

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Mathues <i>MM</i>	Masterton <i>MM</i>	1. PR _____	_____
2. _____	_____	2. JU _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT:

Deceptive and Unfair Trade Practices

BILL NO. AND SPONSOR:

SB 2142 by Senator Forman

I. SUMMARY:

A. Present Situation:

Part II of chapter 501, F.S., is the Florida Deceptive and Unfair Trade Practices Act. The Florida law (or little FTC act) is modeled after the Federal Trade Commission Act and is to be construed to be consistent with federal interpretations of unfair or deceptive acts. The part provides definitions, including a definition for "consumer transaction," which means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible to an individual primarily for personal, family, or household use, or that relate to a business opportunity requiring the consumer's expenditure of money, or property and certain continuing personal services, or certain supplier's solicitations.

Section 501.205, F.S., requires the Department of Legal Affairs (DOLA) to propose to the Governor and Cabinet rules which prohibit specified acts or practices constituting violations of the act and to adopt procedural rules for the act's administration. The law requires the rules to be adopted upon a majority vote of the Governor and Cabinet. The law also requires all rules and administrative action taken by the department to be pursuant to chapter 120, F.S., the Administrative Procedure Act. The law requires the department to mail, at least 30 days prior to consideration at a Cabinet meeting, a copy of proposed rules to anyone filing a written request to receive them. All rules adopted under part II of chapter 501, F.S., must be consistent with federal interpretations of the federal Deceptive and Unfair Trade Practices Act.

Section 501.206, F.S., relates to the investigative powers of the enforcing authority. The section does not currently contain a specific public records exemption. Section 501.2065, F.S., states that the department may, in the course of an investigation of a violation of the Florida Deceptive and Unfair Trade Practices Act, obtain and use criminal intelligence, criminal investigative, or other information which is provided to the department by other agencies on a confidential or restricted basis. The section also provides that any criminal intelligence or investigative information exempt from public inspection and examination pursuant to s. 119.07, F.S., which is provided to the department by other agencies on a confidential or restricted basis, retains its exempt status.

Section 501.207, F.S., provides remedies for the enforcing authority. No action may be brought by an enforcing authority for a violation of the part more than two years after the violation occurred or more than one year after the last payment in a consumer transaction, whichever is later. Section

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501.2105, F.S., relates to attorney's fees. Section 501.212, F.S., provides that the part does not apply in five specified instances, including an act or practice required or specifically permitted by federal or state law.

The Department of Legal Affairs and the state attorneys of the judicial circuits share the responsibility for enforcing violations of part II of chapter 501, F.S. The Department of Consumer Services within the Department of Agriculture and Consumer Services (DACs) administers laws related to consumer protection, under the provisions of s. 570.544, F.S. The division is directed to investigate violations of state consumer protection laws. If a violation of certain provisions of chapter 501, F.S., has occurred, the division has the authority to bring legal action with the coordination of the Department of Legal Affairs and any state attorney.

Chapter 120, F.S., governs the rulemaking process for agency rules. The act prescribes uniform procedures for state agencies to follow in adopting rules. An agency is required to give notice of each rule proposed for adoption. The full text of all proposed rules is published in the Florida Administrative Weekly (F.A.W.). By law, the proposed rule must be available for public inspection and copying at the time of publication of notice. Generally, the notice must be published in the F.A.W. not less than 28 days before the adoption date of the rule. Section 120.54, F.S., requires a notice of proposed rulemaking to be sent to any person who made a previous request of the agency for notices and to all persons named in the proposed rule. The notice to affected persons must be given by mail scheduled to arrive at least 21 days prior to the intended action. The section also provides for emergency rules, as well as reporting changes to proposed rules.

Chapter 559, F.S., generally relates to the regulation of trade, commerce, and investments. Chapter 812, F.S., relates to theft, robbery, and related crimes. Chapter 817, F.S., relates to fraudulent practices and chapter 849, F.S., relates to gambling.

Black's Law Dictionary defines the term "per se" as by or in itself; taken alone; unconnected to other matters; or in isolation.

Chapter 95, F.S., addresses limitations on actions and adverse possession.

B. Effect of Proposed Changes:

The bill includes real or personal property in the definition of a consumer transaction. The bill creates s. 501.2042, F.S., and deems a violation of any other state law which is an unfair or deceptive act in trade or commerce a per se violation of part II of chapter 501, F.S. The bill provides that a per se violation cannot be based on an inapplicable provision, as delineated in s. 501.212, F.S. A per se violation may, however, be based upon a violation of chapters 501, 559, 812, 817, or 849, F.S. The bill provides for the availability of civil remedies in addition to those set forth in part II of chapter 501, F.S., for per se violations.

The bill amends s. 501.205, F.S., requiring the DOLA to adopt rules prohibiting acts or practices in violation of the part. The bill deletes the provision requiring the DOLA to mail a copy of proposed rules to anyone filing a written request to receive them within 30 days prior to their consideration at a Cabinet meeting. The bill also deletes language requiring rules to be adopted by the DOLA upon a majority vote of the Governor and Cabinet.

The bill amends s. 501.206, F.S., relating to the investigative authority of the enforcing authority, to provide an exemption from the public access provisions of the public records law for information collected under the section until an administrative or civil proceeding is filed, unless disclosure is needed for enforcement and consumer protection purposes. The bill subjects the exemption to future legislative review.

The bill amends s. 501.2065, F.S., relating to an existing public records exemption, to provide that intelligence or investigative information, whether civil or criminal, received by the department remains confidential or restricted while held by the department.

The bill provides that no action may be brought by an enforcing authority for a violation of the part more than 4 years after the violation occurred or more than 2 years after the last payment in a consumer transaction, whichever is later. This extends the limitations period for enforcement actions brought under the act.

The bill amends s. 501.2105, F.S., relating to attorney's fees, to provide that in certain civil actions a prevailing plaintiff, following judgment in a trial court and exhaustion of all appeals, receives reasonable attorney's fees and costs from the nonprevailing defendant. The prevailing plaintiff's attorney must attest to the time and costs involved in the case. The bill identifies the plaintiff as the party to whom the judge awards reasonable costs plus fees. The bill authorizes the court to award reasonable attorney's fees and costs to the enforcing authority upon a finding by the court that the enforcing authority's action were substantially justified in fact or law. This applies in civil litigation initiated by the enforcing authority. The bill deletes reference to a finding by the court related to a complete absence of a justiciable issue of law or fact raised by the losing party or a finding of bad faith on the losing party's part.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The public may benefit by the extended limitations period.

B. Government:

There may be some reduced costs associated with the changes related to the rulemaking process.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None identified.

IV. COMMENTS:

A similar bill, HB 1661, has been referred to the House Committee on Governmental Operations. SB 88, relating to open records, by the Committee on Professional Regulation passed the Legislature and was signed by the officers and presented to the Governor on February 3, 1992. It addresses confidentiality provisions contained in SB 2142.

The bill amends s. 501.206, F.S., relating to the investigative powers of the enforcing authority, to create an exemption from the public records law for certain investigative information. Section 119.14, F.S., the Open Government Sunset Review Act, defines an exemption as a provision in the statutes which creates an exemption to ss. 119.01, 119.07(1), or 286.011, F.S., and which applies to the executive branch of state government or to local governments. Prior to reenacting or creating any exemption to the public records

law, the Legislature must consider whether the exemption serves an identifiable public purpose. A public purpose is deemed to exist if the confidentiality of the information is necessary for the effective and efficient administration of a government program, protects information of a sensitive, personal nature concerning individuals, or protects information of a confidential nature concerning entities. If an exemption protects information of a sensitive, personal nature concerning individuals, the act provides that only such information which identifies individuals may be exempt from public access. An exemption may be no broader than is necessary to meet a public purpose for which it was created. The Legislature must find that the purpose for enacting an exemption is sufficiently compelling to override the state's strong public policy of open government, and that such purpose may not be accomplished absent the exemption. An exemption from the law's public access provisions does not imply a corresponding exemption from the public meetings law in s. 286.011, F.S. Confidentiality of civil investigative demand information is addressed in chapter 542, F.S., relating to antitrust. SB 698, by the Judiciary Committee, address the confidentiality of such information and is now in House messages.

A technical amendment is needed on page 3, line 17, to clarify "must consist."

According to Department of Legal Affairs staff, rulemaking under part II of chapter 501, F.S., is the only instance in which the department must go to the Governor and Cabinet. Rules under chapter 501, F.S., according to department staff, were last adopted in 1980.

V. AMENDMENTS:

None.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1. Mathues <i>[Signature]</i>	Masterton <i>[Signature]</i>	1. PR	_____
2. _____	_____	2. JU	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT:

Deceptive and Unfair Trade Practices

BILL NO. AND SPONSOR:

PCS/SB 2142 by Professional Regulation Committee and Senator Forman

I. SUMMARY:

A. Present Situation:

Part II of chapter 501, F.S., is the Florida Deceptive and Unfair Trade Practices Act. The Florida law (or little FTC act) is modeled after the Federal Trade Commission Act and is to be construed to be consistent with federal interpretations of unfair or deceptive acts. The part provides definitions, including a definition for "consumer transaction," which means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible to an individual primarily for personal, family, or household use, or that relate to a business opportunity requiring the consumer's expenditure of money, or property and certain continuing personal services, or certain supplier's solicitations.

Section 501.205, F.S., requires the Department of Legal Affairs (DOLA) to propose to the Governor and Cabinet rules which prohibit specified acts or practices constituting violations of the act and to adopt procedural rules for the act's administration. The law requires the rules to be adopted upon a majority vote of the Governor and Cabinet. The law also requires all rules and administrative action taken by the department to be pursuant to chapter 120, F.S., the Administrative Procedure Act. The law requires the department to mail, at least 30 days prior to consideration at a Cabinet meeting, a copy of proposed rules to anyone filing a written request to receive them. All rules adopted under part II of chapter 501, F.S., must be consistent with interpretations of the federal Deceptive and Unfair Trade Practices Act.

Section 501.207, F.S., provides remedies for the enforcing authority. No action may be brought by an enforcing authority for a violation of the part more than two years after the violation occurred or more than one year after the last payment in a consumer transaction, whichever is later.

Section 501.2075, F.S., provides for civil penalties. Section 501.2101, F.S., relates to enforcing authorities, moneys, and the Consumer Frauds Trust Fund. Section 501.212, F.S., provides that the part does not apply in five specified instances, including an act or practice required or specifically permitted by federal or state law.

The Department of Legal Affairs and the state attorneys of the judicial circuits share the responsibility for enforcing violations of part II of chapter 501, F.S. The Department of Consumer Services within the Department of Agriculture and Consumer Services (DACS) administers laws related to consumer protection, under the provisions of s. 570.544, F.S. The division is directed to investigate violations of state

consumer protection laws. If a violation of certain provisions of chapter 501, F.S., has occurred, the division has the authority to bring legal action with the coordination of the Department of Legal Affairs and any state attorney.

Chapter 120, F.S., governs the rulemaking process for agency rules. The act prescribes uniform procedures for state agencies to follow in adopting rules. An agency is required to give notice of each rule proposed for adoption. The full text of all proposed rules is published in the Florida Administrative Weekly (F.A.W.). By law, the proposed rule must be available for public inspection and copying at the time of publication of notice. Generally, the notice must be published in the F.A.W. not less than 28 days before the adoption date of the rule. Section 120.54, F.S., requires a notice of proposed rulemaking to be sent to any person who made a previous request of the agency for notices and to all persons named in the proposed rule. The notice to affected persons must be given by mail scheduled to arrive at least 21 days prior to the intended action. The section also provides for emergency rules, as well as reporting changes to proposed rules.

Chapter 95, F.S., addresses limitations on actions and adverse possession.

B. Effect of Proposed Changes:

The bill amends s. 501.205, F.S., requiring the DOLA to propose rules prohibiting acts or practices in violation of the part. The bill deletes the provision requiring the DOLA to mail a copy of proposed rules to anyone filing a written request to receive them within 30 days prior to their consideration at a Cabinet meeting. The bill also deletes language requiring rules to be adopted by the DOLA upon a majority vote of the Governor and Cabinet.

The bill provides that no action may be brought by an enforcing authority for a violation of the part more than 4 years after the violation occurred or more than 2 years after the last payment in a consumer transaction, whichever is later. This extends the limitations period for enforcement actions brought under the act. The bill increases the civil penalties under the provisions of the part from \$5,000 to \$10,000 per violation.

The bill amends s. 501.2101, F.S., to clarify that the department may recover costs and attorney's fees for litigation or investigation proceedings conducted under the part. The reference to reimbursement is deleted to enable the department to recover attorney's fees pursuant to a settlement agreement.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The public may benefit by the extended limitations period. Those who violate the provisions of part II of chapter 501, F.S., will be subject to the increased penalties.

B. Government:

There may be some reduced costs associated with the changes related to the rulemaking process.

To the extent the DOLA's ability to recover costs and attorney's fees is expanded, it will benefit.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None identified.

IV. COMMENTS:

A similar bill, HB 1661, has been referred to the House Committee on Governmental Operations.

According to Department of Legal Affairs staff, rulemaking under part II of chapter 501, F.S., is the only instance in which the department must go to the Governor and Cabinet. Rules under chapter 501, F.S., according to department staff, were last adopted in 1980. It is not clear, under the provisions of the bill, whether the rules that must be proposed are required to ultimately be adopted.

V. AMENDMENTS:

None.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Mathues <i>JM</i>	Masterton <i>SSM</i>	1. PR	Fav/CS
2. _____	_____	2. JU	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

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The bill amends s. 501.2101, F.S., relating to enforcing authorities, money received, and the Consumer Frauds Trust Fund, to clarify that the department may recover costs and attorney's fees for litigation or investigation proceedings conducted under the part. The reference to reimbursement is deleted to enable the department to recover attorney's fees pursuant to a settlement agreement.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The public may benefit by the extended limitations period. Those who violate the provisions of part II of chapter 501, F.S., will be subject to the increased penalties.

B. Government:

There may be some reduced costs associated with the changes related to the rulemaking process.

To the extent the DOLA's ability to recover costs and attorney's fees is expanded, it will benefit.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None identified.

IV. COMMENTS:

A similar bill, CS/HB 1661, was passed by the House Committee on Governmental Operations. SB 88 passed the Legislature, was approved by the Governor (chapter 92-1, L.O.F.), and contains a provision that deletes the requirement that the DOLA mail copies of proposed rules upon request.

According to Department of Legal Affairs staff, rulemaking under part II of chapter 501, F.S., is the only instance in which the department must go to the Governor and Cabinet. Rules under chapter 501, F.S., according to department staff, were last adopted in 1980.

V. AMENDMENTS:

None.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 2142

The committee substitute deletes the proposed change to add real property to the definition of a consumer transaction. The committee substitute deletes the proposed changes to create and modify public records exemptions and to create per se violations. The committee substitute also deletes changes to provisions related to federal interpretation and state rules and to attorney's fees. The committee substitute increases the threshold for civil penalties from \$5,000 to \$10,000 and clarifies that the Department of Legal Affairs may recover costs and attorney's fees for litigation or investigation proceedings conducted under part II of chapter 501, F.S. The committee substitute provides that moneys received by an enforcing authority for attorney's fees and costs of investigation or litigation related to either ss. 501.207, 501.208, or 501.211, F.S., must be deposited into the Consumer Frauds Trust Fund (CFTF). Finally, the committee substitute provides that moneys received by the enforcing authority and that are not for attorney's fees and costs of investigation or litigation must be deposited into the General Revenue Fund, unallocated.

Committee on Professional Regulation

Swan S. Martin
Staff Director

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)

BILL VOTE SHEET

(VS-90: File with Secretary of Senate)

BILL NO. SB 2142

COMMITTEE ON: Professional Regulation

DATE: February 17, 1992

ACTION:

TIME: 02:00 PM -- 05:00 PM

Favorably with _____ amendments

PLACE: Room A, Senate Office Building

Favorably with Committee Substitute

Unfavorably

OTHER COMMITTEE REFERENCES:
(in order shown)

Submitted as a Committee Bill

JU

Temporarily Passed

Reconsidered

Not Considered

THE VOTE WAS:

NO QUORUM

02/17/92 02/17/92 02/17/92

FINAL BILL VOTE		SENATORS	Motion to hear Prop. CS_by Sen. Souto		#1 by Sen. Yancey		Motion to report as CS					
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
X		Davis										
		Dudley										
X		Grizzle										
X		Jennings										
		Kirkpatrick										
X		Souto										
		Weinstein VICE-CHAIRMAN										
		Weinstock CHAIRMAN										
X		Yancey										
5	0	TOTAL	FWO	-	FWO	-	FWO	-				
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay

Please Complete: The key sponsor appeared ()
 A Senator appeared ()
 Sponsor's aide appeared (X)
 Other appearance ()