The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL:	SB 1512
INTRODUCER:	Senator Evers
SUBJECT:	Unfair or Deceptive Acts or Practices Involving Motor Vehicles
DATE:	February 1, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Pre-meeting**
2.			BI	
3.			JU	
4.			BC	
5.				
6.				

I. Summary:

SB 1512 addresses unfair deceptive acts or practices involving motor vehicles as regulated under part VI of ch. 501, F.S. Specifically, the bill does the following: defines the term business day; creates a presuit notice requirement for filing claims relating to unfair or deceptive acts or practices against a motor vehicle dealer; as well as establishes substantive rules for the filing and handling of such notices and claims. The bill does not apply to actions by an enforcing authority, certified class action suits, other provisions of federal or state law, or personal injury or death claims.

This bill amends the following section of the Florida Statutes: 501.975, F.S.

This bill creates the following section of the Florida Statutes: 501.977, F.S.

II. Present Situation:

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA), found in part II of ch. 501, F.S., prohibits unfair methods of competition, as well as deceptive acts or practices, in the conduct of any trade or commerce.[1] Specifically, the act is designed to accomplish the following objectives:

- Simplify, clarify and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
- 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; and
- Make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.[2]

With respect to enforcement, s. 501.203, F.S., defines the term "enforcing authority" to mean the office of the state attorney if a violation of FDUTPA occurs in or affects the judicial circuit under the office's jurisdiction, or the Department of Legal Affairs (department) if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney. Thus, the enforcing authority may bring:

- An action to obtain a declaratory judgment that an act or practice violates FDUTPA;
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate FDUTPA; and
- An action on behalf of one or more consumers for the actual damages caused by an act or practice in violation of FDUTPA.[3, 4]

Similarly, s. 501.211, F.S., provides that, in any individual action brought by a consumer who has suffered a loss as a result of a violation of FDUTPA, such consumer may recover actual damages, plus certain attorney's fees and court costs. However, no damages, fees, or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

[1] Section 501.204, F.S. (2011)
[2] Section 501.202, F.S. (2011)
[3] Section 501.207, F.S. (2011)
[4] Note that the statute stipulates that no damages shall be recoverable under this section against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated FDUTPA.

In 2001, ch. 2001-196, L.O.F., was enacted and codified as part VI of ch. 501, F.S., which dealt directly with unfair, deceptive acts or practice by a motor vehicle dealer.[5] Accordingly, the law enumerated the following actions by a dealer as unfair or deceptive acts or practices actionable under FDUTPA including, but not limited to, the following:

- Represent directly or indirectly that a motor vehicle is a factory executive vehicle or executive vehicle unless that 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.
- Represent the previous usage or status of a vehicle to be something that 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.
- Represent orally or in writing that a 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 agent to determine whether the vehicle has incurred such damage.
- 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, the amount of the deposit, and the conditions under which the deposit is refundable or nonrefundable.
- Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, unless
    - A trade-in vehicle is reappraised because it subsequently is damaged or parts or accessories are removed;
    - The price increase is caused by the addition of new equipment, as required by state or federal law;
    - The price increase is caused by the revaluation of the U.S. dollar by the Federal Government, in the case of a foreign-made vehicle;
    - The price increase is caused by state or federal tax rate changes; or
    - Price protection is not provided by the manufacturer, importer, or distributor.

III. Effect of Proposed Changes:

Section 1 amends s. 501.975, F.S., to define the term "business day," which is to mean any day other than a Saturday, Sunday, or legal holiday.

Section 2 creates s. 501.977, F.S., to establish the procedure for filing a claim for unfair and deceptive trade practices against a motor vehicle dealer. A summary of the governing rules is provided below.

[5] Section 501.976, F.S. (2011)

Notice of Claim

Prior to initiating a civil lawsuit against a dealer under parts II or VI of ch. 501, F.S., a claimant must provide the dealer with written notice of the claim and the claimant's good intent to initiate litigation 15 days prior to filing his or her lawsuit. The department is authorized to adopt a notice-of-claim form that provides blank space for filling out the required information. The notice of claim shall be published on the department's Internet website. Additionally, a claimant must include the following information in the notice of claim:

- A statement that the notice of claim is provided under this section.
- The name, address, and telephone number of the claimant.
- The name and address of the dealer.
- The date and description of the transaction, event, or circumstances upon which the claim is based.
- A cite to the provisions of parts II or VI of ch. 501, F.S., which the dealer is claimed to have violated and a specific description of the facts evidencing the violation.
- A comprehensive and detailed statement describing each item for which actual damages are claimed and recoverable under part II or VI of ch. 501, F.S., and the amount claimed for each item, including, to the extent applicable, the formula or basis by which the damages are calculated.

The dealer must provide a copy of the department's notice-of-claim form to each customer at the time of each transaction and include on the form the name or position title and address of the person responsible for processing the claim. That person must be one of the following:

- The dealer's registered agent
- The party authorized to receive service of process for the dealership under s. 48.081(1), F.S.[6]
- The name and address of the dealer's business division assigned by the dealer with responsibility for processing claims.

To the extent applicable, the notice of claim must be accompanied by a copy of the document for which the claim is based on or relied upon in asserting the claim. Additionally, the notice of claim must be sent to the dealer by certified or registered U.S. postal mail by the claimant to any of the three parties described above. A dealer's failure to provide a copy of the department's notice-of-claim form to a claimant will be deemed as a waiver of the dealer's right to notice with the effect that the claimant may initiate civil litigation against the dealer automatically. The dealer must reimburse the claimant for the postal costs of providing the notice, if the dealer pays the claim and if requested by the claimant.

[6] Process against any private corporation, domestic or foreign, may be served: (a) On the president or vice president, or other head of the corporation; (b) in the absence of any person described in paragraph (a), on the cashier, treasurer, secretary, or general manager; (c) in the absence of any person described in paragraph (a) or paragraph (b), on any director; or (d) in the absence of any person described in paragraph (a), paragraph (b), or paragraph (c), on any officer or business agent residing in the state. *See* s. 48.081(1), F.S. (2011).

Civil Litigation

A claimant is precluded from initiating a civil action against a dealer under part II or VI of ch. 501, F.S., if within 15 business days after receipt of the notice of claim the dealer pays to the claimant:

- The amount of actual damages claimed in the notice
- A surcharge equal to 10 percent of the amount of actual damages claimed in the notice not to exceed a surcharge of $500. A claimant is not entitled to a surcharge if the dealer rejects or does not respond to the claimant's notice of claim.[7]

A dealer who pays the claimant for actual damages and the surcharge is not further liable to the claimant for the transaction, event, or circumstances described in the notice of claim.

Moreover, a dealer is not required to pay the claimant's attorney fees in any civil litigation initiated under parts II or VI of ch. 501, F.S., if the dealer within 15 business days after receipt of the notice of claim notifies the claimant in writing, and a court arbitrator agrees, to the following:

- The amount claimed is not supported by the underlying facts described in the notice of claim, generally accepted accounting principles,
- The amount claimed includes items that are not recoverable under parts II or VI of ch. 501, F.S., or
- The claimant has not substantially complied with this section.

Statute of Limitation

Any time limitation[8] on initiating civil litigation under part II or part VI of ch. 501, F.S., is tolled for 15 business days or for such other period agreed to in writing by the parties. The date for tolling the statute of limitations will commence the day after the notice of claim is postmarked by the U.S. postal service.

Miscellaneous

A dealer's payment of the claimant's actual damages or offer to pay such damages is not an admission of any wrongdoing by the dealer or admissible as evidence.

Moreover, a claim is deemed paid on the date that a draft or other valid payment is posted by the U.S. Postal Service; date-stamped with a verifiable tracking number by a common carrier; or delivered, if a postmark or verifiable tracking number is not available.

[7] Note that s. 57.105, F.S., governs the award of attorney's fees.
[8] The specific time limitation associated with a specific cause of action can be found in s. 95.11, F.S.

Exceptions

This section will not apply to the following actions:

- A claim for actual damages brought and certified as a maintainable class action.
- An action brought by the enforcing authority, which is either the office of the state attorney or department as defined in s. 501.203, F.S.
- An act or practice required or specifically authorized by federal law or any provision of state law found outside of ch. 501, F.S.
- A claim for personal injury or death or a claim for damage to tangible personal property other than the property that is the subject of the customer transaction.

Section 3 provides that this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Separation of Power

Article II, Section 3 of the Florida Constitution, provides that "no person belonging to one branch shall exercise any powers appertaining to either of the other branches." Accordingly, the power to create procedural rights is reserved to the Supreme Court while the Legislature is endowed with the power to create substantive rights.

When discerning whether a statute is regulating substantive or procedural matters, the Florida Supreme Court has stated that "if a statute governs a substantive right or sets the bound of substantive right, then the statute is within the power of the Legislature and therefore constitutional."[9] Thus, the Florida Supreme Court has held that imposing a condition, such as a pre-suit notice requirement, on the arising of a cause of action is constitutional and not an improper attempt by the Legislature to invade upon the rule-

[9] *Campagnulo v. Williams*, 563 So. 2d 733, 734 (Fla. 4th DCA 1990) (quoting *VanBibber v. Hartford Accident and Indemnity Ins. Co.*, 439 So. 2d 880 (Fla. 1983)).

making power of the judicial branch.[10] As such, the creation of s. 501.977, F.S., by SB 1512 should not implicate any concerns with respect to separation of powers.

Access to Court

Article 1, Section 21 of the Florida Constitution, provides that "the courts shall be open to every person for redress of any injury and just shall be administered without sale, denial, or delay." Presuit notice requirements have been recognized and upheld for numerous causes of action[11] and generally are required to be interpreted by the courts in a manner that favors access.[12] As such, the creation of s. 501.977, F.S., by SB 1512 should not implicate any constitutional concerns with respect to access to courts.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Office of the State Court Administrator's 2011 Judicial Impact Statement, SB 1512 would afford claimants a brief cooling-off period during which potential defendants are asked to weigh the value of prospective claims. As such, the bill is structured in a manner that promotes settlement and consequent reduction in both court work load and expenditure of judicial time. However, the fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantifiably establish the potential decrease in court workload and judicial time.

VI. Technical Deficiencies:

SB 1512 provides that "a dealer who pays the claimant for actual damages and the surcharge is not further liable to the claimant for the transaction, event, or circumstances described in the notice of claim." However, it is unclear whether the term "transaction" and the subsequent listing of the more narrow terms, "event" and "circumstances," is intended to foreclose future claims concerning a separate grievance that arose from the same transaction.

Specifically, the use of such a broad term followed by more narrower terms may lead to a confusing interpretation since it is unclear whether the settling of one claim arising out of a particular transaction will foreclose future claims relating to a separate grievance that arose from

[10] *See Id.*
[11] *See* ss. 627.736(10), 766.106(2) and 558.004, F.S. (2011)
[12] *Weinstock v. Groth,* 629 So. 2d 835, 838 (Fla. 1993).

the same transaction by the fact that the earlier matter was previously settled under the provisions created by this section.

VII. Related Issues:

SB 1512 provides that the requirements, as created by this bill, for filing a civil lawsuit against a dealer under parts II or VI, of ch. 501, F.S., will not apply to a claim for actual damages brought and certified as a maintainable class action. However, because the language limits this exclusion to only a certified class action, concern exists that this will continue to encourage the "picking-off" of the named class representative[13] during the pre-certification phase of a class-action suit."[14, 15] The consequence for removing the class representative by a tender or offer of payment for his or her damages results in the class representative's claim becoming moot, which will result in a dismissal of the entire class action.[16]

Federal case law has developed with respect to this issue and some courts have implemented legal tests for averting the dismissal of a class-action during the pre-certification phase.[17] In Florida, the state of the current law remains unclear; however, the Third District Court of Appeal has briefly stated that "a [defendant] cannot simply try to 'pick off' a named class representative."[18]

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

[13] The named class representative refers to the plaintiff filing on behalf of members of the class that are similarly situated.
[14] The 4 prerequisites for maintaining a class action are as follows: (1) the members of the class must be so numerous that it is impractical to join each member; (2) the claim or defense must raise questions of law or fact that are common to the individual members; (3) the claim or defense of the representative parties must be typical of those that would be asserted by individual members; (4) the representative party must be able to fairly and adequately protect and represent the interest of each member of the class. Fla. R. Civ. P. 1.220(a).
[15] "The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viabe means of addressing their needs in court." *Johnson v. Plantation Gen. Hosp. Ltd. P'ship,* 641 So. 2d 58, 60 (Fla. 1994).
[16] *See Taran v. Blue Cross Blue Shield of Fla. Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d. DCA 1997) ("If none of the named plaintiffs purporting to represent a class establishes a requisite case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class.") (holding trial court could rule on standing before considering whether to certify class).
[17] *See Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d. Cir. 2004) (holding that where a defendant makes an offer to an individual claim that has the effect of mooting class relief asserted in the complaint, absent undue delay in filing a motion for class certification, the appropriate course is to relate the certification motion back to the filing of the class complaint).
[18] *Allstate Indemnity Co. v. De la Rosa,* 800 So. 2d 245, 246 (Fla. 3d DCA 2001), *review denied,* 823 So. 2d 122 (Fla. 2002).