The Florida Senate

PROFESSIONAL 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: Transportation Committee

BILL: SB 2214

INTRODUCER: Senator Dockery

SUBJECT: Deceptive and Unfair Trade Practices

DATE: April 4, 2007 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Meyer	TR	**Pre-meeting**
2.			CM	
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 should 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 additional procedures for bringing an individual FDUTPA claim against a motor vehicle dealer for such practices.

This bill 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. The bill provides the dealer's compliance with the demand serves as a release from further FDUTPA liability arising from the same transaction, but is not an admission of wrongdoing. 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 bill does not appear to have a fiscal impact on local or state governments.

The bill takes effect upon becoming law.

This bill substantially amends sections 501.975, 501.976, and 501.212 and creates sections 501.9755, 501.9765, 501.977, 501.978, 501.979, 501.98, and 501.99 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 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:

[1] Sections 501.201-501.213, F.S.
[2] Section 501.202(2), F.S.
[3] Section 501.204(1), F.S.
[4] Section 501.2075, 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.

> 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 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).

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

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.
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 bill 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. For instance:

- Section 2 reproduces s. 501.204, F.S., relating to unlawful acts and practices, and how the section is to be construed;
- Section 4 reproduces s. 501.2077, F.S., relating to violations involving a senior citizen or handicapped person, and the civil penalties for such a violation;
- Section 5 largely reproduces s. 501.211, F.S., relating to other individual remedies;
- Section 6 reproduces s. 501.213, F.S., relating to the effect on other remedies; and
- Section 7 is essentially the same as s. 501.2105, F.S., relating to the awarding of attorney's fees and how the fees are determined.

Section 501.979, F.S., specifies the trial court shall consider actual damages in relation to the time spent when evaluating the reasonableness of an award of attorney's fees to a private person. This language is reproduced from s. 501.976, F.S.

The bill 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. The language relating to the demand letter process is comparable to the language currently found in s. 627.736(11), F.S., the Personal Injury Protection statute.

Consumers retain their right to pursue other remedies such as the Lemon Law found in ch. 681, F.S., and causes of action such as breach of contract and fraud, which do not require notice under

[8] It should be noted, however, theses conditions do not apply to actions brought by a State Attorney or DLA (the enforcing authorities).

this act. The bill specifically applies only to claims under the Unfair or Deceptive Acts or Practices part (part VI, ch. 501, F.S.).

Further, this bill requires the Department of Legal Affairs (DLA) to prepare a form demand letter to incorporate the information required by subsection (2) 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 claimant may sue for a FDUTPA violation, the claimant must provide an alleged dealer written notice of the claimant's intent to initiate litigation. This good faith written notice by the claimant must:

- Indicate it is a demand letter pursuant to s. 501.98, F.S.;
- State the name, address, telephone number of the claimant and the name and address of the dealer;
- Describe with specificity the underlying facts and how the facts give rise to an alleged violation of FDUTPA;
- Be accompanied by a copy of all documents upon which the claim is based; and
- Include a comprehensive and detailed statement describing each item of actual damage demanded by the claimant and recoverable under FDUTPA and the amount claimed for each item of damage, including, if applicable, the formula or basis by which each item of damage was calculated.

The notice must be sent by certified or registered, return receipt requested mail, to the dealer. If the dealer is a corporate entity, the notice must be sent to the dealer's registered agent on file with the Secretary of State and, in the absence of a registered agent, any person listed in s. 48.081(1), F.S.

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), then the claimant may not initiate litigation against the dealer under this section. This provision is similar to the one found in the Personal Injury Protection statute, s. 627.736(11), F.S., which provides for a penalty of 10 percent of the amount paid by the insurer, not to exceed $250, when the insurer pays an overdue claim.

A dealer is not required to pay attorney's fees if:

- The dealer, within 30 days after receiving the notice, notifies the claimant in writing, and a court or arbitrator agrees, the amount claimed is not supported by the facts of the transaction or by generally accepted accounting principles, or includes items not properly recoverable under this part; or
- The claimant fails to substantially comply with this section.

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 United States mail, or other nationally recognized carrier, in a properly addressed, postpaid envelope, or, if not so posted, on the date of actual 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 notice of claim.

A dealer's offer to pay, or payment of, a claimant's actual damages does 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 provisions requiring the demand letter do not apply to any claim for actual damages brought and certified as a maintainable class action or to any action brought by the enforcing authority.

If the claimant initiates litigation without having complied with the outlined procedures, the court is permitted to abate litigation until the claimant has complied with the required procedures and the dealer has been allowed the opportunity to accept or reject the demand.

The provisions found in part VI of ch. 501, F.S. do not apply to:

- An act or practice required or specifically permitted by federal or state law.
- A claim for personal injury or death or a claim for damage to property other than property that is the subject of the consumer transaction.
- Any person or activity regulated under the laws administered by the Office of Insurance Regulation of the Financial Services Commission.
- Any person or activity regulated under the laws administered by the former Department of Insurance that are now administered by the Department of Financial Services.

A claim brought by a person, other than the enforcing authority, against a dealer is now precluded under part II of ch. 501, F.S., and must be pursued through part VI of ch. 501, F.S.

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. In addition, this section provides legislative intent.

Section 3 amends s. 501.976, F.S., to revise language concerning actionable, unfair, or deceptive acts or practices by dealers.

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. 501.98, F.S., to describe the demand letter provisions.

Section 9 creates s. 501.99, F.S., to provide application of certain provisions.

Section 10 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 11 provides this bill 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:

To the extent the bill allows consumer claims against motor vehicle dealers to be resolved prior to a FDUTPA suit being filed, the costs associated with litigation will be avoided.

C. Government Sector Impact:

There will be minimal nonrecurring fiscal costs to the DLA in FY 2007-08 related to preparing a sample notice for the public's use.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.