

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 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 and Online Safety Act” and states the following legislative findings:

- The Legislature has received public testimony that criminals and sex offenders use online dating services to prey upon residents of the state.

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.

- There presently exists a compelling state interest to develop a statewide uniform online safety policy that includes measures to enhance the public's awareness of the use of online dating services by predators to communicate with potential victims.
- Residents need to be informed when viewing websites of online dating services as to the potential risks to personal safety associated with online dating.
- Requiring certain disclosures fulfills a compelling state interest to increase public awareness.
- 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, communicating, or communication,” “convicted, conviction, and convictions,” “criminal background screening,” “department,” “felony,” “Florida member,” “member,” “misdemeanor,” “online dating service provider or provider,” and “sexual offense conviction.”

Provider safety awareness disclosures

An online dating service supplier offering services to Florida members must:

- Provide a safety awareness notification that includes a list and description of safety measures designed to increase awareness of safer dating practices as determined by the provider.
- Disclose at the time a member signs up, whether the online dating service provider conducts criminal background screenings on its members. Such disclosure must be provided as a hyperlink titled “Safety Tips” from the profile pages and within the provider’s terms and conditions.
- Disclose that background screenings of applicants can be fallible and there is no way to guarantee that the name provided by a person for background screening is the person’s true identity and that not all criminal records are publicly available.
- Disclose that 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.
- 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.
- Provide a hyperlink labeled “Details about our Criminal Background Screenings” that clearly describes the name of the vendor conducting the background screening, how often the vendor updates its database of criminal convictions, a list of states covered, and any limitations on access to a state’s criminal conviction data.

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 that violates any requirement of this act. Suit may be brought by either the department's Division of Consumer Services or by the Department of Legal Affairs. Penalties collected accrue to the enforcing authority or the Division of Consumer Services for further consumer enforcement efforts. A private cause of action is not created.

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 communications between members of an online dating service provider." Primarily, this protects internet service providers from being deemed an online dating service company simply for transmitting e-mail and instant messages between persons.

The bill further provides that the bill does not create a cause of action against an Internet access service, an Internet service provider, or a telecommunications provider whose equipment or network is used to transport or handle the transmission of a communication.

C. SECTION DIRECTORY:

Section 1. Creates s. 501.165, F.S.; providing a short title; providing legislative findings; providing definitions; requiring certain disclosures by online dating services; providing a clearinghouse for consumers; providing civil penalties for noncompliance; providing exclusions.

Section 2. Provides a directive to the Division of Statutory Revision.

Section 3. Provides for severability.

Section 4. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a fiscal impact on website owners as websites would, most likely, have to be reprogrammed to meet the bill's requirements. Those website operators electing to change their operations due to the bill's requirements may also incur the cost of ordering and analyzing criminal background screenings.

The cost to Florida residents utilizing online dating services may increase if more providers start requiring criminal background screenings.

D. FISCAL COMMENTS:

The bill provides that any penalties accrue to the enforcing authority⁹ or the department's Division of Consumer Services 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.

The bill also requires the department to serve as the clearinghouse for intake of all information from consumers, residents, and victims concerning the act, and allows the consumer hotline to be used for intake of such information. The department has indicated that the added responsibility of being the clearinghouse can be absorbed within existing resources.

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:

Some past attempts by federal and state governments to regulate the Internet 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:

⁹ s. 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.

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 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

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).

sado-masochistic abuse, and which is harmful to minors."²¹ The court found that the statute violated the Commerce Clause for three reasons:

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

This 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 an Internet provider offering services to members in Florida to provide a safety awareness notification and to provide one or more specific notifications to all Florida members who access the website, and provides civil penalties for the failure to provide notifications.

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

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

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.

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 a newspaper that publishes an editorial critical of a candidate for political office to 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

"This bill does not create a private cause of action for an individual; therefore violations can only be brought by: 1) the Attorney General; 2) State Attorney; and 3) Department of Agriculture and Consumer Services.

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).

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).

All constitutional issues have been addressed in the bill and meet the appropriate tests established by the Supreme Court providing for a tailored and reasonable regulation based on compelling state interests to protect the safety, health and welfare of Florida residents.”

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A