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.)

Prepared By: Commerce and Consumer Services Committee

BILL:	CS/SB 2496
INTRODUCER:	Commerce and Consumer Services Committee and Senator Aronberg
SUBJECT:	Motor Vehicle Dealers
DATE:	April 21, 2006 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Meyer	TR	**Favorable**
2.	Earlywine	Cooper	CM	**Fav/CS**
3.			JU	
4.				
5.				
6.				

I. Summary:

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) authorizes a cause of action by a consumer against a business or individuals engaging in a described deceptive or unfair trade practice that harms the consumer. Current law also lists activities and practices by a motor vehicle dealer that constitute unfair or deceptive trade practices under FDUTPA. A court is supposed to consider the amount of actual damages when evaluating an award of attorney's fees for any other of the listed violations, but otherwise current law provides no special procedures for bringing an individual FDUTPA claim against a motor vehicle dealer for such practices.

This committee substitute requires a consumer who seeks to sue a motor vehicle dealer under FDUTPA must first serve that dealer with a written demand at least 30 days before filing suit. If the dealer pays the claim in the notice as required under the committee substitute, then the plaintiff may not initiate litigation against the dealer under this section. This committee substitute also provides for possible attorney fees and costs for the prevailing party.

This committee substitute substantially amends sections 501.975, 501.976, and 501.212 and creates sections 501.9755, 501.9765, 501.977, 501.978, 501.979, and 501.980 of the Florida Statutes.

II. Present Situation:

General Background on 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

[1] Sections 501.201-501.213, F.S.

acts or practices in the conduct of any trade or commerce."[2] The act is also intended to make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

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.

Section 501.204, F.S., declares unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. Willful violations occur when the person knew or should have known his or her conduct was unfair or deceptive.[4] A person willfully violating the provisions of this act is liable for a civil penalty of not more than $10,000 per violation. This penalty is increased to $15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons. Individuals aggrieved by a violation of this act may seek to obtain a declaratory judgment that an act or practice violates this act and to enjoin a person from continuing the deceptive or unfair act. An individual harmed by a person who has violated this act may also seek actual damages from that person, plus attorney's fees and court costs.[5]

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"[6] or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation. Section 501.207, F.S., specifies the actions the enforcing authority may bring.

Unfair or Deceptive Acts or Practices Relating to Vehicles

Part VI of ch. 501, F.S., currently consisting of only ss. 501.975 and 501.976, F.S., applies FDUTPA specifically to motor vehicle dealers, which s. 501.975(2), F.S., defines as being "motor vehicle dealers" as defined in s. 320.27, F.S., which provides, in pertinent part, the term applies to:

> any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1), F.S. Any person who buys, sells, or deals in three or more motor vehicles in any 12-month period or who offers or displays for sale in any 12-month period shall be prima facie presumed

[2] Section 501.202(2), F.S.
[3] Section 501.204(1), F.S.
[4] Section 501.2075, F.S.
[5] Section 501.211(1) and (2), F.S.
[6] 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, 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 within 90 days of receiving a written complaint.

> to be engaged in such business. The terms "selling" and "sale" include lease-purchase transactions.[7]

Section 320.27(1)(b), F.S., defines a "motor vehicle" as:

> any motor vehicle of the type and kind required to be registered under chapter 319 and [chapter 320], except a recreational vehicle, moped, motorcycle powered by a motor with a displacement of 50 cubic centimeters or less, or mobile home.

Section 501.976, F.S., lists activities and practices by a motor vehicle dealer that constitute unfair or deceptive trade practices under FDUTPA. This section specifies it is such a practice for a dealer to:

1) Represent directly or indirectly a motor vehicle is a factory executive vehicle or executive vehicle unless such vehicle was purchased directly from the manufacturer or a subsidiary of the manufacturer and the vehicle was used exclusively by the manufacturer, its subsidiary, or a dealer for the commercial or personal use of the manufacturer's, subsidiary's, or dealer's employees.
2) Represent directly or indirectly a vehicle is a demonstrator unless the vehicle complies with the definition of a demonstrator in s. 320.60(3).
3) Represent the previous usage or status of a vehicle to be something it was not, or make usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.
4) 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.
5) Represent orally or in writing 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 or his or her agent to determine whether the vehicle has incurred such damage.
6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions the dealer or manufacturer has given to the buyer. If the warranty obligations are to be shared by the dealer and the buyer, the method of determining the percentage of repair costs to be assumed by each party must be disclosed. If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in lay terms in accordance with ch. 672, F.S., [Article 2 of the Uniform Commercial Code, relating to sales of goods, as adopted in Florida] and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.
7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).
8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.
9) Obtain signatures from a customer on contracts 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.

[7] Section 320.27(1)(c), F.S.

10) Require or accept a deposit from a prospective customer prior to entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt that states how long the dealer will hold the vehicle from other sale and the amount of the deposit, and clearly and conspicuously states whether and upon what conditions the deposit is refundable or nonrefundable.
11) Add to the cash price of a vehicle as defined in s. 520.02(2), F.S., any fee or charge other than those provided in that section and in rule 3D-50.001, F.A.C. All fees or charges permitted to be added to the cash price by rule 3D-50.001, F.A.C., must be fully disclosed to customers in all binding contracts concerning the vehicle's selling price.
12) Alter or change the odometer mileage of a vehicle.
13) Sell a vehicle without disclosing to the customer the actual year and model of the vehicle.
14) File a lien against a new vehicle purchased with a check unless the dealer fully discloses to the purchaser that a lien will be filed if purchase is made by check and fully discloses to the buyer the procedures and cost to the buyer for gaining title to the vehicle after the lien is filed.
15) Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, notwithstanding subsequent receipt of an official price change notification. The price of a vehicle may be increased after a dealer accepts an order of purchase or a contract from a buyer if:
    a) A trade-in vehicle is reappraised because it subsequently is damaged, or parts or accessories are removed;
    b) The price increase is caused by the addition of new equipment, as required by state or federal law;
    c) The price increase is caused by the revaluation of the United States dollar by the Federal Government, in the case of a foreign-made vehicle;
    d) The price increase is caused by state or federal tax rate changes; or
    e) Price protection is not provided by the manufacturer, importer, or distributor.
16) Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name. The advertised price must include all fees or charges the customer must pay, including freight or destination charge, dealer preparation charge, and charges for undercoating or rustproofing. State and local taxes, tags, registration fees, and title fees, unless otherwise required by local law or standard, need not be disclosed in the advertisement. When two or more dealers advertise jointly, with or without participation of the franchisor, the advertised price need not include fees and charges that are variable among the individual dealers cooperating in the advertisement, but the nature of all charges that are not included in the advertised price must be disclosed in the advertisement.
17) Charge a customer for any predelivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the manufacturer, distributor, or importer.
18) Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."
19) Fail to disclose damage to a new motor vehicle, as defined in s. 319.001(8), F.S., of which the dealer had actual knowledge, if the dealer's actual cost of repairs exceeds the threshold amount, excluding replacement items.

Section 501.976, F.S., further provides a court should consider the amount of actual damages when evaluating an award of attorney's fees for any other of the listed violations, but otherwise provides no special procedures for bringing a private-party FDUTPA claim against a motor vehicle dealer for such practices.

In addition, current law does not require a potential plaintiff contemplating a FDUTPA action to send a demand letter and attempt to settle the action before filing suit against a motor vehicle dealer.

III. Effect of Proposed Changes:

In an effort to reflect current FDUTPA provisions apply to the deceptive and unfair trade practices relating to motor vehicles, the committee substitute mirrors several sections of the FDUTPA as provided in Part II, ch. 501, F.S., and creates those provisions relating to motor vehicles to Part VI, of ch. 501, F.S.

The committee substitute also adds the requirement an individual, prior to filing a civil action under FDUTPA against a motor vehicle dealer, to first send the potential defendant a demand letter.[8] 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 45 days for a class action claim. Further, this committee substitute requires the Department of Legal Affairs (DLA) to prepare a sample notice for individual claims to be made available to the public.

The important aspects of the pre-suit notice process are detailed below.

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 it is a demand pursuant to the new provisions of this committee substitute;
- State the name, address, telephone number of the plaintiff and the name and address of the dealer;
- 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 (if the plaintiff cannot in good faith quantify any item of actual damage as required, the claimant must provide a description of the item of damage or a formula or basis by which the dealer may calculate the damage).

The notice must be sent by certified, return receipt requested mail, or by a private delivery business that provides the sender with written documentation of receipt to the dealer. If the dealer is a corporate entity, the notice must be sent to the motor vehicle dealer or to the business's registered agent on file with the Secretary of State.

[8] It should be noted, however, theses conditions do not apply to actions brought by a State Attorney or DLA (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 the dealer proposes to pay the claim with modifications. The dealer must inform the claimant 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 rejects the proposal of the dealer.

In 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 claimant is not entitled to a surcharge in any proceeding initiated against a dealer under this part, if the dealer 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 claimant in writing 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 the actual damages supported by the facts described in the notice; the claimant'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 claimant who fails to comply with the notice requirements.

The enforcing authority is not required to comply with the pre-suit notification requirements.

The following is a section-by-section analysis of the committee substitute:

Section 1 amends s. 501.975, F.S., to expand the definitions to apply to Part VI, of ch. 501, F.S., Unfair or Deceptive Acts or Practices; Vehicles.

Section 2 creates s. 501.9755, F.S., to provide unlawful acts and practices. This section declares unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

Section 3 amends s. 501.976, F.S., to require a statutory consumer notice.

Section 4 creates s. 501.9765, F.S., to describe violations against senior citizens and handicapped persons and to provide civil penalties for those violations.

Section 5 creates s. 501.977, F.S., to provide other individual remedies.

Section 6 creates s. 501.978, F.S., to provide the effect of other remedies.

Section 7 creates s. 501.979, F.S., to provide for attorney's fees.

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

Section 9 amends s. 501.212, F.S., relating to persons, entities or activities exempt from the application of the FDUTPA. Subsection (8) is created to provide a claim brought by a person other than the enforcing authority against a dealer is exempt from the FDUTPA.

Section 10 provides this committee substitute is effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.