

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill creates government regulation over a currently unregulated business.

Safeguard individual liberty – The bill creates government regulation over a currently unregulated business.

Promote personal responsibility – The bill may increase personal responsibility for past unlawful behavior and may increase awareness of potential risks to personal safety.

B. EFFECT OF PROPOSED CHANGES:

Background

Online dating services provide an opportunity for persons using the Internet to advertise themselves as available for dating, and to search for others similarly available. There are thousands of online dating services, including large generalized services and smaller specialized services. The two largest services claim to have approximately 13 million subscribers each. Smaller specialized versions often cater to particular ethnic and religious groups, or offer specialized services. Online dating services are currently unregulated by the state.

Part II of ch. 501, F.S., is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The act provides remedies and penalties for “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹ Remedies for acts prohibited by FDUTPA may include an action to enjoin a person from committing such acts,² as well as, the imposition of a civil penalty of not more than \$10,000.³ Actions may be brought by a state attorney or the Department of Legal Affairs⁴ or by a consumer.⁵

Additionally, FDUTPA permits any person who has been aggrieved by a violation under FDUTPA to obtain a declaratory judgment and to enjoin a person who has or is violating FDUTPA.⁶ A person who has suffered a loss as a result of such violation may be able to recover actual damages, attorney’s fees, and costs.⁷

Effect of Proposed Changes

The bill creates the “Internet Predator Awareness Act” and makes the following legislative findings:

- Residents of this state need to be informed when viewing websites of online dating services as to potential risks to personal safety associated with online dating.
- Requiring disclosures in the form of guidelines for safer dating and informing residents as to whether a criminal background screening has been conducted on members of

¹ Section 501.204, F.S.

² Section 501.207(1)(b), F.S.

³ Section 501.2075, F.S. Violations against a senior citizen or handicapped person may result in a penalty of not more than \$15,000 (s. 501.2077, F.S.).

⁴ Section 501.207, F.S.

⁵ *Id.*

⁶ Section 501.211(1), F.S.

⁷ Section 501.211(2), F.S.

online dating services fulfills a compelling state interest to increase public awareness of possible risks associated with Internet dating activities.

- The act of transmitting electronic dating information over the Internet addressed to residents of the state, and the act of accepting membership fees from residents of the state, means that an online dating service is operating, conducting, engaging in, and otherwise carrying on a business in the state subjecting such on-line dating service providers to regulation by the state and to the jurisdiction of the state's courts.

The bill provides definitions for “communicate or communicating,” “criminal background screening,” “department,” “Florida member,” “member,” “online dating service provider or provider,” and “sexual offense conviction.”

Provider safety awareness disclosures

An online dating service provider offering services to Florida members must disclose:

- A safety awareness notification that includes a list and description of safety measures reasonably designed to increase awareness of safer dating practices as determined by the provider.
- Whether or not the website conducts criminal background screenings. Such disclosure must be in bold, capital letters in at least 12-point type.

If the online dating service provider conducts criminal background screenings, the provider must disclose that background screenings of applicants are not perfect and that there is no way to guarantee that the name provided by a person to be run through a background screening is in fact the person's true identity and that not all criminal records are publicly available. The bill further states the screenings may not identify every member who has a felony or sexual offense conviction and users should participate in the service at their own risk and use caution when communicating with other members. The bill also requires the provider to disclose whether it has a policy allowing a member who has been identified as having a felony or sexual offense conviction to have access to its service to communicate with any Florida member.

Clearinghouse

The bill provides that the Department of Agriculture and Consumer Services (department) shall serve as the clearinghouse for intake of all information from consumers, residents, and victims concerning the act. The consumer hotline may be used for intake of information, which may be directed to the appropriate enforcement authority, as determined by the department.

Civil Penalties

This bill provides that failure of an online dating service provider to comply with the disclosure requirements is a deceptive and unfair trade practice under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Each failure to provide a required disclosure constitutes a separate violation. Under FDUTPA, the state⁸ may seek declaratory and injunctive relief against a violator. The state may also seek a civil penalty of up to \$10,000 for a willful violation, plus attorney's fees. The Attorney General may issue a cease and desist order to anyone violating FDUTPA. An individual may bring an action for injunctive relief, actual damages, and attorney's fees.

In addition to the FDUTPA remedy, this bill provides that a court may impose a civil penalty of up to \$1,000 per violation, with an aggregate total not to exceed \$25,000 for any 24-hour period, against any on-line dating service provider who violates any requirement of this act. Suit may be brought by either

⁸ Section 501.203(2), F.S., provides that the state attorney for the judicial circuit in which the violation occurred is the primary enforcing authority. If the violation occurs in more than one judicial circuit, if the state attorney defers, or if the state attorney does not act on a complaint within 90 days, the Attorney General is the enforcing authority.

the Department of Legal Affairs or by the Division of Consumer Services of the Department of Agriculture and Consumer Services. Penalties collected accrue to the enforcing agency to "further consumer enforcement efforts."

Exceptions to Regulation

This bill provides: "An internet service provider does not violate this act solely as a result of serving as an intermediary for the transmission of electronic messages between members of an online dating service provider." Primarily, this protects internet service providers from being deemed an online dating service company simply because they are transmitting e-mail and instant messages between persons.

Another exception is provided for Internet web access services, which are not considered an online dating service provider simply for renting storage space and bandwidth.

C. SECTION DIRECTORY:

Section 1. Creates s. 501.165, F.S., creating a short title and stating legislative findings.

Section 2. Creates s. 501.166, F.S., providing definitions applicable to regulation of online dating service providers.

Section 3. Creates s. 501.167, F.S., requiring certain disclosures by online dating service providers.

Section 4. Creates s. 501.168, F.S., naming the Department of Agriculture and Consumer Services as the clearinghouse for intake of information (from consumers, residents, and victims) relating to the act.

Section 5. Creates s. 501.169, F.S., creating civil penalties for failure of an online dating service provider to comply with the act.

Section 6. Creates s. 501.171, F.S., to provide exclusions.

Section 7. Provides direction to the Division of Statutory Revision.

Section 8. Creates a severability clause.

Section 9. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. See Fiscal Comments.

2. Expenditures:

None. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears as if it may have a fiscal impact on thousands of website owners who will be required to reprogram their websites to comply with the bill's requirements, or cease offering services to Florida residents. Website operators who elect to change their operation because of this bill may also incur the cost of ordering and analyzing criminal history background checks.

This bill may increase the cost to Florida residents who utilize online dating services should more providers start requiring criminal history background checks.

D. FISCAL COMMENTS:

The bill provides that any penalties collected may be kept by the enforcing authority⁹ or the department's Division of Consumer Affairs for "further consumer enforcement efforts." It is unknown to what extent violations will occur, or the imposition of penalties and resulting collections; therefore, the amount of potential revenue cannot be determined.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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 revenues in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

There have been attempts by federal and state governments to regulate the Internet and some have been found unconstitutional. Constitutional concerns may be raised by the bill related to the Commerce Clause, the First Amendment, and Due Process. The First Amendment issue applies regardless of where the website operator resides. The Commerce Clause and Due Process issues apply only to websites operated outside of the state. As of the writing of this analysis, staff is unaware of any major online dating service provider headquartered in Florida.¹⁰

Commerce Clause

The United States Supreme Court describes the Commerce Clause as follows:

The Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state

⁹ Section 501.203(2), F.S., defines "enforcing authority" as the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction. If the violation occurs in or affects *more* than one judicial circuit or if the office of the state attorney defers to the Department of Legal Affairs, in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney, the enforcing authority would be the Department of Legal Affairs.

¹⁰ Two of the three largest on-line dating services are located in California; the third is located in Texas.

taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. It is in this light that we have interpreted the negative implication of the Commerce Clause.¹¹

The Commerce Clause allows Congress to regulate commerce between the states. Congress has stated that "it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."¹² It could be argued that this clause states a congressional intent that the states may not regulate the Internet.

Dormant Commerce Clause analysis is a part of Commerce Clause analysis. The dormant commerce clause is the theory that, where Congress has not acted to regulate or deregulate a specific form of commerce between the states, it is presumed that Congress would prohibit unreasonable restrictions upon that form of interstate commerce.¹³

Dormant Commerce Clause doctrine distinguishes between state regulations that "affirmatively discriminate" against interstate commerce and evenhanded regulations that "burden interstate transactions only incidentally."¹⁴ Regulations that "clearly discriminate against interstate commerce [are] virtually invalid per se,"¹⁵ while those that incidentally burden interstate commerce will be struck down only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹⁶

State regulations may burden interstate commerce "when a statute (i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question, as distinct from the impact on companies trading in those goods."¹⁷

"A state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."¹⁸ Because the Internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate Internet activities without "project[ing] its legislation into other States."¹⁹ "We think it likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they 'imperatively demand[] a single uniform rule.'"²⁰

The court enjoined New York from enforcing a statute which prevented communications with minors over the Internet "which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors."²¹ The court found that the statute violated the Commerce Clause for three reasons:

¹¹ *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (internal citations omitted).

¹² 47 U.S.C. 230(b).

¹³ The Commerce Clause also allows Congress to specifically leave regulation of an area to the states, even if the effect of leaving such regulation to the states leads to burdensome and conflicting regulation. The most notable example of this is regulation of the insurance industry.

¹⁴ *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

¹⁵ *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001).

¹⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁷ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208-09 (2d Cir. 2003) (citations omitted).

¹⁸ *Healy v. The Beer Institute*, 491 U.S. 324, 332 (1989).

¹⁹ *Id.* at 334.

²⁰ *American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003). See also, *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999); and *American Libraries Association v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997)(all three cases striking a state law regulating Internet commerce as a violation of the dormant commerce clause).

²¹ *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 163 (S.D.N.Y. 1997).

First, the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states and is therefore per se violative of the Commerce Clause. Second, the benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce. Finally, the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes.²²

The bill provides that it only applies to web pages viewed by persons in Florida. Case law has said that "it remains difficult for 'publishers' who post information on the Internet to limit website access to . . . viewers from certain states."²³ However, users of online dating service providers are required to give their location, and have incentive to do so because of the local nature of dating.

Neither the United States Supreme Court nor the 11th Circuit has addressed the impact of the Commerce Clause on state regulation of the Internet. This bill may impose some burden on interstate commerce; the key question for Commerce Clause analysis is whether such burden is "unreasonable."

First Amendment

This bill requires that an Internet provider give one or more specific messages to all persons who access the website, and provides civil penalties for the failure to provide that message.

The First Amendment right to free speech applies to commercial speech.²⁴ In later decisions, the Supreme Court gradually articulated a test based on the "commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."²⁵ *Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.²⁶

The Supreme Court has held that the Government carries the burden of showing that a challenged regulation directly advances the governmental interest asserted in a direct and material way.²⁷ That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."²⁸ The Court cautions that this requirement is critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."²⁹

A state cannot compel a person to distribute a particular statement that the person disagrees with. A Florida law requiring that a newspaper that published an editorial critical of a candidate for political

²² *Id.* at 183-184.

²³ *American Booksellers v. Dean*, 342 F.3d 96, 99 (2nd Cir. 2003).

²⁴ *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²⁵ *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980).

²⁶ *Id.* at 566.

²⁷ *Edenfeld v. Fane*, 507 U.S. 761 (1993).

²⁸ *Id.* at 770-771.

²⁹ *Id.* at 771. See also, *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995)(prohibiting certain government regulation of beer labeling despite a government argument that such restrictions were necessary for health, safety and welfare).

office provide the politician with space to make a reply was found unconstitutional.³⁰ The United States Supreme Court ruled that California cannot compel a utility company to give its excess space in billing envelopes to other entities.³¹ “Compelled access like that ordered in this case [by the utilities commission] both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.”³² It is possible that a court may find that the statements required by this bill rise to the level of compelled speech.

Jurisdiction Over Non-Residents

The due process clause of the state and federal constitutions require the courts to provide due process to all litigants in any court case. One part of the concept of due process is the requirement that a court not act unless the court has legal jurisdiction over a party to the litigation. It is a violation of due process for a court to enter a judgment affecting a person unless the court has jurisdiction over that person.

Whether the State of Florida can exercise civil jurisdiction over a website operator in a foreign country is a matter of treaty. It is possible that the State, or a citizen of the state, may be able to prosecute a civil cause of action against a website operator located in a foreign country who is violating the provisions of this bill.

It is likely that the state can impose civil court jurisdiction over a citizen of another state who violates the provisions of this bill. The leading case on civil jurisdiction over Internet commerce is from a federal district court in Pennsylvania.³³ This case makes a distinction between a passive website, one that just provides information, versus an active website that actively takes orders and allows the operator to enter into contracts with citizens of the state. The rule from this case is that the operator of a passive website is not subject to personal jurisdiction in any state where someone may happen to view the website. On the other hand, the operator of an active website that accepts sales orders from the resident of a state should anticipate having to defend a civil lawsuit in that state.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

Thank you for the opportunity to respond to the staff analysis draft written for HB 531. Here are my thoughts after reviewing the draft.

1. Correction of title, “Cyber Predator Awareness Act”. This will be conveyed in a title amendment presented in the committee meeting.
2. The discussion under the First Amendment, 4th full paragraph, discusses whether this bill rises to the level of compelled speech. It should be stated that the bill was specifically crafted to address this by not requiring specific content in the disclosures. Instead, it says that examples are provided as guidelines for assistance but does not require compelled speech as addressed by the courts. It gives companies totally flexibility on how to address the disclosures. Moreover the Supreme Court has been fairly consistent in upholding states’ consumer protection legislation requiring reasonable disclosures on products and services that concern the public health and safety.

³⁰ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

³¹ *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986).

³² *Id.* at 9.

³³ *Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997).

3. As to the argument on the Commerce Clause, once again, the bill was specifically drafted by several constitutional lawyers to comply. Interstate commerce violations occur when a company outside Florida is treated differently from a company in Florida. In this bill, all companies are treated exactly the same. The customers within Florida are entitled to increase consumer protection with the disclosures and the bill does not require companies to address how residents outside Florida are handled. The legislature has full authority to protect the safety of its own residents through consumer protection measures.

4. As to the fiscal impact, the Senate sponsor Senator Jeremy Ring, a founder of one of the largest internet companies, confirmed there is no cost impact on internet companies for simple compliance with this bill. The technical staff of a website routinely updates web material through out a work day. However, a message for Florida users would just be a one time update to their website login content and then will be disclosed to users through automatic features causing by an automatic popup message specifically for them. Since the bill in no way requires criminal screenings, it is unfair to say it will increase costs to Florida residents.

5. The staff analysis draft also states (page 5) there are no online dating service companies based in Florida. My staff conducted a google.com and ask.com search and found nearly 20 online dating services based in Florida. Some of the sites based in Florida are: the-online-dating-reviews.com, floridasmart.com, newfriends4u.com, datinginmiami.com, americansingles.com, floridaluv.com, tallahassee.bookofmatches.com, hellotampa.com, 12meet.com, hellokeywest.com, newfriend.us/state/fl, latineuro.com, florida-personals.net, florida.outladies.com, clearwater.friendsearch.com/dating/florida.htm, miami.date.com, rateordate.com/local/us/fl/southflorida.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A