

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2522

SPONSOR: Senator Dyer

SUBJECT: Consumer Services

DATE: March 11, 2002

REVISED: 03/13/02 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill makes it a deceptive and unfair trade practice under part II of ch. 501, F.S., to begin billing a consumer for goods or services at the end of a free trial period unless the person offering the goods or services has contacted the consumer after the free trial period has ended and the consumer has provided positive permission to be billed for goods and services at that time.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA), part II of ch. 501, F.S., provides that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful (s. 501.204(1), F.S.). In construing which acts or practices are unlawful under FDUTPA, current law (s. 501.204(2), F.S.) requires that due consideration and great weight be given to the interpretations of the Federal Trade Commission and the federal courts under the Federal Trade Commission Act (15 U.S.C. s. 45(a)(1)).

Current law allows the Department of Legal Affairs (department) to adopt rules specifying acts or practices that violate FDUTPA, but requires these rules to be consistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting the Federal Trade Commission Act. After the Fourth District Court of Appeal ruled in 1994 that no specific rule or regulation is needed to find that conduct is an unfair or deceptive act or

practice under FDUTPA, in 1996 and 1997, the department repealed the rules it had adopted codifying specific acts and practices as violations and adopted rule 2-2.001, F.A.C., which states:

It is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II, Chapter 501, Florida Statutes. (See *Department of Legal Affairs v. Father & Son Moving & Storage*, 643 So. 2d 22 (Fla. 4th DCA 1994)). The repeal by the Department of Legal Affairs of [rules specifying violations] shall not modify or restrict the application of Part II, Chapter 501, Florida Statutes, to deceptive and unfair trade practices.

Despite the department's repeal of these rules, several provisions in current law specify that violation of a provision is a violation of FDUTPA, but do not provide a specific penalty, while other laws provide a specific penalty in addition to specifying that a prohibited act or practice is a violation of FDUTPA.

Violations of FDUTPA which occur in or affect a single judicial circuit are enforced by the state attorney for that circuit, while violations that occur in or affect multiple judicial circuits are enforced by the Department of Legal Affairs (s. 501.203(2), F.S.). The department may also enforce violations in a single judicial circuit if the state attorney defers to the department or fails to act upon a complaint within 90 days. To enforce FDUTPA, the department or state attorney, as applicable, may bring actions:

- To obtain a declaratory judgment that an act or practice violates FDUTPA;
- To enjoin any person who has violated, is violating, or is otherwise likely to violate FDUTPA; or
- On behalf of one or more consumers for the actual damages caused by an act or practice that violates FDUTPA.

Damages, however, are not recoverable 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 (s. 501.207, F.S.).

With the exception of violations that victimize senior citizens or handicapped persons,¹ a person who willfully uses a method, act, or practice declared unlawful under FDUTPA, or who willfully violates any rules adopted under FDUTPA, is liable for a civil penalty of not more than \$10,000 for each violation (s. 501.2075, F.S.). A willful violation occurs when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. If a civil penalty is assessed, the department or state attorney, as applicable, is entitled to reasonable attorney's fees and costs.

In addition to enforcement by the department or a state attorney, a consumer who has suffered a loss resulting from a violation of FDUTPA may bring an individual action to recover actual damages, plus certain attorney's fees and court costs. However, damages, fees, or costs are not recoverable against a retailer who has, in good faith, engaged in the dissemination of claims of a

¹ A person who victimizes or attempts to victimize a senior citizen or handicapped person under FDUTPA is liable for a civil penalty of not more than \$15,000 for each violation (s. 501.2077(2), F.S.).

manufacturer or wholesaler without actual knowledge that it violated FDUTPA (s. 501.211, F.S.).

Free Trial Offers

Although FDUPTA does not attempt to codify every possible deceptive and unfair trade practice, under current law it is not a deceptive and unfair trade practice to make a free trial offer of a good or service and to automatically bill a customer who does not cancel the purchase of goods or services within the free trial period. Free trial offers are authorized by law if they prominently disclose all material terms of the offers. (16 C.F.R. s. 251.1(c)). Material terms of trial offers may include:

- notice that by accepting a trial offer, a consumer is agreeing to be enrolled in a membership, subscription, or service contract or purchasing additional products and services if the offer is not cancelled by the consumer within the trial period;
- the time period in which the offer must be cancelled by the consumer to avoid charges;
- the cost of the goods or services if the offer is not cancelled in the trial period;
- how to cancel the offer;
- whether a consumer will be charged a non-refundable membership fee if the offer is cancelled after the trial period; and
- whether fees will be charged automatically to a credit card used to purchase other goods or services.

Federal Trade Commission, *Trial Offers: The Deal Is In the Details*, available at <http://www.ftc.gov/bcp/online/pubs/products/trialoffers.htm>.

Conversely, it is an unfair and deceptive trade practice to fail to provide consumers with the material terms of a free trial offer. *Spiegel, Inc., v. Federal Trade Commission*, 494 F. 2d 59 (7th Cir. 1974).

Unsolicited Goods

Section 570.545, F.S., states:

When unsolicited goods are delivered to a person, the person may refuse delivery of the goods, or, if the goods are delivered, the person is not obligated to return the goods to the sender. If unsolicited goods are either addressed to or intended for the recipient, they shall be deemed a gift and the recipient may use or dispose of them in any manner without obligation to the sender.

III. Effect of Proposed Changes:

The bill makes it a deceptive and unfair trade practice under part II of ch. 501, F.S., to begin billing a consumer for goods or services at the end of a free trial period unless the person offering the goods or services has contacted the consumer after the free trial period has ended and the consumer has provided positive permission to be billed for goods and services at that time. The term “positive permission” is not defined in the bill. The term “positive permission” as

defined within the context of several judicial decisions means an affirmative act of giving permission, rather than implied permission resulting from a lack of action. See, e.g., *Robbins v. MacKenzie*, 364 F. 2d 45, 52 (1st Cir. 1966), *United Furniture Workers of America v. Gates*, 75 F. Supp. 620, 623 (N.D. Ind. 1948), *Schillinger v. Schillinger House*, 101 F. Supp. 707, 709 (D. Mass. 1951). Goods provided after a free trial period has ended without the consumer's affirmative consent to continue delivery may be deemed to be unsolicited goods in accordance with s. 570.545, F.S., authorizing a consumer to dispose of unsolicited goods without obligation to the sender.

The bill takes effect on July 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses who market their goods and services by making free trial offers requiring a consumer to affirmatively act to cancel a free trial offer during the free trial period to avoid a bill will be committing an unfair and deceptive trade practice. These businesses will have to change their marketing practices to be in compliance with the bill.

Businesses that market their goods and services in violation of the bill may be subject to legal actions for damages, costs, and attorneys fees. To comply with the bill, these businesses may have to act quickly to change their marketing practices because the effective date of the bill is July 1, 2002. As a result, the Legislature may wish to consider delaying the effective date for a few additional months.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of the Attorney General recommends that the language in this bill be assigned a statutory reference that is not in part II of ch. 501, F.S., to avoid arguments that violations of the Florida Deceptive and Unfair Trade Practices Act are limited to those expressly found in part II of ch. 501 F.S.

VIII. Amendments:

#1 by Commerce & Economic Opportunities:

Requires a person who markets goods and services by using free trial offers to obtain a consumer's written permission at the end of the free trial period to bill the consumer for continued delivery or access to the good or service provided in the free trial offer. (WITH TITLE AMENDMENT)

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
