

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill amends the Florida Deceptive and Unfair Trade Practices Act to provide for new civil causes of action.

Promote personal responsibility – The bill creates new criminal offenses. The bill provides for civil penalties for certain acts.

B. EFFECT OF PROPOSED CHANGES:

Criminal Use of Personal Identification Information – Identity Theft: Section 817.568, F.S., provides that any person who willfully and without authorization fraudulently uses or possesses with intent to fraudulently use, personal identification information¹ concerning an individual without first obtaining that individual's consent commits a third degree felony. This offense is commonly known as "identity theft". The section also provides for enhanced penalties as follows:

- If the value of the pecuniary benefit, services received or injury is \$5,000 or more or if the person fraudulently uses the personal identification information of ten or more individuals without their consent, the offense is a second degree felony and the judge must impose a three year minimum mandatory term of imprisonment.
- If the value of the pecuniary benefit, services received or injury is \$50,000 or more or if the person uses the personal identification information of 20 or more individuals, the offense is a first degree felony and the judge must impose a five year minimum mandatory sentence.
- If the value of the pecuniary benefit, services received or injury is \$100,000 or more or if the person uses the personal identification information of 30 or more individuals, the offense is a first degree felony and the judge must impose of a ten year minimum mandatory sentence.

This section also provides penalties for the offense of harassment² by use of personal identification information as well as using a public record to commit identity theft.³ Further, the section provides penalties if identity theft is committed using the personal identification information of a individual less than 18 years of age.⁴

HB 481 amends the definition of the term "personal identification information" to include: a postal or e-mail address; telephone number; mother's maiden name; debit card number; personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card; medical records; or other number or information that can be used to access a person's financial resources.

¹ This section defines "personal identification information" to mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any: 1) Name, social security number, date of birth, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, or Medicaid or food stamp account number, or bank account or credit card number; 2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; 3) Unique electronic identification number, address, or routing code; or 4) Telecommunication identifying information or access device.

² The term "harass" means to engage in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose. s. 817.568(1)(c), F.S.

³ 817.568(4) and (5), F.S.

⁴ s. 817.568(6) and (7), F.S.

The bill also provides that any person who willfully and fraudulently uses or possesses with intent to fraudulently use personal identification information concerning a *deceased individual* commits a third degree felony. The bill also provides for enhanced penalties as follows:

- If the value of the pecuniary benefit, services received or injury is \$5,000 or more or if the person fraudulently uses the personal identification information of 10 or more but fewer than 20 deceased individuals, the offense is a second degree felony and the judge must impose a three year minimum mandatory term of imprisonment.
- If the value of the pecuniary benefit, services received or injury is \$50,000 or more or if the person uses the personal identification information of 20 or more but fewer than 30 deceased individuals, the offense is a first degree felony and the judge must impose a five year minimum mandatory sentence.
- If the value of the pecuniary benefit, services received or injury is \$100,000 or more or if the person uses the personal identification information of 30 or more deceased individuals, the offense is a first degree felony and the judge must impose of a ten year minimum mandatory sentence.

The bill provides that any person who willfully and fraudulently creates or uses or possesses with intent to use, counterfeit or fictitious personal identification information either concerning a fictitious individual or concerning a real individual without first obtaining that real individual's consent, intending to use such counterfeit or fictitious personal identification information for the purpose of committing or facilitating the commission of a fraud against another person commits a third degree felony.⁵

The bill further provides that any person who commits an offense prohibited by section 817.568, F.S. and for the purpose of obtaining or using personal identification information misrepresents himself or herself to be a law enforcement officer, an employee or representative of a bank, credit card company, credit counseling company or a credit reporting agency, or any person who wrongfully represents that he or she is seeking to assist the victim with a problem with the victim's credit history shall have the offense reclassified as follows:

- In the case of a misdemeanor, the offense is reclassified as a third degree felony
- In the case of a third degree felony, the offense is reclassified as a second degree felony
- In the case of a second degree felony, the offense is reclassified as a first degree felony
- In the case of a first degree felony, the offense is reclassified as a life felony.

The bill also authorizes a prosecutor to move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of the section and who provides substantial assistance in the identification, arrest, or conviction of any of that person's accomplices, accessories, coconspirators, or principals or of any other person engaged in fraudulent possession or use of personal identification information. The bill requires that the arresting agency be given an opportunity to be heard in aggravation or mitigation in reference to this motion and allows the motion to be filed and heard in camera upon good cause shown.

The bill provides that a person who violates the identity theft statute commits a deceptive and unfair trade practice in violation of part II of chapter 501 and is subject to the penalties and remedies provided for the violation as described further below.

Deceptive and Unfair Trade Practices Act: Part II of Chapter 501, F.S., is known as the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).⁶ Section 501.204, F.S., provides that "unfair

⁵ The bill also defines the term "counterfeit or fictitious personal identification information" to mean "any counterfeit, fictitious, or fabricated information in the similitude of the data outlined [in the definition of personal identification information] which, though not truthful or accurate, would in the context lead a reasonably prudent person to credit its truthfulness and accuracy."

⁶ See s. 501.201, F.S

methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce⁷ are hereby declared unlawful.” The section also provides that in constructing this act, “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1).”⁸

Willful violations occur when the person knew or should have known that his or her conduct was unfair or deceptive.⁹ A person willfully violating the provisions of the FDUTPA is liable for a civil penalty of not more than \$10,000 per violation. This penalty is increased to \$15,000 for each violation if the willful violation victimizes or attempts to victimize senior citizens or handicapped persons. Individuals aggrieved by a violation of this act may seek to obtain a declaratory judgment that an act or practice violates this act and to enjoin a person from continuing the deceptive or unfair act. An individual harmed by a person who has violated this act may also seek actual damages from that person, plus attorney’s fees and court costs.¹⁰ The state attorneys and the Department of Legal Affairs are the enforcing authorities for the FDUTPA. Section 501.207, F.S., specifies the actions that the enforcing authority may bring.

The First District Court of Appeal has described the FDUTPA as follows:

[The act] ‘is designed to protect not only the rights of litigants, but also the rights of the consuming public at large.’ When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

State Office of Atty. Gen. v. Wyndham Intern, Inc., 869 So.2d 592 (Fla.1st DCA 2004)(citations omitted). “An unfair practice under the federal statute has been defined as one that ‘offends established public policy’ and one that is ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’” Samuels v. King Motor Co. of Fort Lauderdale, 782 So.2d 489, 499 (Fla. 4th DCA 2001)(citations omitted); Davis v. Powertel, Inc., 776 So.2d 971, 974 (Fla. 1st DCA 2000)(“According to the federal decisions, a deceptive practice is one that is ‘likely to mislead’ consumers.); Cummings v. Warren Henry Motors, Inc., 648 So.2d 1230 (Fla. 4th DCA 1995)(holding that plaintiff who alleges that a dealership intentionally concealed he was entering a lease agreement rather than a sales agreement and that as a consequence he was deprived of his trade-in vehicle states a cause of action under FDUTPA); Latman v. Costa Cruise Lines, N.V., 758 So.2d 699, 703 (Fla. 3rd DCA 2000)(holding that deceptive practice under the FDUTPA occurred where a cruise line billed a passenger for port charges but kept part of the money for itself).

HB 481 creates a new section of statute within the Florida Deceptive and Unfair Trade Practices Act. The bill provides that the following are deceptive and unfair trade practices:

⁷ Section 501.203(8) provides the following definition: “‘Trade or commerce’ means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. ‘Trade or commerce’ shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.”

⁸ The term “violation of this part” is defined to mean any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2001:

- (a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;
- (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts;
- (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

⁹ See s. 501.2075, F.S.

¹⁰ See s. 501.211(1) and (2), F.S.

- a person, business entity, or health care business that intentionally uses deceptive practices or means to obtain personal identification information and that uses it or provides it to another to use it to engage in commercial solicitation
- a person, business entity or health care business that discloses, sells, or otherwise transfers to a third party, including a branch, affiliate, subcontractor, or unaffiliated third party located in a foreign country personal identification information concerning an individual without first obtaining the express consent of the individual
- a health care business that terminates an existing relationship with a consumer of health care services to avoid obtaining express consent from the consumer before disclosing, selling or otherwise transferring personal identification information to a party located in a foreign country
- a business or health care business that discriminates against or denies an otherwise qualified individual a product, service or health care service because the individual has previously refused to give express consent to the disclosure, sale or transfer of personal identification information to a party located in a foreign country

The bill defines the term “personal identification information” in the same manner as described in the identity theft statute above. The bill also defines the terms “business entity”¹¹, “health care business”¹² and “individual”.¹³ A person, business entity or health care business that violates any provision of this subsection commits a deceptive and unfair trade practice in violation of part II of chapter 501 and is subject to the penalties described above – generally a \$10,000 civil penalty for each violation. The bill specifically provides that an individual whose property or person is injured by a violation of the newly described deceptive and unfair practices may:

- institute a civil action to enjoin and restrain future acts that constitute a violation of these provisions and to recover for financial loss. Financial loss includes actual losses, lost wages, attorney’s fees, and other costs incurred by the individual in correcting his or her credit history or credit rating or incurred in connection with any criminal, civil or administrative proceeding brought against the individual resulting from the misappropriation of the individual’s person identification information.
- bring a civil action for damages in an amount of up to \$5,000 for each incident, or three times the amount of actual damages, whichever is greater. Also, the court may award reasonable attorney’s fees to the prevailing party.

Venue for the civil action will be the county in which the plaintiff resides or in which any part of the violation took place. The civil action must be brought within 5 years of the violation and may be filed regardless of whether a criminal prosecution is ever instituted for the acts.

C. SECTION DIRECTORY:

Section 1. Creates s. 501.165, F.S. relating to fraudulent use of personal identification information.

Section 2. Amends s. 817.568, F.S. relating to criminal use of personal identification information.

¹¹ The term “business entity” is defined as “a for-profit or not-for-profit corporation, partnership, limited partnership, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state, or a contractor or subcontractor of such business entity.”

¹² The term “health care business” is defined as “ a business entity, unit of local government, or political subdivision of the state that collects or retains personally identifiable information about individuals relating to health care, including, but not limited to, hospitals or other facilities that provide diagnostic, medical, surgical, or dental treatment or care or chronic or rehabilitative care, health maintenance organizations, medical partnerships, pharmacies, emergency medical transportation companies, medical transcription companies, banks and other business entities that collect or process medical billing information, and subcontractors of a health care business.”

¹³ The term “individual” is defined as “a single human being and does not mean a firm, association of individuals, corporation, partnership, joint venture, sole proprietorship, or any other entity.”

Section 3. Amends s. 921.0022, F.S.; making corresponding changes to offense severity ranking chart of Criminal Punishment Code.

Section 4. Provides effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill specifies violations relating to the Florida Deceptive and Unfair Trade Practices Act which may be enforced by the Attorney General. The cost of enforcement is indeterminate because the number of cases that may arise is not known. On February 22, 2005, the Criminal Justice Impact Conference decided that the portions of the bill relating to criminal penalties would have an indeterminate but expected minimal impact on the prison population of the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent that this prohibits businesses entities or health care businesses from providing services that they currently provide, it could have a negative fiscal impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill amends the identity theft statute to provide that any person who willfully and without authorization discloses, sells or transfers personal identification information concerning an individual without first obtaining that individual's consent commits a third degree. This provision does not require proof of any fraudulent intent in the disclosure of the information. Further, the definition of the term "personal identification information" includes any name or number that can be used to identify a specific individual such as a name, address or phone number. It appears that this would prohibit a broad range of common activities. For example, this would make it a third degree felony for a person to give out the name, address or phone number of a friend without that friend's permission - even if the person did not have any fraudulent intent. It would also restrict common business activities. Additionally, many public records maintained by a state, municipal or county agency contain personal identification information as defined in the bill. An analysis of this bill by the Department of Corrections provided to staff, notes that it keeps records containing inmates names and DOC numbers as well as inmate visitation records containing names and identifying numbers.

The bill also amends the Florida Deceptive and Unfair Trade Practices Act to prohibit a person, business entity, or health care business from disclosing to a third party personal identification information without first obtaining the express consent of the individual. A person, business entity or health care business would be subject to substantial civil penalties for violating this provision. The definition of personal identification information is identical to that in the identity theft statute. As such, the same comments discussed above are applicable to this provision. The Department of Corrections maintains that it would fall within the definition of "health care business" and that "[a]s written, the proposed language in this bill is so broad that it would be virtually impossible for the department to comply with the public records statutes and mandatory reporting statutes without being in violation of proposed language of this bill." The bill would prohibit the department from disclosing information regarding an inmate such as names, DOC numbers or fingerprint information to another law enforcement agency or to the public on the department's website.

Additionally, the bill provides that any person who violates the identity theft statute commits a deceptive and unfair trade practice in violation of part II of chapter 501, Florida Statutes and is subject to the penalties and remedies available for the violation. However, part II of chapter 501 applies to unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices *in the conduct of any trade or commerce*. Trade or commerce is defined to apply to acts relating to the advertising, soliciting, providing, offering or distributing of any good or service. Generally, the FDUTPA is used to penalize business entities for deceptive activities. As a result, it is not clear that violation of a statute which prohibits identity theft, which would not be related to the advertising, soliciting, providing, offering or distributing of a good or service and would not be committed by a business entity, would fit in to the overall scope of the act. It does not appear that every offense of identity theft could be categorized as a deceptive and unfair trade practice.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES