

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

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 prohibits such acts in "any trade or commerce,"³ except as its own provisions may specifically exempt. 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.

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"⁴ or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.⁵

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 against a motor vehicle dealer.

Effect of Proposed Changes:

This bill transfers all provisions relating to motor vehicles to Part VI, of ch. 501, F.S. For instance, section 2 reproduces s. 501.204, F.S., section 4 reproduces s. 501.2077, F.S., section 5 largely reproduces s. 501.211, F.S., section 6 reproduces s. 501.213, F.S., and section 7 is essentially the same as s. 501.2105, F.S.

¹ Sections 501.201-501.213, F.S.

² Section 501.202(2), F.S.

³ Section 501.204(1), F.S.

⁴ 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.

⁵ 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 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.

The bill requires an individual to send a demand letter to a motor vehicle dealer prior to filing a civil action under FDUTPA against the dealer.⁶ The applicable statute of limitations period for an action under FDUTPA will be tolled by the mailing of the notice required by the bill for a period of 30 days for an individual claim or 45 days for a class action claim. Further, this bill requires the Department of Legal Affairs to prepare a sample notice for individual claims to be made available to the public.

Current law provides that it is an unfair or deceptive act under FDUTPA for a vehicle dealer to 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 dealer. The bill modifies this language in two ways. First the bill provides that it would be actionable for a dealer to obtain a customer's signature on contracts that are not fully completed as to all material terms at the time the customer signs. Second, the bill provides an exception. This provision would not apply if, at the time of the transaction, the customer acknowledges in writing having read substantially the following notice:

STATUTORY CONSUMER NOTICE: A vehicle purchase or lease is a substantial transaction. Do not execute any sale or lease document if it is not fully completed or does not accurately reflect your agreement with the motor vehicle dealer. If you suffer any damages as a result of improper actions of the motor vehicle dealer, relief may be available to you under the laws of this state including part VI of chapter 501, Florida Statutes.

The important aspects of the pre-suit notice process are detailed below for both individual and class action claims.

Individual

At least 30 days before a potential plaintiff may sue for a FDUTPA violation, the plaintiff must provide an alleged dealer 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 bill;
- State the name, address, telephone number of the plaintiff and the name and address of the dealer;
- Specifically describe the alleged violation;
- Be accompanied by a copy of all documents upon which the claim is based;
- Describe and provide the amount of each item of actual damages demanded by the plaintiff and recoverable under FDUTPA (if the plaintiff cannot in good faith quantify any item of actual damage as required, the claimant must provide a comprehensive description of the item of damage or a formula or basis by which the dealer may calculate the damage); and
- Include a description of reasonable attorney's fees incurred, if any, for which reimbursement, not to exceed \$500, is sought.

The notice must be sent by certified mail, return receipt requested, to the dealer. If the dealer is a corporate entity, 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.

⁶ 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).

If the dealer pays the claim in the notice, within 30 days, together with a surcharge of 10 percent of the amount requested in the demand letter (not to exceed \$500), and attorney's fees of the plaintiff (not to exceed \$500), then the plaintiff may not initiate litigation against the dealer under this section.

However, this protection does not apply if the notice of claim specifies nonquantified items of damage. In such a case, the dealer may notify the plaintiff in writing within 30 days after receiving the notice that the dealer proposes to pay the claim with modifications. The dealer must inform the claimant that he or she has placed a value on the nonquantified items of damage and intends to pay that amount plus the surcharge and the attorney's fees. The plaintiff must accept or reject, in writing, the offer of the dealer within 10 business days. If a plaintiff accepts, the dealer must pay the plaintiff the amount set forth in the proposal within 10 business days. If that is done, a plaintiff may not initiate litigation against the dealer for a claim described in the notice of claim unless the dealer ignores, rejects, or fails to timely respond to the claimant's demand, or fails to pay within 10 business days the amount accepted by claimant; or the claimant does not accept the proposal of the dealer.

If the event the notice includes damages that arise from the plaintiff's lack of access to a motor vehicle due to the conduct of the dealer, the dealer has only 10 business days to respond, not 30 days.

A payment by the dealer 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. The plaintiff is not entitled to a surcharge in any proceeding initiated against a dealer under this part if the dealer rejects or ignores the notice of claim or the plaintiff rejects or ignores the dealer's proposal.

A dealer can avoid paying attorney's fees in a subsequent action if the dealer, within 30 days after receiving the notice, notifies the plaintiff in writing that the amount claimed is not supported by the facts of the transaction or by generally accepted accounting principles, or includes improper damages recoverable, but, the dealer, offers to pay to the actual damages supported by the facts described in the notice; the plaintiff's basis for rejecting or ignoring the dealer's proposal is not supported by the facts described in the notice of claim, generally accepted accounting principles, or the law; or the claimant fails to substantially comply with this section. This provision only offers the dealer protection if a court or arbitrator in a later action agrees. A dealer is not required to pay attorney's fees for a plaintiff who fails to comply with the notice requirements.

Where a dealer 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 dealer's liability or absence of liability. Moreover, such an offer or payment releases the dealer from any further liability under FDUTPA arising out of the event described in the notice. The payment of or offer to pay damages can serve as a defense in any action for damages not brought under FDUTPA against the dealer arising out of the event described in the notice. The payment may also serve as a defense in any subsequent action brought by any member of the class who did not opt out in connection with the class action notice if the action was settled on a class-wide basis.

Class Action

Class actions are similar, although the 10% surcharge is not available, and the applicable time periods are 45 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 dealer agree to pay the actual class damages, the dealer must notify the plaintiff of that decision in writing within 90 days. Within 90 days after receipt of the dealer'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 dealer's response will be deemed void.

The dealer is not obligated to pay attorney's fees if, within 45 days, the dealer informs that the 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 and attorney's fees. This provision only protects the dealer if a court or arbitrator in a later action agrees.

The bill also provides additional remedies and civil damages for violations against handicap and elderly persons.

The bill does not apply to actions brought by the Department of Legal Affairs.

C. SECTION DIRECTORY:

Section 1 amends the definition of "replacement item" in s. 501.975, F.S.

Section 2 creates s. 501.9755, F.S., describing unlawful acts and practices by a motor vehicle dealer taken from 501.204, F.S.

Section 3 amends s. 501.976, F.S., by including unlawful acts and practices under s. 501.9755, F.S. and exempting from the acts failure to sign all contracts under certain circumstances.

Section 4 creates s. 501.9765, F.S., describing violations against senior citizens and handicapped persons, taken from s. 501.2077, F.S.

Section 5 creates s. 501.977, F.S., regarding other individual remedies, taken from s. 501.211, F.S.

Section 6 creates s. 501.978, F.S., providing that remedies are supplemental to other laws, taken from 501.213, F.S.

Section 7 creates s. 501.979, F.S., regarding the award of attorney's fees to a prevailing party, taken from s. 501.2105, F.S.

Section 8 creates s. 501.980, F.S. describing the demand letter provisions.

Section 9 amends s. 501.212, F.S to create subsection (8) exempting actions brought by a person other than the enforcing authority.

Section 10 provides this bill is effective upon becoming law.

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:

Lines 504-507 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 dealer and begin the process anew or if the action may simply continue with the court.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 15, 2006, the Civil Justice Committee adopted one strike all amendment to the bill which primarily limited the FDUTPA pre-suit requirements to actions involving motor vehicle dealers. Additionally, the amendment changed the following:

- Provided for a statutory consumer notice informing a buyer of the significance of signing a contract to purchase a motor vehicle and potential legal remedies for unfair or deceptive acts on the part of the dealer.
- Simplified ch. 501, F.S. by transferring all provisions relating to motor vehicles to Part VI, of ch. 501, F.S. For instance, section 2 reproduces s. 501.204, F.S., section 4 reproduces s. 501.2077, F.S.,

section 5 largely a reproduces s. 501.211, F.S., section 6 reproduces of s. 501.213, F.S., and section 7 is essentially the same as s. 501.2105, F.S.

The bill was then reported favorably with a committee substitute.