

STORAGE NAME: h2171.uco
DATE: March 27, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
UTILITIES AND COMMUNICATIONS
ANALYSIS**

BILL #: HB 2171 (PCB UCO 00-03)

RELATING TO: Consumer Protection

SPONSOR(S): Committee on Utilities and Communications and Rep. Rojas

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) UTILITIES AND COMMUNICATIONS YEAS 10 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The provisions of the Florida Deceptive and Unfair Trade Practices Act (the Act) simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and deceptive, and unfair trade practices. The Act also protects the consuming public and legitimate businesses from those who engage in unfair and deceptive acts and practices in the conduct of any trade or commerce.

The bill requires a public awareness and education campaign to cover issues related to Internet users. This effort to increase public awareness would be coordinated by the Florida Department of Law Enforcement (FDLE), Computer Crime Center, in conjunction with other agency partnerships. The campaign must include the development of guidelines for the safe and secure use of the Internet, including the best ways to prevent users from becoming victims of Internet crime. The campaign must also include guidelines for parents to consider for protecting their children from on-line encounters with molesters, pedophiles, and other criminal elements. Further to be included in the campaign development is a mechanism to report Internet crimes through the FDLE's public Internet site.

For the purposes of the Act, the definition of the term "consumer" is expanded in the bill to include "business" and "commercial entity."

Further, for damages caused by violation of the Act, the bill authorizes an action on behalf of a governmental entity. Also for damages to a governmental entity, the bill provides for a waiver of civil penalties if restitution is made to that entity.

The bill repeals the section of the Act relating to stay of proceedings pending trial.

The bill deletes an exemption from the application section of the Act.

The bill provides an effective date of July 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Government involvement will be needed to development a crime reporting mechanism and receive reports. An indeterminate amount of governmental resources may be required in initiating actions for violations of Chapter 501, Part II, Florida Statutes, on behalf of governmental entities

B. PRESENT SITUATION:

According to the Florida Department of Law Enforcement, the Computer Crime Center, (Center), currently has a statewide mission to investigate complex computer crimes, assist with regional investigations, train investigators, disseminate information to the public and to proactively work to identify computer criminals to prevent future crimes.

The Center has several roles and responsibilities, most of which are categorized within three areas: Investigations, Training, and Prevention.

In the area of investigations, the Center responds to complaints of computer related crime originating from citizens, FDLE offices, or other law enforcement agencies in the state. The Center is designed to conduct investigations that are more complex in nature, or those that exceed the capability of FDLE's seven regional computer crime offices. Typical cases include network intrusion, denial of service attacks, and Internet related crimes.

In the area of training, the Center will be developing computer crime training material for public dissemination which will include online safety for children, protecting information assets for businesses, protection against computer fraud, and addressing parental concerns of the Internet.

In the area of prevention, the Center monitors and evaluates emerging technology for potential value to computer crime investigations. The Center initiates, monitors and comments on pending legislation pertaining to computer crime in the State of Florida

According to the Office of the Attorney General, (OAG), Florida has numerous laws on the books to protect individual and business consumers. Most of those laws, however, were created prior to the rapid proliferation of the Internet and eCommerce.

According to the Information Service Technology Development Task Force, (Task Force), businesses and individuals are afforded broad protection from unfair or deceptive acts or

practices under the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes. The statutory definitions in the Act include coverage of any non-exempt activity in "any trade or commerce," which includes Internet activities.

The Task Force wrote in its 2000 Legislative Report that, the Act by its nature states a broad proscription which applies through civil enforcement across industries and business conduct generally in any medium, including the Internet. The Act's prohibition against unlawful conduct reads:

501.204 Unlawful acts and practices.—

(1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

The term "consumer" is defined in s. 501.203, Florida Statutes. This section provides that:

As used in this chapter, unless the context otherwise requires, the term:

(7) "Consumer" means an individual; child, by and through its parent or legal guardian; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; or any other group or combination.

In 1979, the Legislature added a definition of "consumer" in s. 501.203(7), Florida Statutes, which included businesses. According to the OAG, this change was made because the then current definitions of "consumer transaction" and "consumer" had prevented businesses from utilizing "the act to protect themselves from deceptive trade practices and unfair methods of competition." Courts were interpreting the statute not to be applicable to businesses.

Additionally, the Legislature amended the definition of "consumer" to clarify the intent to include businesses. According to the legislative history, the definition of "consumer" was meant to track the definition of "person" contained in Chapter 1.01(3), Florida Statutes, and thus it departed from the regularly accepted definition of a "consumer". By doing so, the Legislature meant to have the remedies under the Act available to *all* persons, including legitimate businesses.

The Task Force stated in its report that despite the 1979 amendment, courts were still confused by the terms "consumer" and "consumer transaction" in the Act. Accordingly, in 1993, the Legislature again amended the Act to delete the reference to a "consumer transaction" and provided a new legislative statement of intent to protect "legitimate business enterprises" in section 501.202, Florida Statutes.

Notwithstanding these amendments, courts have been inconsistent in their interpretations of the statute and its protections of businesses, be they competitors or otherwise.

Moreover, the Task Force stated that like legitimate businesses, governmental entities should receive protection from those who use the Internet to deceive or defraud. Government at all levels is becoming more and more connected via the Internet. E-mail and eCommerce are becoming as prevalent in the public sector as they are in the private

sector. The OAG currently seeks protection for governmental units under the Act in antitrust-related matters. The Act does not, however, specifically mention governmental entities.

The OAG believes governmental entities need and desire a clarification and codification of the law both to confirm the current practice of the Attorney General to protect state and local governments and to allow such governmental entities to protect themselves from deception and unfairness in their business dealings for goods or services as they too move into the world of eCommerce.

Section 501.2091, Florida Statutes, provides that:

Stay of proceedings pending trial.—Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party's residence. All parties shall be bound by the final order of the circuit court.

Additionally the Task Force reported that the issue of venue has recently arisen under the Act based on an outdated venue provision, which existed in tandem with an administrative (Chapter 120) enforcement scheme which has been repealed. The administrative venue provision was erroneously left in the Act, and at least in one instance, has posed difficulties for the State Attorney's enforcement of the statute in circuit court. See Maddox v. State, 709 So.2d 611 (Fla.1st DCA 1998). The concern with the statutory language is that it may be misused by an out-of-state Internet provider to assert venue in any case, administrative or otherwise, is only proper in its home state.

According to the OAG, this would require the individual or business customer to travel to the provider's location to bring an action for recovery based on the provider's alleged wrong doing, even though the harm to the consumer occurred in Florida. This may have a chilling effect on Florida individual and business consumers trying to recover under state law.

Moreover, all individuals and entities are subject to the Act unless a specific exemption for them is provided. The exemption which may impact coverage of the Act to a growing number of Internet operators and merchants is contained in s. 501.212(4), Florida Statutes, and relates to those persons regulated by the Public Service Commission (PSC). It is the wording of the exemption which is problematic. The section reads:

501.212 Application.—This part does not apply to:

(4) Any person or activity regulated under laws administered by the Department of Insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance or banks or savings and loan associations regulated by federal agencies.

Also, the Task Force stated that the PSC exemption was part of the original 1973 version of the Act which antedated the era of telecommunications deregulation and the Internet, a time when the PSC regulated all of the activities of persons "certificated" by the PSC.

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Today, companies of all sizes and backgrounds are becoming PSC certificated and operating diversified businesses, involving the Internet and other telecommunications endeavors. While the PSC regulates some of these activities, the PSC does not regulate all of these activities.

Furthermore, the PSC staff has informed the OAG that the PSC takes the position that it does not regulate Internet activities, even if the activities are engaged in by persons holding PSC certificates. No Florida state appellate opinion has addressed the PSC exemption. The federal court in City of Gainesville v. Florida Power and Light Co., 488 F.Supp. 1258 (S.D.Fla. 1980) noted the exemption as currently written applied not only to any "activities" regulated by the PSC but also to any "person" so regulated. The court framed the issue as being whether the defendant (Florida Power and Light) was a "person" under the exemption, and if so whether all of its actions were therefore exempt. Without resolving the issue, the federal court in City of Gainesville abstained, opining the matter to be a question of state, rather than federal law.

Presumably, in line with the issue framed in City of Gainesville, according to the Task Force, the term "person" as written in s. 501.212(4), Florida Statutes, could apply to anyone certificated by the PSC no matter what activity, PSC regulated or not, the person engaging in. And as a "person" certificated by the PSC, a company doing business via the Internet may well assert an exemption from the current version of the Act as a PSC-regulated "person." Since the PSC does not regulate Internet activities of PSC-certificated persons, any such "person" could also escape any consumer protection-related scrutiny and enforcement by the PSC. The person would, therefore, not be subject to the Act or PSC regulation.

C. EFFECT OF PROPOSED CHANGES:

The bill requires the Computer Crime Center to coordinate the development of a public awareness campaign aimed at developing guidelines for the safe and secure use of the Internet, including the best ways to prevent users from becoming victims of Internet crimes. These guidelines should also include details for parents to protect their children from on-line encounters with molesters, pedophiles, and other criminal elements. The campaign must also develop a mechanism to report Internet crimes through FDLE's public Internet site.

The bill includes "business" and "commercial entities" in the definition of "consumer" under Chapter 501, Part II, Florida Statutes. The Deceptive and Unfair Trade Practices Act.

The bill clarifies that governmental entities are afforded the same consumer protection under Chapter 501, Part II, Florida Statutes, the Deceptive and Unfair Trade Practice Act, as businesses and individual consumers.

The bill conforms the term "promulgated" to "adopted" in accordance with the Administrative Procedures Act.

The bill repeals s. 501.2091, Florida Statutes, in order to provide aggrieved Florida consumers venue through Florida courts.

The bill amends the application of the Act to clarify that the exemptions are for any activity regulated under laws administered by the Department of Insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the

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Department of Banking and Finance or banks or savings and loan associations regulated by federal agencies in order to prevent circumvention of consumer protection laws.

The bill takes effect July 1, 2000.

D. SECTION-BY-SECTION ANALYSIS:

Please see "Effect of Proposed Changes" section

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

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B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON UTILITIES AND COMMUNICATIONS:

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