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 Committee on Judiciary

BILL:	CS/SB 292
INTRODUCER:	Commerce and Tourism Committee; Senator Richter and others
SUBJECT:	Deceptive and Unfair Trade Practices
DATE:	April 5, 2013 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	**Fav/CS**
2.	Brown	Cibula	JU	**Pre-meeting**
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

CS/SB 292 revises the claims procedure for actions against motor vehicle dealers under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). Specifically, it requires claimants to provide a written demand letter to motor vehicle dealers at least 30 days prior to filing suit or initiating arbitration.

The bill:

- Prescribes the content of the demand letter.
- Specifies the method of delivery of the letter.
- Precludes a claimant from filing a lawsuit if the dealer complies with the request in the demand letter for the damages stated. The dealer must also pay a surcharge of $500 if the claimant is represented by an attorney.
- Specifies that compliance with a demand letter does not constitute an admission of liability or fault, is not admissible into evidence, and releases the dealer from future claims relating to the incident referenced in the letter.
- Provides a written form of notice for dealers to provide to consumers of the demand letter requirement.

This bill substantially amends section 501.975, Florida Statutes.

This bill creates section 501.98, Florida Statutes.

II. Present Situation:

History of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

The original FDUTPA statute was based on the 1973 Uniform Consumer Sales Practices Act (UCSPA) and the Model Little FTC Act.[1] In fact, FDUTPA is commonly known as the "Little FTC Act."[2] In carving out a state law, the Florida Legislature expressed its intent to afford "due consideration and great weight" to interpretations by federal courts and the Federal Trade Commission regarding the definitions of unfair and deceptive practices.[3]

Though not defined in FDUTPA, a motor vehicle dealer is defined in the state's motor vehicle license law as: "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."[4]

A major distinction between the federal act and state law is that federal law does not authorize a private cause of action, whereas FDUTPA does, limited to recovery of actual damages to the consumer plaintiff.[5] In applying to private causes of action, the Florida Supreme Court also upheld FDUTPA's application to a single unfair or deceptive act, "even if it involves only a single party, a single transaction, or a single contract."[6]

Provisions in the Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

The FDUTPA, in part II of ch. 501, F.S., prohibits unfair methods of competition, as well as deceptive acts or practices, in the conduct of trade or commerce.[7] The expressed purpose of the act is to:

- 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.[8]

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[1] David J. Federbush, *Damages Under FDUTPA*, 78 FLA. B.J. 20, 26 (May 2004).
[2] Douglas B. Brown, *Florida Legislature Broadens the Scope of the "Little FTC Act,"* 67 FLA. B.J. 50 (Oct. 1993).
[3] Section 501.204(2), F.S.
[4] Section 320.27(1)(c), F.S.
[5] Brown, *supra* note 2, at 52; *see* s. 501.211(2), F.S.
[6] *P.N.R., Inc. v. Beacon Property Management, Inc.*, 842 So. 2d 773, 777 (Fla. 2003).
[7] Section 501.204, F.S.

The statute authorizes enforcing agencies to bring actions under FDUTPA. An enforcing authority is either the Office of the State Attorney if the violation occurs in 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 a 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.[9] The enforcing authority may bring:

- An action to obtain declaratory judgment that an act or practice violates the FDUTPA;
- An action to enjoin any person who has violated, is violating, or is otherwise likely to violate the FDUTPA; and
- An action on behalf of one or more consumers or governmental entities for actual damages caused by an act or practice in violation of the FDUTPA.[10]

Under the FDUTPA, aggrieved individuals may bring an individual action to obtain a declaratory judgment that a practice or act violates the FDUTPA and to enjoin a person who has violated, is violating, or is likely to violate the act.

FDUTPA authorizes recovery of reasonable attorney fees and court costs from the nonprevailing party.[11] An individual may recover if he or she has suffered a loss. The enforcing authority may recover attorney fees and costs if the losing party commits bad faith or raises issues of law or fact that are not justiciable. However, damages, fees, and costs are not recoverable from a retailer, who in good faith disseminated the claims of a manufacturer or wholesaler without having actual knowledge that it violated the law.[12]

In 2001, the Legislature enacted legislation to address unfair or deceptive acts or practices perpetrated by motor vehicle dealers.[13] The following constitutes unfair or deceptive acts or practices by a motor vehicle dealer:

- Representing the previous usage or status of a vehicle is something that it was not, or making usage or status representations unless the dealer has correct supporting information regarding the history of the vehicle.
- Representing 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.
- Representing orally or in writing that a particular vehicle has not sustained structural or substantial external 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.
- Altering or changing the odometer mileage of a vehicle.

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[8] Section 501.202, F.S.
[9] Section 501.203(2), F.S.
[10] Sections 501.207, F.S. Damages are not recoverable under this section against a retailer who, in good faith, disseminates the claims of a manufacturer or wholesaler without actual knowledge that it violated FTUDPA.
[11] Section 501.2105, F.S.
[12] Section 501.211, F.S.
[13] Chapter 2001-196, L.O.F., codified as part VI, ch. 501, F.S.

- Failing to honor a provided express or implied warranty unless properly disclaimed.
- Misrepresenting warranty coverage, application period, or any warranty transfer cost or conditions to a customer.[14]

Other States

At the prompting of the Federal Trade Commission, all states have adopted laws prohibiting unfair and deceptive trade practices.[15] Florida is in the minority of jurisdictions in limiting damages to actual damages. In contrast to Florida, many other states authorize treble damages, or three times the actual damages awarded in a case. A handful of states authorize punitive damages, and some other states allow for exemplary, or special damages.[16]

Several states mandate some form of pre-suit notice under their respective Unfair and Deceptive Acts. For example, Mississippi requires a pre-suit dispute resolution process.[17]

III. Effect of Proposed Changes:

This bill introduces a presuit process for claims alleging unfair and deceptive trade practices against a motor vehicle dealer.

Demand Letter

Prior to initiating any civil litigation or arbitration against a motor vehicle dealer[18] a claimant must provide the dealer with written notice of the claimant's intent to initiate litigation at least 30 days prior to filing a lawsuit. The demand letter, which must be completed in good faith, must:

- State the name, address, and telephone number of the claimant.
- State the name and address of the dealer.
- Describe the underlying facts of the claim, including a statement describing each item for which actual damages are claimed.
- State the amount of damages claimed.
- To the extent available, be accompanied by all transactions or other documents upon which the claim is based.

A demand letter is satisfactory if it contains sufficient information to reasonably put the dealer on notice as to the nature of the claim and the relief sought.

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[14] For a complete list of practices or acts by a dealer that constitute unfair or deceptive acts or practices and are actionable under the FDUTPA, see s. 501.976, F.S.

[15] Michelle L. Evans, *Who Is A "Consumer" Entitled To Protection Of State Deceptive Trade Practice And Consumer Protection Acts*, 63 A.L.R. 5th 1 (2004).

[16] Richard A. Leiter, NATIONAL SURVEY OF STATE LAWS, 27, 28-38 (4th ed. 2003)

[17] Carolyn L. Carter, *Consumer Protection in the States: A 50 State Report on UDAP Statutes*; National Consumer Law Center (February 2009). *available at* http://www.nclc.org/images/pdf/udap/report_50_states.pdf . Those states requiring some form of pre-suit notice are Alabama, California, Georgia, Indiana, Maine, Massachusetts, Texas, West Virginia, and Wyoming

[18] In this section, the term "dealer" refers to a dealer, its employees, agents, principals, sureties, or insurers.

The demand letter must be delivered to the dealer by the United States Postal Service or other nationally recognized carrier, return receipt requested, at the address where the subject vehicle was purchased or leased, where the transaction occurred, or any address at which the dealer regularly conducts business.

The demand letter expires 30 days after receipt of the letter by the dealer, unless renewed by the claimant, and does not limit the damages the claimant may claim in subsequent civil litigation, including arbitration.

Civil Litigation and Arbitration

The claimant is precluded from initiating civil litigation or arbitration if, within 30 days after receipt of the demand letter, the dealer pays the claimant:

- The amount of actual damages claimed in the demand letter; and
- A surcharge of $500, if the claimant is represented by an attorney.

A dealer is not required to pay attorney fees in a civil action or arbitration brought under the FDUTPA if:

- Within 30 days after receipt of the demand letter, the dealer notifies the claimant, in writing, and a court or arbitrator agrees, that the amount sought in the demand letter is not reasonable in light of the facts or if the demand letter includes items and amounts not properly recoverable under the law; or
- The claimant fails to sufficiently comply with the notice requirements; however, a demand letter is satisfactory if it contains sufficient information to reasonably put the dealer on notice as to the nature of the claim and the relief sought so that the dealer may respond appropriately.

The bill provides that a dealer's payment of damages claimed in the demand letter, as well as any required surcharge, is not an admission of wrongdoing or liability by the dealer, is inadmissible as evidence,[19] and releases the dealer from liability. However, payment does not serve as a release from liability for items not included in the demand letter and not recoverable under FDUTPA.

If a claimant initiates litigation or arbitration prior to complying with the demand letter provisions, upon timely motion, the court or arbitrator must stay the action until the claimant complies. Attorney fees and costs incurred prior to such compliance are not recoverable.

[19] Section 90.408, F.S., provides that "[e]vidence or an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

Statute of Limitation

Any time limit[20] on initiating civil litigation under ch. 501, F.S., is tolled for 30 days after the date of delivery of the demand letter or for such other period agreed to, in writing, by the parties after the demand letter is received by the dealer.

Notice to Consumer

Under the provisions of the bill, the dealer must provide the consumer written notice of the requirements of the demand letter. If the dealer fails to provide notice to the consumer, any civil litigation or arbitration arising out of that transaction is not subject to the demand letter provisions provided in the bill. The notice must be in a font size no smaller than that of the predominant text on the page in which the claim is disclosed, or if it is disclosed by itself, in a font size of at least 12 points. The bill does not specify when the notice must be provided to the consumer.

Exemptions

The provisions of this bill do not apply to any action brought as a class action and ultimately certified as a class action. The bill also does not apply to any action brought by the enforcing authority.[21]

The bill takes effect July 1, 2013.

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:

Article 1, Section 21 of the Florida Constitution, provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Pre-suit notice requirements have been prescribed, by statute, for

[20] The specific time limitation associated with a specific cause of action can be found in s. 95.11, F.S.

[21] Section 501.203(2), F.S., defines enforcing authority as the office of the state attorney if the violation occurs in or affects the judicial circuit under the office's jurisdiction or the Department of Legal Affairs 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.

numerous causes of action.[22] Courts have upheld such pre-suit notice requirements[23] and have generally required that provisions be interpreted by the courts in a manner that favors access.[24]

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 2013 Judicial Impact Statement, CS/SB 292 will facilitate pre-suit disposition of matters that are otherwise actionable in court. The bill will assist in diverting those court resources that would otherwise be engaged to other cases pending in the system.[25]

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Committee Substitute 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[26] during the pre-certification phase of a class-action suit."[27,28] The consequence for removing the class representative by a tender or

[22] See ss. 400.0233, 429.293, 558.004, 627.736(10), 766.106, F.S.
[23] *Lindberg v. Hospital Corp. of America*, 545 So. 2d 1384 (Fla. 4th DCA 1989), *approved by* 571 So. 2d 446 (Fla. 1990).
[24] *Weinstock v. Groth*, 629 So. 2d 835, 838 (Fla. 1993).
[25] Office of State Courts Administrator, *2013 Judicial Impact Statement* (Jan. 18, 2013) (on file with the Senate Commerce and Tourism Committee and the Senate Judiciary Committee).
[26] The named class representative refers to the plaintiff filing on behalf of members of the class that are similarly situated.
[27] The four prerequisites for maintaining a class action are as follows: (1) the members of the class must be so numerous that 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; and (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).
[28] "The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court." *Johnson v. Plantation Gen. Hosp. Ltd. P'ship*, 641 So. 2d 58, 60 (Fla. 1994).

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.[29]

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 stage.[30] In Florida, the state of the current law remains unclear; however, the Third District Court of Appeal stated "a [defendant] cannot simply try to 'pick off' a named class representative."[31]

The bill does not specify when a dealer must provide the notice explaining that the demand letter is a prerequisite to filing a lawsuit.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

CS by Commerce and Tourism on February 19, 2013:
The committee substitute does the following:

- Adds arbitration as an action that may not be undertaken without first adhering to the notice provisions provided.
- Provides that the amount of damages claimed must be stated in the demand letter.
- Changes the address to which the demand letter must be sent to the "address where the subject vehicle was purchased or leased or where the subject transaction occurred, or any address at which the dealer regularly conducts business."
- Amends the condition under which the surcharge may be paid. It may only be paid if an attorney represents the claimant and the surcharge is now $500 rather than the lesser of 10 percent of the claim or $500.
- Provides that the demand letter expires 30 days after receipt by the dealer. The claimant may renew the demand letter without limiting the damages the claimant may later demand in any subsequent litigation.
- Removes the offer of payment of the claim as a basis to release the dealer from liability in connection to the claim.
- Provides that payment of a claim does not release a dealer from liability for damages not included in the demand letter and not recoverable under law.
- Allows for the tolling of time to file a lawsuit to be changed from the 30 days provided in the bill, if agreed upon by the parties, in writing, and signed after the dealer receives the demand letter.
- Provides that upon a timely motion by the dealer that a claimant has not complied with the demand letter requirements, the court or arbitrator will stay an action until

[29] *Taran v. Blue Cross Blue Shield of Fla., Inc.*, 685 So. 2d 1004, 1006 (Fla. 3d. DCA 1997) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)) ("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).
[30] *Weiss v. Regal Collections*, 385 F. 3d 337, 348 (3d. Cir. 2004) (holding that where a defendant makes an offer for 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).
[31] *Allstate Indemnity Co. v. De la Rosa*, 800 So. 2d 245, 246 (Fla. 3d DCA 2001), *review denied*, 823 So. 2d 122 (Fla. 2002).

the claimant complies. Attorney fees and costs incurred prior to compliance with this section are not recoverable.

- Provides the font size for the written notice to the consumer.

B. Amendments:

None.