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 Health Policy

BILL:	SB 1400
INTRODUCER:	Senator Lee
SUBJECT:	Contact Lens Pricing Practices
DATE:	March 17, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	**Pre-meeting**
2.			CM	
3.			AP	

I. Summary:

SB 1400 creates s. 501.161, F.S., which restricts manufacturers of prescription contact lenses, directly or through contact lens distributors, from preventing a retailer from selling or advertising a contact lens to a consumer below a specified price, limiting the ability of a retailer to determine prices for sale or advertisement of contact lenses, and discriminating in the distribution of contact lenses based on channel of trade or whether the retailer is, or is associated with, a prescriber of contact lenses. Any violation of the restrictions constitutes an unfair or deceptive trade practice within the meaning of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[1]

II. Present Situation:

Contact Lens Prescribing and Sales

Chapter 484, F.S., defines contact lenses as prescribed medical devices intended to be worn directly against the cornea of the eye to correct vision conditions, act as a therapeutic device, or provide a cosmetic effect. There are four types of contact lenses: daily-wear soft contact lenses, rigid gas permeable contact lenses, extended wear contact lenses, and disposable contact lenses.[2] Allopathic or osteopathic physicians and licensed optometrists are authorized to prescribe contact lenses for the correction, remedy, or relief of any insufficiencies or abnormal conditions of the human eye.[3] Licensed opticians may fill such prescriptions only to the extent authorized and under the supervision of the prescribing practitioner.[4] Contact lens prescriptions are good for

[1] Chapter 501, part II, F.S.
[2] U.S. Food and Drug Administration, *Types of Contact Lenses* (September 4, 2013) *available at* http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer/ConsumerProducts/ContactLenses/ucm062319.htm, (last visited Mar. 18, 2015).
[3] Sections 463.002(7) and 484.012, F.S.
[4] Rule 64B12-10.009, F.A.C.

2 years and the optometrist or physician who wrote the prescription or the optician who filled the prescription must make the prescription, or a copy of the prescription, available to the patient.[5] Contact lens prescriptions must include, among other things, a specific type or brand of contact lens.[6]

Currently, a contact lens consumer may purchase his or her contact lenses directly from the prescriber or may take the prescription to a third party, such as an optician or a discount contact lens retailer, to purchase the contact lenses.

Unilateral Pricing Policies for Contact Lenses

Recently, several major manufacturers of contact lenses have instituted unilateral pricing policies (UPP) for some of their contact lens products. A UPP, in general, is a restriction placed on a retailer by a manufacturer which requires the retailer to sell at or above the manufacturer's set minimum price for a product. If a retailer violates the UPP, often the manufacturer will refuse to sell to that retailer in the future.[7]

Generally, UPPs do not violate antitrust law (see analysis below). However, there have been no Florida cases which have challenged a UPP for contact lenses either under federal antitrust law or the FDUTPA. Due to the unique nature of contact lenses which require prescriptions and are often chosen by the prescriber rather than the consumer, versus other retail items with UPPs such as electronics and leather products, it is unclear what the result of such a challenge would be.

Antitrust Laws, the Sherman Act, and Cooperative Agreements

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. These antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case.[8]

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." The Sherman Act does not prohibit every restraint of trade, only those that are unreasonable.[9]

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[5] Sections 463.012 and 484.012, F.S.
[6] Rule 64B13-3.012, F.A.C.
[7] See 1800 Contacts, *What is Unilateral Pricing Policy* (posted on July 29, 2014) http://www.1800contacts.com/connect/featured-articles/what-is-unilateral-pricing-policy-upp, (last visited on Mar. 19, 2015). See also What is Unilateral Pricing Policy (UPP), Johnson and Johnson Vision Care, (on file with Senate Committee on Health Policy).
[8] Federal Trade Commission, *The Antitrust Laws*, available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, (last visited Mar. 18, 2015).
[9] Id.

The United States Supreme Court uses two tests to determine if an act is illegal under the Sherman Act, the per se test or the rule of reason test.[10]

Certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.[11]

All acts not challenged as per se illegal are analyzed by the courts under the rule of reason to determine their overall effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.[12]

Under Florida law, three elements must be proven to show an antitrust violation under the rule of reason:

- First, there must be a specifically defined market;
- Second, the defendants must have possessed the ability to affect price or output; and
- Third, the plaintiff's exclusion from the market did, or was intended, to affect the price or supply of goods on the market.[13]

Treatment of Minimum Price Agreements Under the Sherman Act

In 1911, the U.S. Supreme Court decided in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (Dr. Miles) that it is per se illegal for a manufacturer and a distributer to agree to set the minimum price which the distributer can charge for the manufacturer's goods.[14] In 1919, the Supreme Court began backing away from its decision in Dr. Miles by deciding in *U.S. v. Colgate & Co.* that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.[15] Afterwards, the court continued to distance from its original strict position on vertical restraints in Dr. Miles.[16] Most recently, in 2007, the Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (Leegin), in which it reversed its prior decision in Dr. Miles and determined that such agreements should be reviewed under the rule of reason test rather than be considered per se illegal.[17] In Leegin, the Supreme

[10] Federal Trade Commission and the U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, p. 3, (April 2000) *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf, (last visited on Mar. 18, 2015).
[11] Supra note 8
[12] Supra note 10, at 4
[13] Parts Depot v. Florida Auto Supply, 669 So. 2d 321, 326 (Fla. 4th DCA, 1996)
[14] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911)
[15] United States v. Colgate & Co., 250 U. S. 300 (1919)
[16] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), p. 21, *available at* http://www.supremecourt.gov/opinions/06pdf/06-480.pdf, last visited on Mar. 18, 2015.
[17] Id.

Court reasoned that "it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition or decrease output" and that minimum resale prices can have both procompetitive and anticompetitive effects.[18]

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.[19] 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.[20]

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.[21] 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.[22]

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.[23] 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.[24]

[18] Id. at 14
[19] Section 501.204, F.S.
[20] Section 501.202, F.S.
[21] Section 501.203(2), F.S.
[22] Section 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.
[23] Section 501.2105, F.S.
[24] Section 501.211, F.S.

In 2001, the Legislature enacted legislation to address unfair or deceptive acts or practices perpetrated by motor vehicle dealers.[25] 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.
- 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.[26]

III. Effect of Proposed Changes:

SB 1400 creates s. 501.161, F.S., which restricts manufacturers of prescription contact lenses from:

- Preventing a retailer, by any means, including through unilateral policy or agreement, from selling or advertising a contact lens to a consumer below a specified price;
- Limiting the ability of a retailer to determine prices at which contact lenses are offered or advertised to the consumer; and
- Restricting options available to consumers by discriminating in the distribution of contact lenses based on channel of trade or whether the retailer is, or is associated with, a prescriber of contact lenses.

The bill forbids manufacturers from using contact lens distributors to avoid compliance with the listed restrictions.

Any Violation of the restrictions constitutes an unfair or deceptive trade practice within the meaning of the FDUTPA which may make the violator subject to civil or administrative action.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[25] Chapter 2001-196, L.O.F., codified as part VI, ch. 501, F.S.

[26] 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.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact that SB 1400 may have on consumers of contact lenses is indeterminate. SB 1400 may allow certain retailers to sell contact lenses at prices lower than currently available due to UPPs set by contact lens manufacturers. However, the provisions of the bill may also generate additional expenses for contact lens manufacturers to sell in Florida since Florida's regulations will differ from much of the rest of the country. If SB 1400 generates such additional expenses, it is possible that those expenses will be passed on to the consumer.

C. Government Sector Impact:

The bill may have a negative fiscal impact on enforcing authorities, as defined in s. 501.203(2), F.S., who are required to enforce violations under part II of ch. 501, F.S.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 501.161 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.