state law," s. 501.212(1), F.S.; publication, broadcasting, printing or other dissemination of information on behalf of others without actual knowledge of a violation, see s. 501.212(2), F.S.; claims for personal injury, wrongful death, or damage to property other than property that is the basis of the violation, see s. 501.212(3), F.S.; claims against persons regulated by, or on the basis of activities regulated by, the Department of Financial Services, the Office of Insurance Regulation of the Financial Services Commission, or banks or savings and loan associations regulated by those entities or by federal agencies, see s. 501.212(4), F.S.; activities regulated by the Florida Public Service Commission, see s. 501.212(5), F.S.; or activities "involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475 [regulation of realtors and real estate appraisers], which act or practice violates s. 475.42 [realtors' professional ethics] or 475.626 [appraisers' professional ethics]," see s. 501.212(6), F.S.; causes of action related to certain commercial real property transactions, see s. 501.212(7)(a), F.S.; and certain causes of action for failure to maintain real property, see s. 501.212(7)(b), F.S.

⁵ Section 501.203(2), F.S. The state attorney is the default enforcing authority for FDUTPA violations within any particular judicial circuit. The Department of Legal Affairs ("DLA"), headed by the Attorney General, is the enforcing authority for FDUTPA violations occurring in or affecting more than one judicial circuit, and for single-circuit violations where the state attorney either defers to DLA in writing, or fails to act on the violation with 90 days of receiving a written complaint.

⁶ A non-exhaustive list of some actionable acts, pursuant to s. 501.976, F.S., by a dealer are: represent directly or indirectly that a vehicle is a demonstrator; represent the previous usage or status of a vehicle to be something that it was not; represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact; represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer; misrepresent warranty coverage; obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the

Part VI of ch. 501, F.S., consisting of ss. 501.975 and 501.976, F.S., creates a FDUTPA cause of action specific to motor vehicle dealers. Section 501.976, F.S., lists activities and practices by a motor vehicle dealer that are actionable under FDUTPA.⁷

Current law does not require that a potential plaintiff contemplating a FDUTPA action send a demand letter and attempt to settle the action before filing suit.

Effect of Bill

The bill requires an individual, prior to filing a civil action under FDUTPA, or a FDUTPA action against a motor vehicle dealer,⁸ to first send the potential defendant a demand letter. It should be noted, however, that these conditions do not apply to actions brought by a State Attorney or the Department of Legal Affairs (the enforcing authorities).

The applicable statute of limitations period for an action under FDUTPA will be tolled by the mailing of the notice required by this section for a period of 30 days for an individual claim or 90 days for a class action claim. This bill also requires the Department of Legal Affairs to prepare a sample notice for individual claims to be made available to the public.

Individual

At least 30 days before a potential plaintiff may sue for a FDUTPA violation, the plaintiff must provide an alleged defendant written notice of the plaintiff's intent to initiate litigation. This good faith written notice by the plaintiff must indicate that it is a demand pursuant to the new provisions of this bill⁹, state the name, address, telephone number of the plaintiff and the name and address of the defendant, specifically describe the alleged violation, be accompanied by a copy of all documents upon which the claim is based, and describe and provide the amount of each item of actual damages demanded by the plaintiff and recoverable under FDUTPA.

The notice must be sent by certified or registered mail, return receipt requested.¹⁰ If the defendant is a business, the notice must be sent to the business's registered agent on file with the Secretary of State. In the absence of such an agent, the notice can be sent to individuals within the corporation authorized by statute to receive service of process.¹¹

If the defendant pays the claim in the notice, within 30 days, together with a surcharge of 10 percent of the alleged actual damages, then the defendant is released from further liability under the FDUTPA and is not obligated to pay attorney's fees. This surcharge is capped at \$250 and is not available to the plaintiff if the demand is rejected or ignored even in a subsequent action. A payment by the defendant

dealer; alter or change the odometer mileage of a vehicle; and sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

⁷ See s. 501.211, F.S.

⁸ Hereinafter, this analysis will not make a distinction between purely FDUTPA actions and FDUTPA actions against motor vehicle dealers. Rather the single term FDUTPA will be used for both actions.

⁹ The bill directs the notice state in substantially similar language that "[t]his notice is a demand letter under s. 501.2115, Florida Statutes." Section 501.2115(2)(a).

¹⁰ Section 501.2115(3). If requested in the notice, these postal costs will be reimbursed if the defendant pays the claim, s. 501.2115(3).

¹¹ According to s. 48.081(1), F.S., process may be served against a corporation according to the following list:

- (a) On the president or vice president, or other head of the corporation;
- (b) In the absence of any person described in paragraph (a), on the cashier, treasurer, secretary, or general manager;
- (c) In the absence of any person described in paragraph (a) or paragraph (b), on any director; or
- (d) In the absence of any person described in paragraph (a), paragraph (b), or paragraph (c), on any officer or business agent residing in the state.

will be treated as being made on the date a draft or other valid instrument equivalent to payment is placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

A defendant can avoid paying attorney's fees in a subsequent action if the defendant, within 30 days after receiving the notice, notifies the plaintiff in writing, that the plaintiff is either seeking to recover improper damages or is seeking to recover excessive damages, but the defendant offers to pay the plaintiff all properly recoverable damages plus the surcharge. This provision only offers the defendant protection if a court or arbitrator in a later action agrees. A defendant is not required to pay attorney's fees for a plaintiff who fails to comply with the notice requirements.

Where a defendant offers to or pays a plaintiff's actual damages, that action will not constitute an admission of any wrongdoing and is not admissible to prove the defendant's liability or absence of liability.¹² Moreover, such an offer or payment releases the defendant from any further liability under FDUTPA arising out of the event described in the notice. Finally, the payment of or offer to pay damages can serve as a defense in any action for damages not brought under FDUTPA against the defendant arising out of the event described in the notice.

Class Action

Class actions are similar, although the 10% surcharge is not available, and the applicable time periods are 90 days rather than 30 days.

In addition to describing a plaintiff's individual claim, a class action notice must include: the definition of the class of plaintiffs; a description of the alleged violations under FDUTPA to the class; and a statement describing and providing the amount of each item of actual damages demanded on behalf of the class.

Should the defendant agree to pay the actual class damages, the defendant must notify the plaintiff of that decision in writing within 90 days. Within 90 days after receipt of the defendant's notice, the plaintiff must file an action to enforce the agreement in court. It is then the court's responsibility to determine the fairness of the agreement to the class, to administer the agreed upon resolution of the class claim, to carry out the notification and the opt-out processes, and to award reasonable attorney's fees to the plaintiff's counsel only for actual time spent in connection with this proceeding. If the plaintiff fails to timely file this action or if the court determines that the agreement is not fair, both the notice and the defendant's response will be deemed void.

The defendant is not obligated to pay attorney's fees if, within 90 days, the defendant informs that the plaintiff that plaintiff is seeking to recover improper damages or is seeking excessive actual damages, but offers to pay the class all properly recoverable damages listed in the notice; or that the claim is not a valid, properly certified class claim, but still offers to pay the plaintiff individually all properly recoverable actual damages listed in the notice, plus the surcharge. This provision only protects the defendant if a court or arbitrator in a later action agrees.

C. SECTION DIRECTORY:

Section 1, creates s. 501.2115, which requires conditions precedent to filing an action under the Florida Deceptive and Unfair Trade Practices Act.

Section 2, provides an effective date of October 1, 2006.

¹² Section 90.408, F.S. provides that compromise and offers of compromise are inadmissible to prove liability or absence of liability. Specifically, "[e]vidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." *Id.*

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:

None.

D. FISCAL COMMENTS:

There will be a minimal nonrecurring fiscal cost to the Department of Legal Affairs in FY 2006-2007 related to rulemaking regarding a sample notice for the public's use.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill creates rulemaking authority in the Department of Legal Affairs for the purpose of developing a sample claim form.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear why s. 501.2115(7)(b) provides, in lines 111-112, "The surcharge set forth in subsection (4) shall not apply," whereas s. 501.2115(7)(e)(2) provides, in line 143, " plus the surcharge described in subsection (4)." This appears to be two internally inconsistent sections within s. 501.2115(7) both dealing with class action notices.

Lines 125-128 provide that if a court determines that class action notice agreement is not fair or if a claimant fails to timely file the notice, then both the notice and the violator's response are deemed void.

In such a circumstance it is unclear if the potential class will need to file a second notice with the defendant and begin the process anew or if the action may simply continue with the court.

It is unclear what, if any, is the result of a notice's failure to include certain documentation in a notice has on a subsequent proceeding. Does the failure to include certain documents with the original notice preclude their later use in a court proceeding? What too about damage amounts, can they be increased from the original notice? In essence, is the claimant bound by the specific language of the notice in a subsequent action?

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

n/a