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Committee on Judiciary

Senator Daniel Webster, Chair

FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT RELATING TO MOTOR VEHICLES

SUMMARY

In the 2004 Regular Session, a bill was filed that established a demand procedure for the plaintiff to follow prior to filing legal action against a motor vehicle dealer on the basis of a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

It appears well established that Florida courts apply a very narrow approach to the type of monetary damages awardable to private party plaintiffs under FDUTPA. In so doing, both state and federal courts have consistently declined to extend actual damages to such other types of relief as consequential damage awards. Additionally, punitive damages are not available under FDUTPA, absent an independent basis, such that FDUTPA does not preempt other authority. Like Florida, most other states provide for attorney's fees and costs. In Florida, however, the award of fees is discretionary on the part of the court. Also, in contrast to Florida, many other states offer treble damages, and a number of states authorize punitive damage awards. Keeping in mind that a demand process would likely have the positive outcome of expediting claims, one that is mandatory and binding may have an unintentionally deterrent impact on consumers with valid claims.

and odometer tampering.² Some states provide for criminal prosecution or attorney general lawsuits, while others authorize private enforcement.³ A number of states have adopted the Uniform Deceptive Trade Practices Act.⁴ Statutes provide for injunctions or restraining orders prohibiting the continued practice and punishment through fines, damages, and imprisonment.⁵

Florida Law on Unfair and Deceptive Trade Practice; Purpose and Definitions

The Legislature passed the Florida Deceptive and Unfair Trade Practices Act in 1973 (FDUTPA).⁶ A consumer and business protection measure, FDUTPA provides for regulation of unfair competition and deceptive trade practices.⁷ FDUTPA specifically targets unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.⁸

The original FDUTPA statute was based on the 1973 Uniform Consumer Sales Practices Act (UCSPA) and the Model Little FTC Act.⁹ In fact, FDUTPA is commonly known as the "Little FTC Act."¹⁰ In carving out a state law, the Florida Legislature expressed its intent to afford "due consideration and great weight" to interpretations by federal courts and the Federal Trade Commission regarding the definitions of unfair and

BACKGROUND

Deceptive Trade Practice, Generally

A deceptive trade practice occurs when an individual or business engages in behavior that is intended to mislead or lure the public into purchasing a product or service.¹ Common examples include false advertising

² *Id.* at 27.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Chapter 73-124, L.O.F.

⁷ Section 501.202, F.S.

⁸ Section 501.204, F.S.

⁹ David J. Federbush, *Damages Under FDUTPA*, 78-MAY Fla. B.J. 20, 26 (2004).

¹⁰ Douglas B. Brown, *Florida Legislature Broadens the Scope of the "Little FTC Act,"* 67-OCT Fla. B.J. 50 (1993).

¹ Richard A. Leiter, *National Survey of State Laws*, 27 (4th ed. 2003)

deceptive practice.¹¹

In so doing, FDUTPA defines the terms “trade or commerce” as:

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.¹²

Though not defined in FDUTPA, a motor vehicle dealer is defined in the state’s motor vehicle license law as:

any person engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1). Any person who buys, sells, or deals in three or more motor vehicles in any 12-month period or who offers or displays for sale three or more motor vehicles in any 12-month period shall be prima facie presumed to be engaged in such business.¹³

Section 320.60(1), F.S., defines an agreement as:

a contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer, and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make.

FDUTPA and Private Cause of Action

A major distinction between the federal act and state law is that federal law does not authorize a private cause of action, whereas FDUTPA does, limited to

recovery of actual damages to the consumer plaintiff.¹⁴ In applying to private causes of action, the Florida Supreme Court also upheld FDUTPA’s application to a single unfair or deceptive act, “even if it involves only a single party, a single transaction, or a single contract.”¹⁵

FDUTPA Exemptions

Various exemptions are provided for in FDUTPA, including retailers acting in good faith without actual knowledge of a violation;¹⁶ acts or practices that are required or specifically permitted under federal or state law;¹⁷ publication, broadcasting, printing, or other dissemination of information on behalf of others without actual knowledge of a violation;¹⁸ claims for personal injury, wrongful death, or damage to property other than the property that is the subject of the violation;¹⁹ and persons, activities, or banks or savings and loan associations regulated by the Department of Financial Services, the Office of Financial Regulation of the Financial Services Commission, federal agencies, or the Florida Public Service Commission.²⁰ Additionally, activities that violate certain realtors’ or appraisers’ professional ethics are exempted as they are already addressed in statute.²¹

History of Per Se Violations of FDUTPA

Prior to its complete repeal in 1997, a Department of Legal Affairs rule provided for the regulation of motor vehicle sales, and unfair and deceptive practices.²² This rule was originally adopted through specific authority of FDUTPA. Other than the agency rule, the only other authority on this issue at that time appeared in s. 320.27, F.S., which provides for civil fines and the denial, suspension, or revocation of a motor vehicle dealer license for certain violations.

In 2001, the Legislature codified the repealed Department of Legal Affairs rule, thereby statutorily extending the application of FDUTPA to motor vehicle sales.²³ It is a violation of FDUTPA for a dealer to:

¹⁴ Brown, *supra* note 10, at 52; *see* s. 501.211(2), F.S.

¹⁵ *P.N.R., Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777 (Fla. 2003).

¹⁶ Section 501.211(2), F.S.

¹⁷ Section 501.212(1), F.S.

¹⁸ Section 501.212(2), F.S.

¹⁹ Section 501.212(3), F.S.

²⁰ Sections 501.212(4) and (5), F.S.

²¹ Sections 475.42 and 475.626, F.S.

²² Rule 2-19.005, F.A.C., *Motor Vehicle Sales* (repealed).

²³ Chapter 2001-196, L.O.F.

¹¹ Section 501.204(2), F.S.

¹² Section 501.203(8), F.S.

¹³ Section 320.27(1)(c), F.S.

\$650, whichever is less.²⁴

- Misrepresent that a motor vehicle is a factory executive, executive, or a demonstrator vehicle or to misrepresent previous usage or status, quality of care, regularity of service or general condition, or that it has not sustained certain damage;
- Sell a vehicle without full written disclosure of any warranty or guarantee terms, obligations or conditions that the dealer or manufacturer has given to the buyer;
- Fail to uphold an express or implied warranty, or to misrepresent warranty coverage;
- Obtain signatures from a customer on contracts that are not fully completed at the time the customer signs;
- Require or accept a deposit from a prospective customer before entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt with certain information;
- Add unauthorized fees and charges to the cash price of a vehicle;
- Change the odometer reading of a vehicle;
- Sell a vehicle without disclosing its actual year and model;
- File a lien against a new vehicle paid by check without disclosing that a lien will be filed if paid by check and the procedures and cost to the buyer for gaining title to the vehicle post-lien;
- Increase the price of a vehicle after accepting an order of purchase or a contract, unless authorized by law;
- Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name;
- Charge for any pre-delivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the same;
- Charge for any pre-delivery service and fail to disclose that the charge represents costs and profit to the dealer for such items as inspecting, cleaning, and adjusting vehicles, and preparing documents relating to the sale; or
- Fail to disclose damage to a new vehicle of which the dealer had actual knowledge if the dealer's actual cost of repair exceeds 3 percent of the manufacturer's suggested retail price or

In 1993, the Florida Legislature expressly adopted a per se approach in the FDUTPA law, so that any law which prohibits unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices, in and of itself, also prohibits them under FDUTPA.²⁵ Today, s. 501.203, F.S., which specifically references sources upon which a plaintiff may plead a FDUTPA claim, reads, in part:

(3) "Violation of this part" means 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.²⁶

This is notable in that a clear advantage exists for the plaintiff who can claim a per se violation.²⁷ In these situations, "the court will not have to determine whether the act or practice falls under the broad—but not precisely defined—standards of deception and unfairness. Courts may have less discretion interpreting rules, regulations, ordinances, or statutes with specific requirements."²⁸

Authorized Parties and Available Remedies under FDUTPA

Actions are brought by the State Attorney or the Department of Legal Affairs when it is in the public interest on behalf of consumers or governmental

²⁴ Section 501.976, F.S.

²⁵ Mark S. Fistos, *Per Se Violations Of The Florida Deceptive And Unfair Trade Practices Act*, 76-MAY Fla. B.J. 62, 63 (2002).

²⁶ Section 501.203, F.S.

²⁷ Fistos, *supra* note 25, at 66.

²⁸ *Id.*

entities.²⁹ The Offices of the State Attorney are authorized to enforce violations of FDUTPA if the violations take place under their jurisdiction. The Department of Legal Affairs, Office of the Attorney General, has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or if the state attorney fails to act within 90 days after a written complaint is filed.³⁰ Although the Department of Legal Affairs is the primary enforcer and administrator of FDUTPA, followed by state attorneys, consumers, through private actions, also have enforcement authority.³¹

Remedies available to the Department of Legal Affairs or the State Attorney include declaratory judgments,³² injunctive relief,³³ actual damages,³⁴ civil penalties,³⁵ and cease and desist orders.³⁶ Attorney's fees and costs of investigation or litigation may also be sought; however, the Legislature in 1994 changed the mandatory attorney's fee provision to one that is discretionary on the part of the court.³⁷ Time limitations for FDUTPA actions by enforcing authorities are as follows: no later than 4 years after the occurrence of a violation or no later than 2 years after the last payment in a transaction involved in a violation, whichever is later.³⁸

Remedies for private parties are limited to the following:

- A declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and

²⁹ David J. Federbush, *FDUTPA for Civil Antitrust*, 76-DEC Fla. B.J. 52, 57 (2002).

³⁰ Section 501.203(2), F.S.

³¹ "Little FTC Act" *Applicable to Prepaid Legal Service Plans*, AGO 76-226, November 29, 1976.

³² Section 501.207(1)(a), F.S.

³³ Section 501.207(1)(b), F.S.

³⁴ Section 501.207(1)(c), F.S., authorizes the enforcing authority to bring an action on behalf of a consumer for the actual damages caused by an act or practice in violation of FDUTPA.

³⁵ Section 501.2075, F.S., authorizes civil penalties for willful violations of up to \$10,000 per violation, waivable upon payment of full restitution, reimbursement, or actual damages. Section 501.2077, F.S., increases the civil penalty to up to \$15,000 for each violation where senior citizens, at least 60 years old, or handicapped persons are involved.

³⁶ Section 501.208, F.S.

³⁷ Section 4, ch. 94-298, L.O.F.; s. 501.2105(3), F.S.

³⁸ Section 501.207(5), F.S.

- Actual damages, attorney's fees, and court costs, where a person has suffered a loss due to a FDUTPA violation.³⁹

Other than a provision that requires the trial court to consider the amount of actual damages relative to time spent in determining reasonable attorney's fees during civil litigation, no statutory procedures are provided for bringing a private action under FDUTPA against a motor vehicle dealer.⁴⁰

Proposed Legislation Creating a Demand Procedure Relating to Motor Vehicles

A bill was filed during the 2004 Regular Session which would have created a new section of law under Part VI of FDUTPA relating to motor vehicle dealers. This bill established a procedure regarding the law on motor vehicles and unfair and deceptive trade practices. Specifically, this bill would require a car owner intending to litigate under FDUTPA to provide a demand to the motor vehicle dealer as follows:

- Mandated a procedure for a plaintiff to provide a good faith, written demand to a potential defendant at least 30 days before the plaintiff can bring suit;
- Provided that payment subsequent to the demand must be made within 30 days;
- Provided that payment served as a release from further liability and that payment did not constitute an admission;
- Provided a procedure for a dealer to agree to cease and desist within 30 days of a demand and that agreement did not constitute an admission; and
- Precluded an aggrieved party from recovering fees and costs where a dealer rejects a demand and the plaintiff receives actual damages in a judgment that are less than 75 percent of the damages demanded.

Proponents of the legislation expressed that cases would be expedited with the implementation of a demand procedure. Opponents argued that this legislation may discourage consumer-plaintiffs from proceeding with valid claims. This bill did not become law.⁴¹

To date, Florida law does not provide specific

³⁹ Section 501.211(1) and (2), F.S.

⁴⁰ Section 501.976, F.S.

⁴¹ SB 2404 (2004).

guidelines for private party FDUTPA claims relating to motor vehicles.

METHODOLOGY

Staff researched the history of the law on FDUTPA and its application to motor vehicle cases. Likewise, staff reviewed case law and laws in other states. Staff also consulted with organizations and associations that are impacted by FDUTPA legislation, specifically as relates to motor vehicle sales.

FINDINGS

At the prompting of the Federal Trade Commission, all states adopted laws prohibiting unfair and deceptive trade practices. Florida is in the minority of jurisdictions that limit damages to actual damages, and cases are dismissed with some regularity on the grounds that they are insufficiently pled. In practice, some states authorize the Little FTC Act to be applied in conjunction with other consumer protections. Most Attorney General cases in Florida are handled without litigation, and do not appear to run parallel to private actions.

History of State Legislation on Unfair and Deceptive Trade Practices

Common law recognized a cause of action for fraudulent business behavior. Due to the considerable difficulty involved in proving common law fraud against businesses, Congress proposed legislation that would grant additional authority to the Federal Trade Commission to prosecute based on fraudulent practices.⁴²

In 1938, Congress amended the Federal Trade Commission Act to prohibit unfair or deceptive acts or practices, applicable to interstate commerce. The legislation did not provide a private cause of action and limited actions to those brought by the Federal Trade Commission (FTC).⁴³ By the end of the 1960's, which represented the pinnacle of the consumer rights movement, the FTC was strongly encouraging states to enact consumer rights legislation providing for a private cause of action.⁴⁴ The states responded in kind, and from the 1960's to the 1970's, all 50 states passed

unfair and deceptive trade practice protection laws.⁴⁵ States have adopted the Federal Trade Commission Act, the Uniform Consumer Sales Practice Act, or the Uniform Deceptive Trade Practices Act, usually in a modified form.⁴⁶

A Comparison of State Remedies for Deceptive Trade Practices

In contrast to Florida, many other states authorize treble damages, or three times the actual damages awarded in a FDUTPA case. A handful of states authorize punitive damages, and some other states allow for exemplary, or special damages.

Treble Damages

For private party plaintiffs, a number of states authorize treble damages, based on actual damages. These include Alabama, Alaska, Colorado, Delaware, the District of Columbia, Georgia, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire (where the violation is willful), New Mexico (the greater of \$300 or treble damages), New York (in certain instances), North Carolina (where a plaintiff is injured), Pennsylvania, South Carolina, Tennessee (where the violation is willful), Texas, and Washington.⁴⁷

Punitive Damages

Punitive damages are awardable in the following states: Connecticut, the District of Columbia, Kentucky, Missouri, Oregon, and Rhode Island.⁴⁸ By way of example, Oregon courts only award punitive damages for wanton misconduct that indicates a high level of social irresponsibility.⁴⁹ As such, negligent misrepresentation, in and of itself, does not qualify for punitive damages.⁵⁰

Other Damages

Vermont authorizes exemplary damages. Georgia does as well, but only where the violation is intentional. Utah provides for the greater of actual damages or

⁴² Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General For The Lean Years Ahead*, 73 Or.L.Rev. 639, 640 (1994).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 641.

⁴⁶ Michelle L. Evans, *Who Is A "Consumer" Entitled To Protection Of State Deceptive Trade Practice And Consumer Protection Acts*, 63 A.L.R. 5th 1 (2004).

⁴⁷ Leiter, *supra* note 1, at 28-38.

⁴⁸ *Id.*

⁴⁹ Bender, *supra* note 42, at 672.

⁵⁰ *Id.* at 672.

\$2,000. Idaho provides for the greater of actual damages or \$1,000. Senior citizens receive double the amount or value of actual damages in New Jersey.⁵¹

Attorney's Fees

Most states authorize the plaintiff to recover attorney's fees, including: Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.⁵²

Little FTC Acts in Conjunction with Other Consumer Protection Statutes

New York

New York has multiple consumer protection statutes, one of which is its General Business Law. This law authorizes consumers and corporations to sue for \$50 or actual damages, or a treble amount of up to \$1,000 upon a finding that a violation is willful or knowing.⁵³ If an elderly person is victimized, an additional civil penalty of up to \$10,000 is authorized.⁵⁴ This law has applied to such issues as an auto dealer's refusing to pay an arbitrator's award, failing to disclose that a car was previously used as a rental vehicle, altering a purchase agreement, forging a signature on an auto transaction document, and failing to give the purchaser a copy of the purchase agreement.⁵⁵

Other consumer protection statutes are also available to purchasers and lessees of vehicles in New York, such as the Used Car Lemon Law, Implied Warranty of Merchantability, New Car Contract Disclosure Rule, New Car Lemon Law, and Warranty of Serviceability.⁵⁶ The Implied Warranty of Merchantability protects new and used cars, but can be disclaimed by a dealer, if the disclaimer is written and

conspicuous.⁵⁷ The New Car Contract Disclosure Rule provides a consumer with the statutory right to rescission where dealers fail to disclose a notice of prior damage and repairs with a retail value of more than 5 percent of the lesser of the manufacturer's or distributor's suggested retail price.⁵⁸ The Warranty of Serviceability requires used car dealers to inspect vehicles and provide a certificate to buyers stating that the vehicle is "in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery."⁵⁹ This law cannot be waived or disclaimed.⁶⁰ A used car dealer was found liable for violating both GBL s. 349 and VTL s. 417 for failing to disclose that a used car was used mainly as a rental car.⁶¹

Illinois

The Illinois Consumer Fraud and Deceptive Business Practices Act is based on the Uniform Commercial Code.⁶² The Act authorizes a prevailing plaintiff to recover reasonable attorney's fees and costs, which is not provided in the UCC.⁶³ Therefore, a plaintiff's complaint usually contains a count alleging that the defendant also violated the state's Consumer Fraud Act, which does provide for attorney's fees.⁶⁴ Under the Consumer Fraud Act, a plaintiff successfully pled that a used car dealer engaged in bait and switch tactics, such as advertising but not providing easy credit, no money down purchases, bank rate financing, and written warranties.⁶⁵

Sufficiency of Pleadings

In a case involving a Florida dealer in the Southern District of Florida, *Martinez v. Rick Case Cars, Inc.*, the federal court denied a motion to dismiss for insufficiency of a plaintiff's claim that the car seller failed to provide Spanish-language material in either the buyer's guide or the car window sticker, when the sale was made in Spanish. In so doing, the court found that the plaintiff did not have to specifically allege

⁵¹ Leiter, *supra* note 1, at 28-38.

⁵² *Id.*

⁵³ Thomas A. Dickerson, *New York Consumers Enjoy Statutory Protections Under Both State And Federal Statutes*, 76-SEP N.Y. St.B.J. 10 (Sept. 2004); *see* General Business Law Section 349.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 11.

⁵⁶ *Id.* at 16-18.

⁵⁷ *Id.* at 17.

⁵⁸ *Id.* at 18.

⁵⁹ Vehicle and Traffic Law Section 417 (VTL s. 417).

⁶⁰ Dickerson, *supra* note 53, at 18.

⁶¹ *See Ritchie v. Empire Ford Sales, Inc.*, 11/7/96 NYLJ 30 (col. 3).

⁶² Cynthia A. Hagan, *Survey of Illinois Law: Commercial Law*, 21 S. Ill. U. L.J. 729 (1997).

⁶³ *Id.* at 729.

⁶⁴ *Id.*

⁶⁵ *See Garcia v. Overland Bond & Investment Co.*, 282 Ill. App. 3d 486, 492-495 (1st Dist. 1996).

injury, as the claim sufficiently described a failure to provide these materials in Spanish.⁶⁶

In a subsequent federal case before the Middle District of Florida, however, the court found that the plaintiff did not file a sufficient claim for relief, where the plaintiff failed to specifically allege that he was aggrieved by a dealership's acts.⁶⁷ In contrast with *Martinez*, this case involved a plaintiff who did not actually receive the motor vehicle that was the subject of the sales transaction, and whose deposit was fully refunded. In this case, the court ruled that a pleading containing statements that the conduct was unfair and deceptive, without showing actual harm other than "subjective feelings of disappointment," constituted an insufficient pleading.⁶⁸

Actual Damages

In the case of *Rollins, Inc., v. Heller*, the Third District Court of Appeal refused to extend actual damages, the only type of damages awardable under FDUTPA, to awarding consequential damages.⁶⁹ In this case, the facts showed that a burglar alarm company committed gross negligence in its installation and servicing of an alarm in a residential home. Homeowners sought recovery of the value of items stolen from their home, as well as punitive damages.⁷⁰

In limiting the plaintiff's award to the value of the burglar alarm installation and services, the court defined actual damages as those damages recoverable at common law, which are:

The difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.⁷¹

Moreover, the court held, actual damages generally encompass compensatory damages. While FDUTPA does not preclude an award of punitive damages that is recoverable under some other type of remedy, the Act

does not authorize them where they are exclusively based on FDUTPA.⁷²

The Fourth District Court of Appeal in *Smith v. 2001 South Dixie Highway, Inc.* reached a similar finding.⁷³ In this case, the appellee requested injunctive relief, in the form of reinstatement to her employment position. The court categorized loss of employment as an indirect and consequential result of the employer's alleged violation of FDUTPA, and, therefore, not compensable under the Act.

In *Urling v. Helms Exterminators, Inc.*, the First District Court of Appeal reiterated that a FDUTPA award does not include special or consequential damages.⁷⁴ In this case, home buyers brought a FDUTPA action against a termite inspection company for issuing an inspection report which falsely claimed that they had inspected the premises. Appellants also asserted that they relied upon this false report in purchasing their home.⁷⁵ Although severe termite damage was later discovered, the court refused to award for the cost of repairing this damage, classifying this type of damage as special or consequential to the violation, and therefore outside of the scope of the Act. Instead, the court recognized a recovery of the diminished value of the goods received, which would have been the cost of the false termite certificate if the appellants had requested it.⁷⁶

FDUTPA Cases Brought by the Attorney General

The Office of the Attorney General in Florida reports that the majority of FDUTPA cases in 2002 and 2003 ended with a letter of voluntary compliance in which auto dealerships agreed not to engage in deceptive practices. Most of these cases involved deceptive advertising. Since the start of 2004, 15 dealer investigations are open, eight of which involve deceptive advertising. Four of the cases involve misrepresentations, of new cars at half price, two involve a failure to make necessary disclosures, and another misrepresented that vehicles were being sold off pursuant to police seizures. Another recent case involved spot delivery, which is the practice of revising

⁶⁶ 278 F. Supp.2d 1371 (S.D. Fla. 2003).

⁶⁷ See *Haun v. Don Mealy Imports, Inc.*, 285 F. Supp.2d 1297 (M.D. Fla. 2003).

⁶⁸ *Id.* at 1307.

⁶⁹ *Rollins, Inc. v. Heller*, 454 So.2d 580 (Fla. 3d DCA 1984).

⁷⁰ *Id.* at 584.

⁷¹ *Id.* at 585.

⁷² *Id.* at 585, 586.

⁷³ *Smith v. 2001 South Dixie Highway, Inc.*, 872 So.2d 992 (4th DCA 2004).

⁷⁴ *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451, 454 (Fla. 1st DCA 1985).

⁷⁵ *Id.* at 454.

⁷⁶ *Id.*

loan terms after the buyer has left the dealership with the vehicle.

In 2003, most of the almost 100 dealer cases involved a statutory requirement that advertised prices include dealer fees. The cases were opened pursuant to an Attorney General initiative to ensure statutory compliance. Almost all of the cases were resolved with a letter of voluntary compliance. Most of the dealerships also paid \$3,000 each in penalties.

In 2002, most of the 13 dealer cases opened that year involved deceptive advertising, such as of used cars that appeared new.

None of these cases resulted in litigation.⁷⁷

without advice of counsel may be precluded from pursuing litigation based on FDUTPA claims if the demands are rejected and the court finds that they were insufficiently drafted.

RECOMMENDATIONS

Various provisions of the 2004 proposed legislation raise issues which the Legislature may want to consider if it elects to establish a demand procedure related to motor vehicle FDUTPA claims:

- The language relating to the procedure of a demand, payment, and agreement to cease and desist may disadvantage affected plaintiffs, as they may be left unaware regarding the actual extent of the violation without having access to the full discovery that is typically afforded in a lawsuit. If the defendant agrees to the demand, the defendant is released from all future liability from violations arising out of the same transaction. This demand procedure is required and binding on the part of the plaintiff.
- Precluding plaintiffs from recovering costs and fees if the actual damages pursuant to judgment are less than the 75 percent requested in the demand may deter consumers from initiating valid demands, for fear that they will not recover costs and fees.
- Additionally, requirements regarding what needs to be contained in the demand are unclear. Does the demand need to be drafted similar to a pleading and show actual harm? Does the demand need to be sufficiently detailed so as to contain an itemized list of damages to qualify as a demand made in good faith? Plaintiffs who present demands

⁷⁷ White Paper, Alison Finn, Economics Crime Division, Office of the Attorney General, State of Florida, October 1, 2004.